REPORTABLE
CASE NO 20/2007

IN THE SUPREME COURT OF NAMIBIA
IN THE MATTER BETWEEN

MBANDERU TRADITIONAL AUTHORITY	**FIRST APPELLANT**
CHIEF MUNJUKU II NGUVAUVA	**SECOND APPELLANT**

and

MR ERASTUS TJIUNDIKUA KAHUURE	**RESPONDENT**
MR MBURO MOOJA	
MR GEBHARD HENGARI	**THIRD RESPONDENT**
MR BARNABAS KANJAVERA	**FOURTH RESPONDENT**
MS OKERI KAVITJENE	**FIFTH RESPONDENT**
MR REHABEAM NGAUJAKE	**SIXTH RESPONDENT**
MR BORRIE KATJIUANJO	**SEVENTH RESPONDENT**
MR CORNELIUS TJIROZE	**EIGHTH RESPONDENT**
MR NOAH KANGUEEHI	**NINTH RESPONDENT**
MR ERASTUS KARUUOMBE	**TENTH RESPONDENT**
MR PANI KAHORERE	**ELEVENTH RESPONDENT**

CORAM : SHIVUTE, CJ, STRYDOM, AJA, et MTAMBANENGWE, AJA

HEARD ON : 2008/03/20

DELIVERED ON: 2008/07/14

APPEAL JUDGMENT

MTAMBANENGWE, A.J.A:

[1] This appeal is against a judgment of Parker J in the High Court setting aside two decisions purportedly made by the appellants, namely a decision to adopt a constitution for the Mbanderu Community, and a decision to remove the respondents from their position as traditional councilors of the Ovambanderu Traditional Community.

[2] The order made by Parker J was:

> "(1) The purported decision of the 1st and 2nd respondents to adopt the so-called 1 October 2005 constitution and remove the applicants from their traditional positions in the Ovambanderu Community is reviewed and set aside.
>
> (2) The decision of the 1st and 2nd respondents to expel the 1st applicant and the 10 other applicants from their positions of Traditional Councilors under Act 25 of 2000 is reviewed and set aside.
>
> (3) The 1st and 2nd respondents must jointly and severally, pay costs of the applicants in respect of (a) the 8 May 2006, and (b) the review application".

[3] The amended notice of appeal filed on 14 September 2007 says the appeal is

> "…only in respect of order 1 and order 3 of the orders and that portion of his judgment in relation to such order delivered by His Lordship Mr Justice Parker in the High Court of Namibia on 13 April 2007."

[4] The application was made in two combined notices: the first sought the following relief:

"1. Condoning the non-compliance with the Rules of the above Honourable Court and granting leave to the Applicants for the hearing of their application on an urgent basis as envisaged by Rule 6(12) of the High Court Rules;

2. Issuing a Rule Nisi, pending the outcome of the review proceedings (and proceedings for additional or ancillary relief) instituted in terms of this Notice of Motion, and returnable on the date of the hearing of the aforesaid proceedings, calling upon First and Second Respondents to show cause why an order in the following terms should not be granted;

2.1 Directing First and Second Respondent to forthwith re-instate Applicants as traditional councilors of the Ovambanderu Traditional Community.

2.2 Directing First and Second Respondents to forthwith facilitate the consultative process agreed on the 16th July 2005 at Gobabis by the Ovambanderu Traditional Community.

2.3 Directing Second Respondents not to prevent or interfere with the consultative process in 2.2 *supra*;

2.4 Directing the purported silent adoption of the Constitution on the 1 and/or 2 October 2005, null and void;

Pending the outcome of the review proceedings referred to below.

3. Directing that First and Second Respondents pay the costs of this application, alternatively, costs to be costs in the review application.

4. Granting the Applicants such further and/or alternative relief as this Honourable Court meets.

5. Directing that the order in terms of prayer 2.1; 2.2; 2.3 and 2.4 shall have immediate effect, pending the outcome of the finalization of the review proceedings."

[5] The second notice of motion sought the following relief:

> "1. Reviewing and setting aside the purported decision of the First and Second Respondents to adopt a new constitution and remove or dismiss the Applicants.
>
> 2. Directing the First Respondent in so far as this may be necessary, to reinstate the Applicants' as traditional councilors of the Ovambanderu Community. (*sic*)
>
> 3. Directing the First and Second Respondent to pay costs of this review application;
>
> 4. Granting such further and/or alternative relief to the Applicants as the above Honourable Court may deem fit."

[6] The background to the dispute between the parties is that for a number of years the Ovambanderu Community had been in the process of drafting a constitution for themselves. After several drafts of the constitution had been prepared and considered, at a workshop of the leadership of the community held on 18 - 19 June 2006 it was decided to reconstitute the constitution drafting committee to finalize the process and come up with a final draft for endorsement and adoption by the community at a Community General Assembly, eventually scheduled for 1 - 2 October 2006. The dispute arose from the adoption on 1 October 2006 of the final draft which embodied certain changes proposed by the Paramount Chief of the community, second appellant, and subsequent action taken against the respondents, by the appellants.

[7] The matter was first heard by Hoff J on 8 May 2005, whereupon

the Court made the following order:

"1. That the First and Second Respondents agree to reinstate the First and Eleventh Applicants with immediate effect as traditional councilors of the First Respondent in terms of paragraph 2.1 of the Notice of Motion pending the outcome of the presently pending review proceedings and/or negotiations.

2. That the aforesaid review application and all other relief sought by First to Eleventh Applicants under case number (P) A 114/2006 stand over for a period of two months from date hereof pending the outcome of the aforesaid negotiations.

3. That the costs of the urgent part of the application instituted under case number (P) A 114/2006 stand over".

[8] The agreement referred to in this order came as a result of appellants being advised that the removal of respondents as traditional councilors of the community was not in accordance with the requirements of Article 18 of the Namibian Constitution. The tender was made in appellants' answering affidavit served on respondents on 19th December 2006.

[9] The record "of the proceedings and decisions, sought to be corrected or set aside" was requested and supplied. But on receipt thereof respondents did not, in terms of Rule 53(4), amend, add to or

vary the terms of their Notice of Motion or supplement their supporting affidavit.

[10] The second appellant died on 16 January 2008. Before his death second appellant had signed a power of attorney authorizing his legal representatives to prosecute the appeal in the Supreme Court. In this he described his capacity as follows:

> "I, the undersigned PARAMOUNT CHIEF MUNJUKU II NGUVAUVA in my personal capacity and in my capacity as a member of the Mbanderu Traditional Authority do hereby nominate constitute and appoint…"

[11] On the day of the hearing of this matter, notice on affidavits was served on everybody involved, including the Registrar, in which appellants' legal representatives purported to apply for substitution of the late Paramount Chief. This application was abandoned however, with Mr Smuts for the appellants submitting that no substitution was required; he drew the analogy of a Minister being sued in his official capacity, and said if the Minister died before the matter was concluded there would be no need to apply for his substitution. Mr Corbett for the respondents, after taking instructions argued that the late Paramount Chief had signed the

Power of Attorney in his personal capacity and merely as a member of first appellant. Nevertheless he decided he would argue the merits of the appeal. The papers in this appeal amply show that the late Paramount Chief was sued in his capacity as leader of his community both in terms of the Traditional Authorities Act (Act 25 of 2000) and under the customary law of the Mbanderu Community. The hearing then proceeded.

THE TENDER TO REINSTATE RESPONDENTS

[12] Before passing on to consider the main issues in this matter, I must revert to the issue of costs as reflected in paragraph 3 of the Court *a quo's* order. The Court dealt with this in para [77] of its Judgment. The tender was made in paragraph 114.6 - 114.7 of the answering affidavit served on 19 December 2006. The answering affidavit ends with a prayer (record vol 3 p 377), which reads in part:

> "114.6 In such circumstances first and second respondents hereby tender to reinstate first to eleventh applicants as Traditional Councillors of the first respondent with immediate effect.
>
> 114.7 First and second respondents also tender to pay the portion of the first and eleventh applicant's (sic) wasted costs of this application occasioned by this tender and relating

> to this part of the review only on a party and party basis up to this stage of the proceedings."

and concluded (at record vol 3 p 384):

> "WHEREFORE IT IS RESPECTFULLY PRAYED ON BEHALF OF FIRST AND SECOND RESPONDENTS AND SUBJECT TO THE TENDER AS MADE BY THE RESPONDENT'S (SIC) HEREIN THAT IT MAY PLEASE THE ABOVE HONOURABLE COURT TO DISMISS THE REMAINDER OF THIS APPLICATION WITH COSTS."

[13] In light of the above, Mr Smuts made the following valid submissions in his heads of argument:

"Despite this tender, the review of this decision was dealt with at some length in the judgment of the Court below and the appellants' tender itself was referred to in the following way at record vol 5 p 805 ℓ 21 - 25:

> 'I think that the applicants have made out a case to be awarded the costs for 8 May 2006. However they cannot succeed in respect of costs up to 19 December 2006 because it seems to me that the tender was withdrawn because it was not even mentioned by Mr Geier in submissions so as to confirm it. Indeed he argued that the applicants' dismissal was lawful. But since I have upheld the applicant's review application costs should follow the event.'

The learned Judge in the Court below then proceeded to award costs to the respondents in paragraph 3 of the Order of Court without further dealing with the question of the tender made by the respondents or explaining what was meant by the second sentence in the quoted passage.

It is respectfully submitted that the Court below erred in his dealing with the tender made by the

respondents. As is clear from the tender quoted above, it was made in unequivocal terms.

