REPORTABLE

CASE NO: SA 17/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

HIKUMINUE KAPIKA **Appellant**

and

MUTAAMBANDA KAPIKA **First Respondent**
MINISTER OF URBAN AND RURAL DEVELOPMENT **Second Respondent**
CHAIRPERSON OF THE COUNCIL OF TRADITIONAL LEADERS **Third Respondent**
KAPIKA TRADITIONAL AUTHORITY **Fourth Respondent**

Coram: DAMASEB DCJ, MOKGORO AJA and NKABINDE AJA

Heard: **9 October 2019**

Delivered: **20 July 2020**

Summary: This appeal concerns the review and setting aside of an administrative decision designating the appellant as Chief of the Ombuku Traditional Community (Community). The Minister of Urban and Rural Development had designated the appellant as Chief in terms of the Traditional Authorities Act 25 of 2000 (Act). The first respondent, a brother to the appellant, had also applied for designation

seemingly because he was a legitimate leader and that there was no recognised Chief.

The appellant, the first son of the late Chief who died in 1982, was installed as Chief to succeed his father. During his reign as a sitting Chief he unsuccessfully applied, in terms of the repealed Traditional Authorities legislation, to be recognised as Chief. During 2014 the appellant reapplied to be recognised in terms of the Act. The Minister appointed a Committee to investigate the existence of the Community and its jurisdictional area. During the investigation issues regarding the dispute between the appellant and first respondent, his half-brother, surfaced. The latter had also applied in 2015 to be recognised as Chief. In his application for designation it was stated that there was no sitting Chief. The Minister, having considered the report of the Investigating Committee that had been appointed to investigate the existence of the Community and its area of jurisdiction and also having considered that the appellant was a sitting Chief, designated him as Chief.

In the review application brought in the High Court, the first respondent asserted that the appellant had been removed by the Community and was appointed in his stead. Successfully *a quo*, the first respondent challenged the Ministerial decision on the bases that he was the legitimate leader of the Community because the appellant had been removed by the Community in terms of customary law and was appointed in his place; the Minister acted *ultra vires* her powers because the requirements set out in ss 4 (dealing with the requirements for the institution of a person from a royal family as Chief of the Community) and 5(1) (dealing with the requirements for the application to the Minister for designation) of the Act had not been complied with. It was contended that the appellant was not a legitimate Chief because he had been removed by the Community in terms of the applicable customary law and that there was discrepancy regarding what was stated in the prescribed Form in terms of s 5 and what the appellant stated in his opposing papers, regarding the alleged applicable customary law as well as the fact that the person who applied for designation had no authority to do so. The decision was challenged also on the grounds that his right to fair and reasonable administrative action in terms of Art 18 of the Namibian Constitution and the common law principles of natural justice – *audi alteram partem* had been violated because he was not consulted. It was contended

further that the person who applied for the designation of the appellant had no authority to do so.

On appeal the appellant correctly submitted, among other things, that the designation of a chief is not exclusively a customary law issue because the process is also regulated by the Act and maintained that the Minister's decision passed muster and was in accordance with the applicable customary law of the Community. He maintained that even though the first respondent was not entitled to be consulted he was indeed consulted. The first respondent's opposition was based on similar contentions *a quo.*

On appeal the Court determined whether the court *a quo* misdirected itself on the facts and the law when setting aside the impugned administrative decision to designate the appellant as Chief of the Community.

Held that a review court should not exercise its review power by substituting its own discretion for that of the administrative official whose decision is reviewed. The review court is entitled to set aside the impugned decision or action if it satisfied that the requirement of procedural fairness – the incident of natural justice – was not met and that the administrative official failed to exercise its discretion or, if it did, was actuated by improper motives or that an irregularity appears on the record.

Held that the court *a quo* failed to discharge its review function and that the approach to the review was misguided. It misdirected itself on the facts that the first respondent was the legitimate Chief of the Community and that he was not heard when the impugned decision was taken by the Minister.

Held that the legitimacy of the first respondent as Chief or acting Chief was not a matter for determination before the court *a quo* and that the Court *a quo* lost sight of certain relevant considerations including that the appellant was the chosen Chief following the bereavement of his father; that he remained a sitting Chief until his designation; that his removal was not in accordance with the applicable customary law and the Act.

Held further that, the court *a quo* relied on irrelevant considerations.

The Court upheld the appeal. It set aside the decision *a quo* and replaced it with a decision dismissing the review application.

APPEAL JUDGMENT

NKABINDE AJA (DAMASEB DCJ and MOKGORO AJA concurring):

Introduction

[1] This appeal is against the judgment and order of the High Court reviewing and setting aside the impugned administrative decision of the second respondent (Minister)[1] in terms of which she designated the fourth respondent *a quo* (appellant) as Chief of the