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The assumption by the Court below that, because it had not been mentioned by erstwhile counsel for the respondents in argument thus led to its withdrawal is not only, with respect, incorrect in law but also on the facts. .....In the appellants' (then respondents') heads of argument filed in the Court below, the following was in fact stated in paragraphs 12 and 13 at record vol 5 at 685 ℓ 1 - 18:

> 'Subsequently and as appears from first and second respondents' answering affidavits the respondents have tendered to reinstate first to eleventh applicants as Traditional Councillors of the first respondents with immediate effect.
>
> See: Answering affidavit paras 114.5 - 114.6
>
> The only issue with therefore remains to be decided in this application, is whether or not the adoption of the Mbanderu Constitution herein is liable to review and whether or not such adoption should therefore be reversed together with its resultant consequences as well as the nullification of all actions taken under that Constitution to date as claimed by the applicants.'

17

It is respectfully submitted that the Court thus erred in stating that the issue was not referred to by counsel on behalf of the respondents. But more importantly, any failure on his part to have dealt with this aspect further in oral argument would not, as was found, result in any withdrawal of the tender unequivocally made by the respondents in the answering papers in the absence of any evidence of the tender. The fact that extensive argument was provided on this issue on behalf of the applicants in the Court below, would not change the terms of the tender. Indeed it should rather, with respect, have let to an appropriate order as to costs as to the further argument prepared and delivered on this issue.

18

It is respectfully submitted that the Court erred in its reasoning in paragraph 77 and in the consequent finding made in paragraph 3 of its order dealing with the question as to costs. The order of the court itself in respect of the underlying issue, embodied in paragraph 2, at record vol 5 p 906 is not appealed against, given the clear terms of the tender. It is respectfully submitted

that the Court below however thus erred in relation to the tender itself and that the further costs in relation to the review of that decision after 19 December 2006 should have been borne by present respondents.

19

The tender after all was set out in the very terms of the notice of motion. It thus tendered to the applicants in the Court below everything they sought in relation to the decision to remove or dismiss them. The terms of the notice of motion in this regard are embodied in a portion of paragraph 1 and the entire paragraph 2 to be found at record vol 1 p 5 ℓ 20 - 26. These terms were followed directly in the terms of the tender." (My emphasis)

[14] I entirely agree with Mr Smuts's submissions on the issue. Besides what Mr Smuts said, it should be noted that the press statement (Annexure "ETK 20" to respondents' founding affidavit) refers to respondents as being relieved of their positions as traditional councilors, and the tender, about which respondents raised no issue, specified that they were being reinstated as councilors of first appellant.

[15] I now turn to deal with the review application. In his heads of argument in the Court below, Mr Geier, the erstwhile Counsel for the appellants, raised the issue "whether or not the adoption of the Mbanderu Constitution herein is liable to review and whether or not such adoption should therefore be reversed" (his heads para 13, record p 685). The same question has been debated in submissions before us.

[16] The Court *a quo* identified the issues it had to determine in paragraph [17]

of its judgment *viz*:

"(1) Whether the purported decision of the 1st and 2nd respondents to adopt a constitution (hereinafter referred to as the so-called 1 October 2005 Constitution") should be reviewed and set aside;

(2) Whether the expulsion of the applicants as Traditional Councillors of 1st respondent should be reviewed and set aside."

[17] Despite the tender, the Court went on to say:

"Seminal to the first issue is the question whether it was fair and reasonable for the 1st and 2nd respondents to remove the applicants from their traditional, as apposed to statutory, positions as traditional leaders, i.e. as Senior Chief (in respect of the 1st applicant) and chiefs (in respect of the others) or suchlike positions. I, therefore, respectfully do not agree with Mr. Geier, counsel for the 1st and 2nd respondents, that the applicants have not prayed for reinstatement in any traditional, as opposed to statutory, positions they might have held prior to the "adoption" of the so-called 1 October 2005 constitution"

[18] I will say more about this later.

[19] Both Counsel in this appeal have made detailed submissions on the issue whether the adoption of a constitution by a traditional community is an administrative action, and therefore subject to review by a Court. They cited a number of cases and authorities in support of their different stand points.

[20] Mr Smuts submitted that the action of adopting a constitution by a traditional community is a "decision that does not constitute administrative action capable of being reviewed" and that for that reason alone the review should not have been granted. He outlined the appellants' challenge to the decision of the Court *a quo* in paragraph 21 of his heads as follows".

> "It is submitted that the Court *a quo* erred in granting the order in paragraph 1 on various bases, each of which is fatal. In the first instance, it is submitted, that this decision does not constitute administrative action capable of being reviewed and that the review should not have been granted for this reason alone. It is in any event submitted that the review itself was misdirected at the appellants as the decision to adopt the constitution was by the Mbanderu Community Assembly. It is further submitted that the Court below in any event erred by failing to take into account that the respondent had failed to make out review grounds in their founding affidavits for this relief and then further erring in certain factual findings in the context of the approach in motion proceedings to disputed facts."

[20] Leaving aside for later consideration the rest of these bases, I deal with the first attack on the decision of the Court *a quo* regarding the adoption of the constitution. On this issue Mr Smuts relied on a number of authorities where this question was addressed. The first is *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transvaal*

Metropolitan Council and Others 1999(1) SA. 374 (CC). Mr Smuts submitted that in that case at paragraphs 28 - 42 the South African Constitutional Court held-.

> "that the Legislative decision making of a deliberative legislative body whose members are elected in respect of such decision taken by them being influenced by political
>
> considerations for which they are politically accountable to an electorate, do not constitute administrative action for the purpose of constitutional review under the South African Constitution."

[22] The other case heavily relied on by Mr Smuts is *President of the Republic of South Africa v South African Rugby Football Union* 2000(1). SA 1 (CC) (the SARFU case) where at paras 141 - 143, the Constitutional Court said (in the context of a review relating to the exercise of powers by the President of the Republic of South Africa:

> "[141] In s 33 the adjective 'administrative' not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in Fedsure, that some acts of a legislature may constitute 'administrative action'. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is 'administrative action' is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or

she is exercising.

[142] As we have seen, one of the constitutional responsibilities of the President and Cabinet Members in the national sphere (and premiers and members of executive councils in the provincial sphere) is to ensure the implementation of legislation. This responsibility is an administrative one, which is justiciable, and will ordinarily constitute 'administrative action' within the meaning of s 33. Cabinet Members have other constitutional responsibilities as well. In particular, they have constitutional responsibilities to develop policy and to initiate legislation. Action taken in carrying out these responsibilities cannot be construed as being administrative action for the purposes of s 33. It follows that some acts of members of the executive, in both the national and provincial spheres of government will constitute 'administrative action' as contemplated by s 33, but not all acts by such members will do so.

[143] Determining whether an action should be characterized as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterized as administrative action for the purposes of s 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis." (Emphasis is mine)

[23] Mr Smuts also referred to the following authorities:

(a) *ME for Health, Kwazulu Natal v Premier of Kwazulu Natal* 2002 (5) SA 717 (CC);

(b) *Institute for Democracy v ANC* 2005 (5) SA 39 (C) where, respectively, at p 719 and pp 51 - 54 it was held that disputes of a political nature should be resolved at political level; and

(c) **J R de Ville (Judicial Review of Administrative Action in South Africa (5th ed)** where at pp 59 and 60 para 217 the learned authors remarked:

"In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* the Constitutional Court for the first time drew the distinction between executive and administrative action. The classification of the action in question depends primarily on the nature of the power that is exercised (or the function that is being performed), and specifically, in this context, how closely the action is related to policy considerations, administrative action is said to be concerned primarily with the implementation of legislation whereas executive action related to the development or formulation of policy and the initiation of legislation. Other considerations of importance are the source of the power, the subject-matter thereof and whether it involves the exercise of a public duty. In deciding whether action qualifies as administrative action, regard must furthermore be had to 'the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration'. Applying the above guidelines, it has been held that the determination by MEC for Education of the precise criteria or formulae for the grant of subsidies to independent schools constitutes administrative action. Similarly, the appointment by the Premier of a province of a 'chief in terms of section 2(7) of the Black Administration Act constitutes administrative action as the Premier in such an instance (purportedly) acts 'in pursuance of powers conferred upon him to implement specified national legislation'.

The fact that action does not constitute administrative action but rather executive action does

not mean that the action is not reviewable. Such action is still reviewable under the rule of law. Executive action will be reviewable *inter alia* if the functionary acts *mala fide*, misconstrues the nature of its powers, or acts arbitrarily or irrationally." (Emphasis added)

[24] Another case relied on by Mr Smuts is *Chirwa v Transnet Limited and Others* 2008(3) BCLR 251 (CC) where Ngcobo J also refers to the *SARFU* case *supra* at par [140] – [142]. This case is illustrative of the difficulty mentioned by the Constitutional Court in the *SARFU* case *supra* (in the passage already quoted above) (see also par [135] - [142] and [186] of the judgment in *Chirwa v Transnet Limited and Others*, (*supra*). In the last mentioned paragraph, Ngcobo J said the following:

"[186] Determining whether a power or function is "public" is a notoriously difficult exercise. There is no simple definition or clear test to be applied. Instead, it is a question that has to be answered with regard to all the relevant factors including: (a) the relationship of coercion or power that the actor has in its capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercised in the public interest. None of these factors will necessarily be determinative; instead, a court must exercise its discretion considering their relative weight in the context." (Emphasis added)

[25] Lastly Mr Smuts also referred the Court to paragraphs [24] and [25] of the judgment in the case *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works*, 2005(6) SA 313 (SCA). In that case the Court said in

paragraph [24]

> "Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. Features of administrative action (conduct of 'an administrative nature') that have emerged from the construction that has been placed on s 33 of the Constitution are that it does not extend to the exercise of legislative powers by deliberative elected legislative bodies, nor to the ordinary exercise of judicial powers, nor to the formulation of policy or the initiation of legislation by the executive, nor to the exercise of original powers conferred upon the President as head of State. Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals."

[26] On the basis of these authorities, Mr Smuts concluded:

> "The adoption of a constitution by a community – and not by a statutory body exercising statutory powers would not - constitute administrative action for the purpose of review."

[27] On his part, Mr Corbett relied mainly on some observations by TW Bennett. (**Human Rights and African Customary Law under The South African Constitution 1995 : 75**):

> "Administrative functions in a modern, democratic government are regulated by norms of fairness and accountability. Customary law has few rules catering for either principle, but then the personal style of traditional government did not require the strict controls of a bureaucratic regime. The principal method of ensuring fairness was a rule that a leader must consult his

council before taking a decision; and, if the issue affected the entire nation, he had to consult a more representative national council. He had to have an acceptable reason for his proposal, the merits of which would be debated in council. Consultation offers no more than an assurance that the issue was duly considered, however; and, while unanimity through persuasion was always an ideal in traditional government, a ruler was not bound by his council's advice."

(My emphasis)

[28] Writing earlier, in the South African Law Journal vol 110 Part II, 1993, under the heading: "Administrative-law Controls Over Chiefs' Customary Powers of Removal", TW Bennett remarked:

"Any administrative act performed by a chief would obviously have to conform to whatever customary-law requirements there happen to be; common-law standards, however, are more stringent. The decisions of all bodies obliged to act in the public interest are subject to review, and in so far as their decisions fall short of the requirements of authority, regularity, procedural fairness and reasonableness, they may be declared invalid. In principle chiefs should not be able to claim exemption from these requirements merely because their powers happen to derive from customary law. They are still officials acting in the public interest; their office is part of the state administration; they are paid their salaries from public funds; and they are under the control of a Minister." (My emphasis)

[29] Basically, on these passages Mr Corbett concluded:

"It is submitted, in the light of the above authorities, that generally the decisions taken by traditional authorities and chiefs are administrative acts performed by such organs of traditional leadership. Such bodies are accordingly

> obliged to act in the public interest and their decisions are subject to administrative review: The particular decisions taken by the appellants must thus be viewed in the light of these principles." (My emphasis)

[30] Section 3 (1) (a) (b) and (c) of the Traditional Authorities Act (Act 25 of 2000) (the Act) provides:

> "(1) Subject to section 16, the functions of a traditional authority, in relation to the traditional community which it leads, shall be to promote peace and welfare amongst the members of that community, supervise and ensure the observance of the customary law of that community by its members, and in particular to –
>
> (a) ascertain the customary law applicable in that traditional community after consultation with the members of that community, and assist in its codification;
>
> (b) administer and execute the customary law of that traditional community;
>
> (c) uphold, promote and preserve the culture, language, tradition and traditional values of that traditional community." (My emphasis)

It is therefore obvious that it was in accordance with these provisions that, from 18 to 19 June 2005, at its consultative workshop, first appellant took the decision to refer the draft constitution to a Constitution Drafting Committee, which it had there reconstituted,

> "due to the fact that there are some technicality which were in draft Constitution which need to be polished and some need to be added"

[31] The minutes of that workshop are clear on this and that the final result would be discussed and amendments made –

> "at Community General Assembly for the Constitution to be called at the HQ of the Ovambanderu:"

[32] The full minutes of the proceedings at that meeting were produced as part of the documents called for in terms of Rule 53 (1); it is found at pp 109 - 117 and at pp 403 - 411. (Annexure "GK3" to appellants' answering affidavit) (see in particular pp 409 - 410).

[33] In paragraph 29 of their founding affidavit respondents acknowledge that the Mbanderu Community Assembly:

> "Is the highest decision making organ of the Mbanderu Traditional Community. It is responsible to review the Mbanderu Traditional Community's norms and customs."

(1) This acknowledgment is repeated in paragraph 41 of respondents' founding affidavit where first respondent states:

"Most importantly the letter also invited me to a Mbanderu Community Assembly meeting scheduled for the 1st - 2nd October 2005 in order for the Ovambanderu to adopt the Constitution"; (Emphasis added)

(2) in paragraph 42 where first respondent states:

"…and worst of all the Mbanderu Community Assembly which is the highest policy-making organ, was denied the opportunity to discuss and endorse and/or adopt the New Mbanderu Constitution;"

and

(3) in paragraph 44 where first respondent says:

"The meeting adjourned on this note to the 2nd October 2005 in order for deliberations to continue on the draft constitutions." (Emphasis added)

[34] The Court *a quo* correctly identified the first issue it had to determine, but, with respect, in light of the unequivocal and unconditional tender to reinstate respondents in their positions as traditional councilors with first appellant, the second issue had become irrelevant. (see pp 130 - 131 of the record of proceedings before this Court).

[35] When the Court *a quo* proceeded to deal with the issue of reviewability of the decision to adopt the constitution, it did not analyse the facts put before it in the form of the affidavits and the record. Instead the Court initially diverted its attention from the real issue, when it went on to dwell on what appears to be a specious issue namely, whether the document submitted by the community when they applied to the Government for recognition was a constitution or not.

[36] I regard this issue as specious because, while the appellants called the document “provisional guidelines,” the respondents might have called it a constitution but actually acknowledged it was in reality only an initial draft-constitution (see para 13.2 of their replying affidavit) and the document itself is entitled "THE RULING SYSTEM OF THE MBANDERU PEOPLE". The reality is that that document was one of the drafts of the constitution the community had been working on for a period of ten (10) years, as appears on the record (see record pp 112 - 275). (See further relevant references to that document by respondents at paragraphs 17.1, 17.3 and 19 of their replying affidavit.)

[37] Besides, the determination of that issue had no practical consequences in regard to the position of first respondent: section 11 of the Act (and, in similar vein, sec 7 of its predecessor, Act No17 of 1995) provides:

> "11. Nothing in this Act contained shall be construed as precluding the members of a traditional community from addressing a traditional leader by the traditional title accorded to that office, but such traditional title shall not derogate from, or add to, the status, powers, duties and functions associated with the office of a traditional leader as provided for in this Act."

[38] The starting point in determining whether or not an action performed by a body is administrative, and, therefore, reviewable, is to identify the body concerned. In most review cases no problem arises in this regard. The South African Constitutional Court in the *SARFU* matter *supra* was correct, however, to caution that 'difficult boundaries may have to be drawn in deciding what should and what should not be characterized as administrative action for the purpose of section 33 of the South African Constitution (of Article 18 of the Namibian Constitution) and that this can best be done on a case by case basis. In substance, the provisions of Article 18 of the Namibian Constitution are similar to those of s 33 of the South African Constitution.

[39] In the present matter the Court *a quo* made no attempt whatever to identify the body that adopted the constitution, despite clear undisputed facts before it. The Court simply took it for granted, it seems, that the adoption was done by first and second appellants. It based most of its reasoning and ultimate decision on that assumption. This was a serious misdirection. We are, therefore, at large to determine this issue on the facts on the papers. (See *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036 (SCA) at 1045 E)

> [40] On the facts outlined above, in particular the common cause facts, and those clearly admitted by respondents, there can be no doubt that the Ovambanderu Traditional Community was responsible for the adoption of the constitution. In this regard it is to be noted that, whatever was done by second appellant (who bears the brunt of the criticism on this issue) was done by him as part of the process of adopting the constitution. In other words he was acting as an integral part of the community, or as custodian of the customary law of the community (see sec 7 of the Act). The community as such is not a statutory body. There are no statutory provisions relating to its constitution, duties and functions although it is defined in the Act as-

"an indigenous homogeneous endogamous social grouping of persons comprising families deriving from exogamous clans which share a common ancestry, language, cultural heritage, customs and traditions, who recognize a common traditional authority and inhabits a common communal area, and may include members of that traditional community residing outside the common communal area."

[41] As Mr Smuts submitted, correctly, in my opinion, in his heads of argument:

"29. A traditional community would thus not only establish an authority but the community itself would, as is accepted in the founding affidavit, adopt its own constitution. It is thus not first appellant, the established traditional authority, which adopted the constitution. It is respectfully submitted that the review application was thus wrongly directed at first appellant as such and was thus misconceived.

30. Its misconceived nature is also further evident when the underlying decision making, sought to be reviewed, is examined. The adoption of a Constitution by a community, it is respectfully submitted, does not constitute administrative action for the purposes of review proceedings. (Emphasis added)

[42] In this submission Mr Smuts repeated what was held in *Fedsure Life Assurance and Others v Greater Johannesburg Transvaal Metropolitan Council and Others*, *supra,* (see paragraph [20] of this judgment) and continued:

"The adoption of a constitution by a community – and not by a statutory body exercising statutory powers – would not, it is respectfully submitted constitute administrative action for the purpose of review."

[43] The above reasoning which I find cannot be faulted, is based on the same facts which I have found the Court *a quo* did not consider. More significantly, Mr Corbett was pressed by the Court as a whole to pin point any action that he could say was taken by first respondent in relation to the adoption of the constitution; he could not but ended up conceding the point (see pp 125 - 131 of the record of proceedings before this Court), if I understand him correctly.

> [44] I am mindful of the fact that in his oral submissions Mr Corbett tried to say that two decisions to adopt the constitution are revealed on the pleadings. But having found that second appellant was an integral part of the constitution making process by the Mbanderu Community, I do not see any substance in the approach he suggested. Consequently the point of misdirection of the review application against second appellant need not be considered separately; it turns on the same considerations.

[45] I pause here to say that, as I understand Mr Smuts's submission on the three other bases of attack of the decision of the court *a quo*, they are premised on the assumption that the matter is reviewable. I approach the matter on the same basis without necessarily qualifying my finding that

the matter, is not reviewable, which finding, I must add, is strictly based on the particular facts and circumstances pertaining in this matter.

> [46] I turn now to the third point raised by Mr Smuts in paragraph 21 of his written submission – that
>
> "the Court below … erred by failing to take into account that the respondents had failed to make out review grounds in their founding affidavits for the relief."

He submitted, correctly, that respondents as applicants bore the onus of establishing the review grounds alleged by them in their founding (and amplifying papers). The applicants did not provide amplifying affidavits after the record was provided under Rule 53(4). In support of this proposition Mr Smuts relied on *Davis v Chairman, Committee of the Johannesburg Stock Exchange* 1991(4) SA 43 (WLD) where Zulman J stated at 47 G:

> "There is no onus on the body whose conduct is the subject matter of review to justify its conduct. On the contrary, the onus rests upon the Applicant to review to satisfy the Court that good grounds exist to review the conduct complained of. (See, for example, *The Administrator, Transvaal, and the First Investments (Pty) Ltd v Johannesburg City Council* 1971 (1) SA 56 (A) at 86 A – C and *Johannesburg City Council v The Administrator, Transvaal, and Mayofis* 1971 (1) SA 87 (A) at 100 A-B"

[47] In this connection, Mr Smuts stated in paragraphs 9 - 10 of his heads of argument.

"The late head of the Mbanderu Traditional Authority deposed to a confirmatory affidavit at record 464 - 465 and a certain Mr Otniel Kavari deposed to an affidavit in which he qualified himself as an expert in the customary laws, norms, procedures, traditions and usage of the Mbanderu community and confirmed the answering affidavit of Mr Katjirua where it related to customary laws, norms, rules and procedures, traditions and usages. Record 495. This affidavit was filed in accordance with existing authority as to the proof of Herero customary law and customs which may be provided by ordinary persons having knowledge of the nature of the customs and the period over which they have been observed, provided they qualify themselves accordingly.

See: *Kaputuaza and Another v Executive Committee of the Administration of the Hereros and Others* 1984(4) SA 295 (SWA) at 301 F-I.

After the record of proceedings was provided under Rule 53(1), the applicants elected not to amplify their founding papers, as is authorized and contemplated by Rule 53(4) and thereby they thus elected not to amend or add to or vary the terms of the relief sought in the notice of motion or supplement their founding papers in any manner." (My underlining)

[48] Then in paragraphs 44 - 46 of the heads he made the following submissions:

"The context of the review concerning the adoption of the Constitution is of considerable importance in this application. As has been submitted it in any event does not constitute reviewable administrative action. But it in any event plainly does not relate to any *quasi* judicial or adjudicative process or proceedings. What would be relevant in these circumstances would be customs, norms and

traditions of the specific community in relation to adopting its constitution and how this was to be achieved. None of the deponents to the founding affidavits has properly qualified himself as an expert in Mbanderu custom and tradition on the basis of the Kaputuaza decision *supra* of the High Court as it was formerly constituted. This defect is fatal to the respondents' case. The respondents clearly had the onus – as the applicants in the Court below – to establish by means of admissible evidence their review grounds raised in respect of their challenge to the adoption of the constitution. In doing so, it was required of them by means of admissible evidence to establish what process is prescribed by tradition and custom to adopt a constitution in the circumstances and how the process which was followed fell short of that. At the outset, it is submitted that the respondents failed comprehensively in this regard by failing to adduce admissible evidence by any persons qualified as experts in Mbanderu tradition and custom in this respect in the founding papers.

Furthermore, this aspect is particularly important in the context of the approach of the courts over the years that a body under review is entitled, subject to its own rules, to determine its own rules and procedure.

See: *Davis v Committee of the JSE, supra,* at 48 C-D and the authorities collected there.

The context is thus crucial – a community drawn together by tradition, custom, language, culture and kin adopting a constitution after a deliberative process spanning some 10 years." (My underlinging)

[49] Only in paragraph 27.6 of respondents' replying affidavit did Erastus Tjiundikua Kahuure (the deponent of their founding affidavit) state:

"27.6 I am an expert on customary law of the Ovambanderu people. This is based upon my extensive experience as traditional leader and senior traditional leader in the community. As such I am regularly consulted on issues relating to customary law and represented the Ovambanderu community on the Council of Traditional Leaders, which advises the President on

traditional matters. I also adjudicate on traditional marriages and divorces, as stated in the founding papers." (Underlining is mine)

Respondents do not dispute the correctness of the *Kaputuaza* decision.

[50] The Court *a quo* apparently regarded paragraph 27.6 of the replying affidavit as supplementation; it stated in paragraph [20] of its judgment:

> "I have carefully perused and considered the papers filed of record and I am satisfied that the applicants' founding affidavit contains sufficient allegations for the establishment of their case: their founding affidavit is not a mere skeleton of their case. I find that their allegations are sufficiently set out in their founding affidavit. Moreover, in my opinion, the applicants were entitled to respond appropriately by supplementation in their replying affidavit so as to refute the case put up by the respondents in their answering affidavit." (Emphasis added)

[51] Foot notes 11 and 12 show that the Court relied on *Titty's Bar and Bottle Store v A.B.C Garage (Pty) Ltd and Others* 1974 (4) SA 362 (T.P.D) at 368 H – 369 B

> In that case the question of *locus standi* of applicant was only made in the replying affidavit of the applicant. An application

to strike out certain matters appearing in the replying affidavit succeeded, the Court finding that-

"The replying affidavit does contain allegations which do not, not even in bare form, appear in the founding affidavit." (at 367 A)

At p 368 H the Court went on to say:

"It has always been the practice of the Courts in South Africa to strike out matter in replying affidavits which should have appeared in petitions or founding affidavits, including facts to establish *locus standi* or the jurisdiction of the Court."

At 369 B the Court added:

"It lies, of course, in the discretion of the Court in each particular case to decide whether the applicant's founding affidavit contains sufficient allegations for the establishment of his case. Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit. In the present case, the applicant has not made out even a skeleton of a case in so far as his *locus standi rests* on a *stipulatio alteri."*

[52] As I see it, the belated attempt by first respondent to qualify himself as an expert on the norms, customs and tradition of the

> Mbanderu Community was an attempt to lay an evidential basis on which the Court would be entitled to accept his evidence on that aspect of the matter (i.e. how a community would go about adopting its constitution).

[53] In *Simmons N.O v Gilbert Hamer & Co Ltd* 1963 (1) SA 897 (NPD) Caney J dealt with a refusal by the judge in the Court below to admit an affidavit that the judge had regarded 'as a fifth set of affidavits introducing a new matter' the judge below had rejected the explanation given by respondent in that case, why the affidavit had not been filed with the originating (founding) papers. Caney J said at 902 A-E

> "In stating his reasons for refusing the admission of Mr. Owen's affidavit the learned Judge commences by saying
>
> > 'Normally in motion proceedings only three sets of affidavits are permitted, but the Courts, in the exercise of their discretion, have, in some cases, permitted more.'
>
> This is undoubtedly so; in the normal course of litigation on affidavit, three, and sometimes four, sets of affidavits suffice to define the issues and enable each party to make his case and answer that of his opponent. In the present instance a fourth set of affidavits was admitted by consent. It does not appear to me, however, that Mr. Owen's affidavit is truly to be regarded as a fifth set. There can be no doubt that it ought to have been filed with the applicant's originating set of papers, but, as I shall indicate, the applicant has proffered evidence explanatory of his failure to file the affidavit at that stage. Having regard to the fact that affidavits in motion proceedings may be considered to be analogous to the pleadings and the evidence, together in a trial action, the application to put Mr. Owen's

affidavit on the record can be likened to an application on the part of a plaintiff to amend his declaration at a late stage of the trial or, a better analogy, to an application to lead further evidence after he has closed his case. The affidavit does not purport to answer any of the averments made in affidavits filed on behalf of the respondent, but to supplement the evidence upon which the applicant bases his case. In the light of these observations, the fact that four sets of affidavits have already been filed is not a weighty obstacle to the admission of Mr. Owen's affidavit." (My underlining)

[54] In *Davis v Chairman, Committee of the JSE, supra,* (at 51G – 52 A) Zulman J, dealt with a situation similar to that arising in the present matter on the point under consideration. He remarked:

"The next main ground of attack on the finding of the committee was that relating to certain evidence given by Gerber to which I have made brief reference at the outset of this judgment. This ground of attack was not set out in the applicant's founding affidavit. At the outset of argument on behalf of the respondent counsel for the respondent took the point that because of this fact, and upon the basis of authorities such as *Minister of Justice v Bagattini and Others* 1975 (4) SA 252 (T) at 258 G-H and *Terblanche v Wiese en Andere* 1973 (4) SA 497 (A) at 504 C and 504 H, this ground could not be relied upon by the applicant. Upon being appraised of the point, counsel for the applicant, who had by then completed his opening argument, immediately conceded the point and sought leave to hand up a supplementary affidavit to deal specifically with the matter. This was objected to by counsel for the respondent. I overruled the objection and permitted the affidavit to be handed in, I also stood the matter down until the next morning to afford the respondent an opportunity of dealing with the matter raised in the affidavit, if he so wished. I did this because I believed that there was no prejudice, on this basis, to the respondent by admitting the affidavit, and upon the further basis that in this particular case all the facts raised in the supplementary affidavit had indeed emerged from the record of proceedings before the committee. (This record has been placed before me). In the result, and at the commencement of proceedings the next day,

counsel for the respondent handed in a further affidavit from respondent, dealing with the evidence of Gerber."(Emphasis added)

[55] Both *Minister of Justice v Bagattini and Others* and *Terblanche v Wiese en Andere,* referred to the passage I have quoted from *Davis v Chairman Committee* of the JSE *supra* deal with the requirements of Rule 52 (2) and (4) and 52 (2) respectively at the relevant pages.

[56] I find no need to quote them, suffice it to say that from these decisions the following points regarding supplementary affidavits emerge, namely:

1. that affidavits in applications in review proceedings are both the pleadings and evidence;

2. that the evidence supporting the relief claimed must appear in the founding papers;

3. that the evidence like any allegations appearing in the founding papers can be supplemented in the replying affidavit of the applicant; and

4. that if the evidence sought to be tendered does not appear in the founding papers, it can still be tendered on application, in the replying affidavit provided an acceptable explanation is given why it was not contained in the founding papers, and provided the respondent is given an opportunity to deal with the evidence, and respondent is not prejudiced thereby.

[57] Paragraph 27.6 of respondents' replying affidavit in this case seeks to establish the deponent's competence as a witness to testify on the norms, traditions and customs of the Mbanderu people as regards the process of adopting a constitution (or any important decision like that). That fact, like *locus standi* or jurisdiction, ought to have been stated in respondents' founding papers.

[58] While the Court *a quo* was correct to say that respondents were entitled to supplement allegations made in their founding affidavit, here there was nothing being supplemented by paragraph 27.6 of the replying affidavit, worse still, there was no application made to bring the fact on the record. As a result the appellants were not afforded any opportunity to deny the competence of Kahuure to testify on the matters he claims to be an expert in. I accordingly agree with Mr Smuts that the omission by

Kahuure to qualify himself as required was fatal to the application in regard to the adoption of the constitution by the Mbanderu Community.

[59] I turn now to consider the factual findings by the Court a quo. To begin with, regard must be had to the complaints by the respondents which are directed mainly against actions taken by second appellant, namely that (in summary)

(a) he unilaterally undermined the work of the constitution drafting committee re-established at a meeting of the Ovambanderu Community at Gobabis on 18 - 19 June 2005;

(b) he dictated changes to the constitution in a letter (annexure "ETK2") to the committee, which letter effectively put on hold the consultative process with regard to the draft constitution (this letter is read together with the Committee Chairman's letter of invitation to the meeting of 1 - 2 October 2005);

(c) the terms of reference of the drafting committee were not followed to the letter and spirit as stipulated at the said meeting of the community at Gobabis;

(d) the consultative process was aborted in that the constituencies were not visited;

(e) the Mbanderu Community Assembly, the highest policy-making organ of the Mbanderu community was denied the opportunity "to discuss and endorse and/or adopt the new constitution."

These complaints are enumerated in paragraphs 39 to 45 of Kahuure's (respondents') founding affidavit (record pp 19 - 21).

[60] The letter by second appellant reads:

"To: The Chairperson
Mbanderu Constitutional Drafting Committee
Windhoek

Me, the Paramount Chief of the Ovambanderu Munjuku II Nguvauva, am bringing the following changes to the draft Constitution.

Page 4, Chapter 2, Number 2

The Chief will be called Paramount Chief.

Chapter 3

There will be no middle person between the Paramount Chief and the other leaders and there will no more be a 'Senior Chief', all will be called Senior Councillors from the first once to the last one (all will be called Senior Traditional Councillors only). The Paramount Chief will elect one amongst them to be the 'Chairperson' of the Councillors, while all will remain to be equal to run their respective constituencies. No one will be called Senior to the others.

Chapter 8

(a) bb) Completely take out

ee) Will now be called 'All General Field Marshalls of the Green Flag'.

b) (b) I. No.(*sic*)

8 (b) I number 10 and number 9 seem to be in conflict with each other with reference to 'Supreme Council' and 'Community Assembly' Is it one and the same thing? (*sic*)

9.2 Remove and replace with 'Chairperson'

Chapter 13

The Constitution should indicate that Community Courts and their dependants are constituted by Government in terms of Act No. 10 of 2003 which is so gazetted. Also indicate where this should resort.

Chapter 14

Indicate that the Traditional Army (Troop) will resort under the Paramount Chief. He will appoint and remove officials and this will not be done by any other leaders.
Yours in Culture

_____

MUNJUKU II NGUVAUVA

PARAMOUNT CHIEF OF THE MBANDERU PEOPLE"

[61] The Chairman's invitation letter reads:

"8 September 2005

Honourable…….

DRAFT CONSTITUTION OF THE OVAMBANDERU COMMUNITY

First you are being greeted with love together with our Ovambanderu Community in your district. This letter accompanies the Draft Ovambanderu Community Constitution.

Secondly, the Draft Constitution Committee of the Ovambanderu Community is happy to send you the Draft Ovambanderu Constitution, for your perusal and note its contents. In addition, we have attached a letter by the Paramount Chief of the Ovambanderu regarding his position on the Ovambanderu Constitution.

We as the Ovambanderu Constitution Drafting Committee, have strongly embraced the views and position of the Paramount Chief of the Committee which visited him at Ezorongondo from 2 - 4 September 2005, following his invitation said 'That is my view and I will not change on that position, it is my view which I see as the sole way by which I will protect my Ovambanderu Community'

Therefore, the constitution as it is, it stands as per the Paramount Chief's directive.

We also would like to inform and invite you to the Ovambanderu Community Assembly to be held in Omawezonjanda by the 'Five Camel thorn trees' from 1 - 2 October 2005.

At this Assembly, the Ovambanderu community will have the Draft Constitution read to them and accepted by them.

Loving Greetings to you all.

Kauku Hengari

(Chairperson)" (My emphasis)

[62] The minutes of the meeting on 18 - 19 June 2005 are found at pp 109 - 117, and those of the meeting on 1 October 2005 at pp 269 - 274 of the record respectively. I shall for convenience (refer to the said minutes respectively as "the 1st set of minutes" and "the 2nd set of minutes."

[63] The 1st set of minutes reflects the following (at 115 - 116) (as regards the Constitution Drafting Committee's terms of reference:

"…the Director of Ceremony of that topic conclude that point with following statement that the committee have to travel to all the Regions to take the constitution there. Financial constrain was mentioned in the meeting and Committee was referred to Mr Tjozongoro a Chief

Representative in Windhoek and Chief Representative Mr Sirirka of Gobabis raise his concern on the money issue as one of those responsible for financial management and control and he told the meeting that there no money for such trips to be undertook. Its also been resolved that having a Committee to take the constitution to each region and for members of the (committee) to read it for the people it will be impossible but it will be better for the committee just to left the constitution with community itself to read and to have its change with time and it was agree upon that discussion will only materialize at Community General Assembly for the Constitution to be called at the HQ of the Ovambanderu". (*sic*) (Emphasis added)

and at p 116 - 117:

"Final resolution

The meeting resolves that Mr Erastus Tjiundikua Kahuure as Senior Chief have to take a mission to the Paramount Chief of Ovambanderu to report the outcome of the meeting of Gobabis, within a period of 14 days, to go and hear from the Paramount Chief what his comment is from the outcome of this meeting and also have his input and blessing on what is been said." (*sic*) (My underlining)

[64] The 2nd set of minutes reflect the following (i.e. as to what transpired on 1 October 2005) and I find it necessary to quote the minutes in full:

"M**INUTES OF THE OVAMBANDERU COMMUNITY ASSEMBLY HELD ON 1 OCTOBER 2005 AT OMAUEZONJANDA (POST 3) IN THE EPUKIRO CONSTITUENCY**

Venue : Ovambanderu Head Quarter Office (centre)

Chairperson : Chief Gerson Katjirua of Epukiro Constituency

Agenda : Discussion and adoption of the Ovambanderu Constitution.

Present:

(i) Senior Chief Erastus Kahuure from Rietfontein Block and the Ovambanderu community from Rietfontein Block.

(ii) Chief Gerson Katjirua from Epukiro and the Ovambanderu community from Epukiro.

(iii) Chief Matheus Katjiteo from Eiseb Block and the Ovambanderu community from Eiseb Block.

(iv) Chief Joseph Uandia from Otjinene Constituency and the Ovambanderu community from Otjinene.

(v) Mr Katjambungu Mbatara representing the Paramount Chief of the Ovambanderu in the Gamm area as well as the Ovambanderu community from Gamm Resettlement area.

(vi) Mr Ripuree Tjozongoro representing the Paramount Chief of the Ovambanderu people in the Khomas Region and the Ovambanderu community from the Khomas Region.

(vii) Mr Pineas Siririka representing the Paramount Chief of the Ovambanderu people in Gobabis and the Ovambanderu community from Gobabis district.

(viii) Mr Utarera Borry Katjiuanjo representing Chief Ludwig Karumendu of the Aminius constituency under the Paramount Chief of the Ovambanderu in the Aminius constituency and the Ovambanderu community from Aminius.

(ix) Mr Zaundika Makono representing the Paramount Chief of the Ovambanderu people in the Steinhausen constituency and the Ovambanderu community from Steinhausen constituency.

Absent with apology:

Chief Karutavi Harley from the Kaokoveld

Discussions

1. **The Chairperson Chief Katjirua** requested Pastor Peter Murangi to open the meeting with a prayer. Immediately after that, he welcomed all the Ovambanderu present by highlighting the importance of this meeting. He further appealed to the media not to reflect or record anything from this meeting, as they would inform the media on the outcome after the meeting. He also registered his happiness with the attendance as the Ovambanderu who gathered at the assembly were between 600 to 7000. He also nominated **Mr Amos Kamaze** to assist him, of which the meeting agreed and Mr Kamaze took over chairmanship.

2. **Mr Benjamin Murangi** raised up and proposes that the Ovambanderu Constitution Drafting Committee introduce the constitution.

3. **Mr Katjivikua** opposed **Mr Murangi's** request and indicated that the Ovambanderu have instructed only one Ovambanderu Constitution Drafting Committee but it seems to him that one committee have withdrawn from the original one, which caused that there are now two Ovambanderu Constitution Drafting Committees.

4. **Senior Chief Kahuure** indicated to the meeting, to look for the cause which led to the committees to become two, before discussing the constitution.

5. **Mr Kazuu Hengari** informed the meeting that the members who prepared the constitution were less than the total members of the Ovambanderu Constitution Drafting Committee, and some of them drove during nights to the Chief to force him to sign the constitution.

6. **Mr Kaitjombiri Katjirua** registered his disappointment with the statement made by **Mr Kazuu Hengari**. He informed the meeting that, firstly, Mr Hengari is not a member of the Ovambanderu Constitution Drafting Committee how can he (**Mr Hengari**) make such a false and a misleading statement, secondly, the

Ovambanderu Constitution is not sign as we are sitting here. (*sic*)

This led to the very angry **Mr Albertus Tanii Kanguatjivi** to stand up, without even allowed by the chairman and rush to **Chief Katjirua**, stamp the table and pinpoint a finger to him. The meeting decided to banish him from the whole meeting.

7. This was a very childish and very bad behaviour from **Mr Kanguatjivi**, and **Dr Kaire Mbuende** requested the meeting to re-look into the misbehavior of **Mr Kanguatjivi** and come forward with rules how we should proceed with the meeting.

8. **Mr Jarurakouje Nguvauva** supported **Dr Mbuende** request and requested **Mr Kanguatjiv**i to apologize for his misbehavior.

The Chairman adjourned the meeting for a small break.

9. After the break, **Mr Kanguu Hengari** requested the Committee to come forward with their presentation on the constitutions.

10. **Mr Kilus Nguvauva** supported the idea of **Mr Kazuu Hengari**, and highlighted the importance of the Ovambanderu community to have their own constitution and the meeting agreed.

11. The Chairman than brought the meeting under control by emphasizing the idea of two speakers before him. He mentioned that the Ovambanderus are here to listen to their constitution. He further elaborated that it does not matter whether the constitutions are two, what matters today is one constitution for the entire Ovambanderu community towards the end of the day.

He then allowed the leaders of the two committees to present the constitutions to the community.

12. **Mr Lukas Tjitunga** who was representing his committee indicated that there are not two constitutions as indicated by the previous speakers and the Chairperson. We drafted the constitution together and this constitution was drafted since 1995.

According to him the difference came only after the letter from the Paramount Chief. Firstly, the letter was not sign by the Paramount Chief, and secondly, the letter was not on the letterhead. This led to questions raised by them as to who the writer of the letter is.

He further informed the meeting that the constitution was presented several times before the Gobabis meeting; the community knows the constitution very well. The Gobabis meeting only instructed the committee to polish the constitution. Even Mr Uaatjo Uanivi (member of the Committee) presented the Ovambanderu Constitution at the Gobabis meeting.

He indicated to the meeting that some of the committee members, namely, Kauku Hengari, Ngondi Muundjua and Kaitjombiri Katjirua rushed to Ezorongondo to meet the Paramount Chief and they were informed later about this mission. The content of the letter goes in line with the idea of Mr Muundjua and he is quite sure Mr Muundjua prepared the letter and he is the one who forced the Paramount Chief to sign for it.
Our intention was not to take the constitution to the Paramount Chief but to forward it to the constituencies.

A letter was prepared and sign by Mr Kauku Hengari, the Chairperson of the Committee, reflecting that the Paramount Chief have brought some changes to the structure of the Authority, and he (Paramount Chief) think this is the correct way to save his community. Mr Tjitunga further informed the meeting that he was not aware of the letter, and someone called him to enquire whether all of them are aware of the said letter from Hengari my response was negative. This led to some of us to stand up and start another committee that is drafting the constitution follow the process as decided by the Gobabis meeting.

Mr Uanivi indicated that he also participate in the mission to the paramount Chief on 2 - 4 September 2006, and at that meeting he asked the Paramount Chief whether he is the one who sign for that letter, the response was positive. I was not happy with the answer of the Paramount Chief because I foreseen that things would be very difficult as it is now.

Mr Vemupa Hauanga informed the meeting that he is the Chairman of the Drafting

Committee and he is not aware of any other constitution. He only knows the first draft, which is drafted in 1995. He chaired the entire meetings.

13. **Mr Kauku Hengari** the Chairperson of the Ovambanderu Constitution Drafting Committee informed the meeting that Mr Tjitunga for the first time revealed the truth by indicating that we prepared the Ovambanderu Constitution as a committee together. Mr Tjitunga only attended the first session of meeting of the Committee and then disappeared. He did not even bother to inform the chairman of the Committee what prevent him from attending the following committee meetings. At the first meeting we prepared the date of the meetings and those members who attended, agreed.

After the Gobabis meeting, Mr Kauku Hengari informed Mr Hauanga as the first chairman to convene a meeting, but he refused, saying that he will be out of country for about three months and he is not prepared to convene such a meeting. Mr Hengari informed that Mr Tjitunga out of the blue re-appeared again at the last meeting, when we were discussing the invitation by the Chief to visit Ezorongondo and to brief him about the draft constitution. Seven members of the Committee attended this meeting. He (Mr Tjitunga) did not bother to adhere to the invitation of the Paramount Chief because, they arranged another meeting at Witvlei to plot against the Paramount Chief.

However, my presentation will go back to the conclusion of the Gobabis meeting, in that meeting it was decided that:

- As the meeting was never authorized and neither approved by the Paramount Chief a delegation headed by the Senior Chief Erastus Kahuure should go and report to the Paramount Chief about the preparation and conclusion of that meeting and seek his approval.

- Any constitution about the Ovambanseru community should clearly states that the Ovambanderu are Traditional Royal community headed by the Nguvauva Royal House.

- All the Kings of the Ovambanderu have originated from the Nguvauva Royal

clan and they should be continuing to be appointed from the Nguvauva Royal clan. The original committee should be reactivated to polish the constitution and circulate it among the Ovambanderu communities, and if possible go and make presentation to the constituencies if money allows.

Mr Kauku Hengari informed the meeting that after they finish the constitution they requested money from Senior Chief Kahuure through King Representative Ripuree Tjozongoro of Khomas Region. Mr Kahuure could not do any efforts to have money available, and we (Committee members) went for another option of distributing the constitution to the Traditional Leaders and request them to read the constitution for the community and if the community have any comments to raise, this would be discussed at the 1 - 2 October 2005. At this meeting we are expecting comments, and he invited those who have comments to the constitution to come forward and not hide under pretext."

Mr Ngondi Muundjua informed the meeting by warning those who mislead others that eight members of the Committee did not accept the constitution except three members only. From the said eight members the following four members, namely, Mr Vemupa Hauanga, Mr Tjitambi Marenga, Ms Inge Murangi and Ms Kaveri Kavari have not attended a single meeting of the committee although they are informed through media of the dated of the meetings. Mr Karihangana Uanivi is not a member of the Committee, he was requested by Uaatjo Uanivi to attend because of the translation of the constitution.

Mr Kaitjombiri Katjirua supported the statements of Mr Kauku Hengari, and Mr Muundjua and indicated that he knows Pastor Uanivi very good and he warned the members not to accept him to join the committee meetings because as a Pastor he prayed in the morning and before noon he destroy every thing he prayed for.

14. **The Senior Chief Kahuure** after the briefing from the two asked whether he got it right that the committee members prepared the constitution together, the answer was positive. He further wanted to know whether amendments of the Paramount Chief are incorporated in the constitution or not? The answer again was positive.

15. **Mr Katjivikua** told the meeting not to start another meeting because it seems to he

was also misinformed. The committee prepared the constitution together, it was only a problem of attendance.

16. **Senior Chief Erastus Kahuure** than come back and indicated that he does not believe that the Paramount Chief is the one who sign for that letter.

17. **Mr Makono** wanted to know from Mr Hauanga that as a chairman, how many meetings did he chaired after the Gobabis meeting. The answer was none. Again Mr Makono wanted to know whether he attended any committee meeting after the Gobabis meeting. The answer was no.

    Mr Makono proceeded with his question to Mr Hauanga on how he can call himself a chairperson if he never attended or chaired any meetings.
    Without answering Mr Makono question, Mr Hauanga decided to sit down.

18. **Mr Tjozongoro** informed the meeting that, it seems to him that the committee members prepared this documents together. The problem came after the letter from the Paramount Chief. He requested the meeting to adjourned and after break, the letter of the Paramount Chief must be red.

19. **Chief Katjirua** then summarized the meeting by informing that the concern is about the letter from the Paramount Chief, because even the member of the Committee invited us to come forward with our comments to the constitution but we are all quite, silence gives concern. It means we have no objection with the constitution per say but only with who sign the letter from the Paramount Chief.

20. **Chief Katjirua** then came with the proposal as to call the Paramount Chief who was sitting abut 100 meters away from the meeting.
    The meeting agreed.

21. **The Chairman Mr Kamaze** again direct the meeting that if we call the Paramount Chief to testify whether he is the one who sign the letter, we are not going to discuss the constitution again because there is no one who is having any problem with the whole draft constitution, apart from the letter sign by the Paramount Chief himself, whether it was sign by him or not as it was stated earlier by Senior Chief

Kahuure that he does not believe that the letter was written and sign by the Paramount Chief and as it was also the only concern raised by the other members of the committee.

The meeting agreed.

22. **The Chairperson** then requested Chief Katjiteo from Eiseb Block to go and call the Paramount Chief. When the Paramount Chief arrived, he was informed the aim why he is called by Mr Benjamin Murangi.

23. **The Chairman** asked the Paramount Chief as to who wrote and sing the letter to the Committee.

24. **The Paramount Chief** asked, which letter, and the Chairman requested Mr Muundjua to show the letter.

25. **The Paramount Chief** then requested the letter to be red. Mr Muundjua was requested by the chairperson to read to letter. After the reading the letter, The Paramount Chief confirmed that he is the one wrote and sign the letter.

The Paramount Chief then proceed by instructing the Queen to read a statement prepared by him (Paramount Chief) to the community, in which he urge his community as he normally do, to behave and accept his input to the Constitution. (See attached statement from the Paramount Chief)

26. **Traditionally,** when the Chief spoke his final nobody is allowed to say anything afterwards. The Chairperson requested Chief Katjiteo to accompany the Paramount Chief to his car.

The community was singing, dancing and allotting, showing their happiness and triumph, that the community has a constitution of its own.

27. **The Chairman** then adjourned the meeting and wish everybody a save journey back to their places." (*sic*) (My underlining)

[65] As I tried to show by underlining various aspects thereof, what is

reflected in these minutes contradicts a number of the allegations made by the respondents in their founding affidavit. I particularly refer, for example, to the allegations that the community was not given an opportunity to discuss the constitution on 1 October 2005 before it was adopted. These minutes show (and it is not denied) that first respondent took an active part in the discussions, in which various queries were raised and settled about the constitutional drafting and consultative processes. The nine members of the constitution drafting committee who later sided with him were present. According to their confirmatory affidavits, several of them are holding high positions in Government, and at least one of them a lawyer. The minutes also show that first respondent and his supporters remained silent even when urged or challenged to speak out and make any comment about the constitution.

[66] If the minutes of the "Ovambanderu Community Assembly held on 1 October 2005" reflect what transpired at that meeting, it means that Kahuure's and his group's protest to second appellant thereafter was an afterthought. This inference is inescapable in all the circumstances revealed on the papers, including the fact that the so-called confirmatory affidavits of the 9 members of the constitution drafting committee only appear in the replying papers of respondents. It is surprising that the Court below attached so much weight to their affidavits as against the supporting affidavits of several prominent leaders of the Community

(listed in the minutes) which appear in the answering papers of the appellants.

[67] In paragraph [17] [18] and [19] of its judgment, the Court *a quo* dealt with the submission by counsel for the appellants that there were material dispute of fact on the papers. In paragraph [19] the Court "decided not to accept the alleged disputes of fact on their face value" and proceeded to say:

> "There may be disputes of facts on certain issues, but they are irrelevant in the determination of the two aforementioned issues in this application"

When the Court *a quo* came to deal with issue (1)- the adoption of the constitution, it first stated in paragraph (37) of its judgment:

> "…Here, too, I do not find any genuine, material and *bona fide* disputes of facts"

[68] The necessary implication of what the Court said in paragraph [19] and [37] of its judgment is that the Court accepted the minutes of the two meetings of the Mbanderu Community that addressed the drafting, and the adoption of the constitution.

[69] Respondents had in their replying affidavit denied the correctness of the minutes of the two meetings thus:

(a) in paragraph 25.2 (re 18 - 19 June 2005 meeting)

> "I submit that annexure GK3 to the respondents answering affidavit does not correctly reflect the decision concerning the obtaining of feed back on the final draft constitution as decided in such meeting."

(b) in paragraph 29.6 (re 1 October 2005 meeting):

> "The discussion only related to the fact that the tabling of the new constitution was irregular since there had been no prior proper circulation and discussion of the draft in the Traditional Community. The meeting also discussed the authenticity of the letter allegedly written by the second respondent – 'GK3B'. Reference is made to the minutes of this meeting held on 1 October 2005, but no such minutes are annexed to the respondents' answering papers. In any event, the applicants dispute the contents of the '*minutes*' forming part of the record (Item 13) since it is not stated who produced them and they are in any event not signed. They simply give a distorted picture of what transpired at the meeting, in order to favour the incorrect version of events put up by the respondents before this Court;" (My highlighting)

[70] It was these denials, *inter alia,* that led Mr Geier for the appellants to submit in the Court below in his alternative argument, that:

"48 With reference to what has already been set out hereinabove in respect of the approach to disputed facts in motion proceedings it appears that:

a. the Respondents have denied most of the material allegations made on the Applicants' behalf and have produced positive evidence to the contrary;

b. in addition, for instance with regard to what transpired at the meeting of 1 October 2005, and although some of the evidence set out in Applicants' founding papers is admitted, it appears that the Respondents allege a totally different version of events which the Appellants in turn dispute. The material nature of this dispute also appears from the lengthy replying affidavit filed only a few days ago.

c. the same holds true in regard to the important issue whether or not the terms of reference relevant to the consultative process were followed to the letter and spirit and whether or not the consultative process was effectively put on hold and whether or not the Second Respondent undermined the work of the Constitutional Committee.

51. It is submitted that the multitude of allegations, issues and disputes raised on the papers herein are genuine and real disputes of fact, which disputes, given the nature and importance of the matter, its history and sequence of events are not surprising.

52. It is submitted respectfully that this may well be an appropriate case for the above Honourable Court to exercise its powers in terms of Rule 6(5)(g) of the Rules of Court."

[71] The Court *a quo* declined that invitation. That it rejected respondents' contention regarding the correctness of the minutes of the

two meetings is amply demonstrated by the Court's use of, or reference to (albeit selectively) both those minutes (the minutes).

[72] The Court *a quo* had every reason to reject the challenge to the correctness of the minutes. In the first place, if the challenge was seriously meant, it would have been made in the founding affidavits, not in the replying affidavits of respondents. Secondly even those members of the drafting committee who supported Kahuure, and who also attended the two meetings, do not directly support the contention that the minutes do not correctly reflect what took place at the meetings. Thirdly, the challenge made in the replying affidavit is made in an argumentative manner. Fourthly, and most importantly the minutes are a complete refutation of each and every complaint made by the respondents in their founding affidavit – they show:

(a) that the process of consultation, especially taking the constitution to the constituencies was, as appellants contended, subject to the availability of funds (see the account given by Kauku Hengari in the second set of minutes and pp 7 - 8 of the first set of minutes (record pp 115 - 116).

(b) that a lively debate took place on the constitution on 1 October 2005 before

the adoption of the constitution,

(c) that the only item on the agenda for that meeting was the adoption of the constitution both (b) and (c) contrary to Kahuure's vague allegations and denials as to what that meeting was all about,

(d) that the assembly who knew that constitution well was given ample opportunity to discuss even second appellant's inputs: Kahuure and his supporters nowhere deny that the meeting lasted up to 8 hours as stated by appellants,

(e) that second appellant did not decide before hand that his inputs to the constitution were not negotiable, he in fact, even at the very last minute, urged the assembly to accept his input (see p 8 to p 9 of the June 2005 minutes (record p 116 - 117 and para 25 of the 1 October 2005 meeting).

[73] In paragraph 55 of his heads of argument Mr Smuts listed a number of facts which he said should be accepted, in the absence of any application for oral evidence by the respondents. They are as follows:

"55.1 The quest by the Mbanderu community to obtain a final draft constitution – and to adopt it – had been an ongoing process spanning some 10 years and involving a number of different drafts.

Record vol 3 p 341 l 23 - 30.

55.2 The consultative process was, during the second half of 2005 nearing its end. Record vol 3 p 344 ℓ 1 - 2.

55.3 Annexure 'EK3' constituted a circular sent to all senior traditional councilors for comment and a final opportunity to make an input which was afforded to interested parties in advance of the scheduled meeting of the community set for 1 and 2 October 2005. Record vol 3 p 344 ℓ 11 - 13

55.4 It was the prerogative (in the loose sense of the word) of the second respondent as head of the traditional community to call an end to discussion when he had determined that consensus or a decision had been reached. Record vol 3 p 344 ℓ 21 - 23

55.5 The constituencies were not physically visited by the drafting committee, as was initially envisaged. It is pointed out that the decision to have done so was always subject to the availability of funds and it was subsequently preferred to circulate a draft rather than physically visiting each constituency. This in the context of a consultative process which had been ongoing for some 10 years. Record vol 3 p 345 ℓ 11 - 22

55.6 It is also pointed out that certain organs which the respondents alleged should have been consulted were only to have been created in the constitution itself and could always thereafter make an input on constitutional matters. Record vol 3 345 ℓ 28 - 346 ℓ 2

55.7 The meeting on 1 October 2005 of the Mbanderu community drew some 800 to a 1000 people. Record vol 3 p 348 ℓ 9 - 11

55.8 The respondents, including the first respondent, had been invited.

55.9 The discussions at that meeting lasted about 7 to 8 hours. Record vol 3 p 348 ℓ 23 - 25. The minutes of that meeting are provided as part of the Rule 53 record. (Record vol 2, p 269 - 274)

55.10 At the conclusion of the discussions, the second respondent, in accordance with custom and tradition, declared that the constitution had been adopted. Record vol 3 p 348 ℓ 26 - 30

55.11 It was also indicated that amendments could be made in the future but that the constitution would be operational so that the Mbanderu community could have its own constitution. Record vol 3 p 349 ℓ 1 - 3

55.12 It was also pointed out that decisions in the traditional community of the Mbanderu are not taken by vote but the consensus or decision is rather determined by the head of the community at the conclusion of discussions on an issue. Record vol 3 p 350 ℓ 1 - 8, ℓ 17 - 20

55.13 This is confirmed to be in accordance with traditional custom by Mr Otniel Kavari in his affidavit. (Record vol 3, p 494 - 496)"

[74] Though I agree with Mr Smuts that the Court *a quo* incorrectly applied the authorities it cited in regard to the proper approach to disputed facts in motion proceedings, in my opinion, however, if the Court accepted respondents' challenge as to the correctness of the minutes of both meetings then the Court *a quo* had to find that the material disputes of fact referred to by Mr Geier could not be resolved without the hearing of oral evidence.

[75] *In South African Veterinary Council and Another v Szymanski* 2003 (4) SA 42 (SCA) there was a dispute as to what *Szymanski* had been

informed about what was the pass mark required for two parts of an examination to qualify to be registered as a veterinary surgeon. As a ground of review *Szymanski* had relied on legitimate expectation which he claimed arose from certain correspondence from the council (appellant) and a certain conversation he had had with one of the members of the council. Cameron JA said (at 52 par 28 - 29. (dismissing certain contentions by counsel on behalf of *Szymanski*):

> "[28] These submissions are incorrect. First, Terblanche and Rautenbach specially deny that examination entrants were ever told that the 'Administrative Rules' could be ignored or were sent out in error. Terblanche (the main deponent authorized by the Council) denies 'each and every allegation' in the relevant portion of Dr Szymanski's account. He also denies 'particularly' that he indicated to Rautenbach, or *that the later communicated to the students*, that the rules had been sent in administrative error, or that any of the rules could be ignored. Rautenbach's subsidiary deposition confirms that of Terblanche. Rautenbach adds 'more particularly' that the only discussion he ever had with Dr Szymanski concerned the application of the subminimum to the different sections of the written examination, and that it was never indicated to him that Dr Szymanski was under the impression, that the 50% pass mark did not apply. Hence it was never discussed.
>
> [29] Second, as I have shown, the Council's explicit and detailed denials rendered the matter incapable of decision by affidavit on the probabilities. At best for Dr Szymanski, the apparent discordance between the examination format the 'Administrative Rules' envisaged and the special examination format gave rise to confusion, This, of course, is why he approached Rautenbach, with an upshot that brings us back to the irresoluble conflict between the depositions. (My emphasis)

[76] The learned Judge of Appeal in that case upheld the appeal.

[77] With due respect, the best one can say of the finding by the Court *a quo* as to the facts it said it found established is that the finding is confusing, contradictory or ambivalent. It does not rest on a sound foundation: there is a clear discordance between it and the minutes of the two meetings that were before the Court and other facts in the matter. It stands to be rejected.

[78] I turn back, for a moment, to the issues as to whether this matter was reviewable or not. The substantive attention that the Court *a quo* paid to this important issue appears in paragraph [52] of the judgment *a quo.* Suffice it to say that in light of Mr Corbett's concession that nowhere on the papers could he pin point any action taken by first appellant in regard to the adoption of the constitution, and in light of the Court *a quo* itself recognizing that, "the community assembly which in my judgment, was the only body having power and authority to select a route different from what the community had agreed earlier", and in light of the

acceptance by the Court *a quo* that

> "[43] It is again not in dispute that it was the understanding of the community that 'discussion and amendments' (of the draft constitution will only materialize at the Community General Assembly." (See p 8 of the June 2005 Minutes),

I conclude that the Court *a quo* proceeded on a wrong footing when it dealt with the reviewability or otherwise of the decision regarding the adoption of the constitution. All that the Court said on the matter must therefore be regarded as irrelevant. The failure by the Court to distinguish between the Ovambanderu Community Assembly and the Mbanderu Traditional Authority amount to this, that the Court *a quo* misconceived the nature of it duties. This it did by:

(a) paying scant or no critical attention to the facts before it;

(b) falling into the trap of misreading the pleadings:

[79] In this both Counsel appearing in the Court below were partly responsible, counsel for respondents by initially not examining the papers

properly to see if the application was bringing the right parties before the Court, Counsel for the appellant who raised a number of preliminary points *in limine*, by failing to raise this point *in limine.* The error was fundamental, and the result of this misdirection was that the argument based on the Constitution, particularly sections 18 and 66 thereof hardly received proper attention from the Court, and thus fell away. In any event the argument by Mr Corbett was itself based on wrong premises.

[80] Quite apart from the conclusions I have reached on various grounds, why the Court *a quo's* decision on the adoption of the constitution cannot stand, a look at the reasoning by the Court *a quo,* based on the facts before it convinces me that the Court also erred in that regard and its decision must be interfered with.

[81] The record of the decision to be reviewed in this matter was before Parker J, including the minutes of the two meetings central to the drafting and adoption of the constitution. In *W C Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road, Transportation Boar and Others* 1982 (4) 427 (AD) at 434 H the record of proceedings of a Road Transportation Board was considered as evidence in a review application and in *Dawnlaan*

Beleggings (Edms) BPK v Johannesburg Stock Exchange and Another 1983 (3) SA 344 (WLD) the minutes of the Committee of the JSE were quoted and considered as evidence from 357 E to 359 A, and 367 H - 368 D. In *Rosenburg v South African Pharmacy Board* 1981 (1) SA 22 (AD) Miller JA stated at 33 E- 34 A:

> "Concerning the approach of our Courts to such an appeal, the principles which will generally be applied are reflected in what now follows. If the Board, notwithstanding that it is not obliged to give reasons, nevertheless does so and states the facts which it found to have been established, the Court, as in all cases where an appeal on facts is before it, will not lightly interfere with such factual findings, bearing in mind that the members of the Board had the opportunity of seeing and hearing the witnesses, but it will interfere if it is of the firm opinion that the Board was wrong. And the position will not be substantially different when, although the Board gives no reasons whatever, it might reasonably safely be inferred from the decision it made that it found certain specific facts to have been established. In such a case the absence of reasons will not induce the Court to apply any more stringent criterion of interference; it will still interfere if it is satisfied that the Board was wrong in finding such facts to have been established, or if, not knowing what facts the Board found, it is satisfied that the facts essential to a finding of guilt were not established.
>
> Concerning inferences drawn or conclusions reached by the Board from established facts, they are likely to fall into two broad categories:
>
> (a) conclusions depending wholly or in part on special knowledge of the practice of their profession by pharmacists and of the desired standards of ethical behaviour in

the practice and conduct of the profession; and

(b) inferences of fact, not at all involving such special knowledge. In the case of (b), the Court, as in any other ordinary appeal, will interfere if it is satisfied that the inference drawn is not consistent with logical reasoning or the general probabilities and therefore ought not to have been drawn." (My emphasis)

[82] In that case the learned Judge of Appeal was of course referring to an appeal where the decision by the Court of appeal is only on the record before it (as in the present case where the Court *a quo* said it found certain facts established).

[83] I have great difficulty to see how the Court *a quo* could find as established the allegations of respondents detailed in paragraphs 39 - 46 of their founding affidavits, as against what is recorded in the minutes of both the meetings held in connection with the drafting and adoption of the constitution, and as against the two letters referred to in paragraphs [60] and [61] of this judgment. As to the two letters, suffice it to repeat with respect, Hefer JA's statement in *Shepstone & Wyle's*-case *supra* at 1036 (when interpreting a section of a statute):

> "But it is well to be reminded of Schriener JA's observation in *Jaga v Dönges NO and Another* 1950 (4) SA 653 (A) at 664 H. 'But the legitimate field of interpretation should not be restricted as a result of excessive peering at the language to be interpreted without sufficient attention to the contextual scene'."

[84] It seems clear, with respect, that not only Kahuure, but also counsel for the respondents and the Court *a quo* itself, were in their approach to the two documents, guilty of ignoring that warning. What is worse, no attempt was made by the Court below to interpret what was said in those documents in the contextual scene of the case. Had the Court below carried out that exercise, it would have, in my opinion, inevitably come to the conclusion (a) that the fact that second appellant expressed his views as strongly as he did, did not derogate from the fact that he was merely making his input, as he was entitled to do, to the constitution drafting process; and (b) that the views of the Chairman of the Constitution Drafting Committee, *vis-à-vis* second appellant's letter amounted to no more than his (if not the committee's) endorsement of second appellant's input, both subject to the overriding view of the Ovambanderu General Assembly.

[85] To sum up, I have come to the conclusion, based on the

particular facts and circumstances of this matter, that the constitution making process by the Ovambanderu Community was similar to a legislative action and not reviewable notwithstanding this finding, I have assumed, for purposes of completeness, that if the matter were reviewable, then on the facts and circumstances of the matter properly approached, the judgment of the Court below as regards the adoption of the constitution could not be sustained; it has to be set aside on the several other grounds raised by the appellants.

[86] In the result, the appeal against orders 1 and 3 of the Court *a quo* succeeds with costs. Orders 1 and 3 of the Court *a quo* are set aside. Order 2 of the Court *a quo* is confirmed, with costs only up to the 19th December 2006.

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MTAMBANENGWE, AJA

I agree.

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SHIVUTE, CJ

I agree.

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STRYDOM, AJA

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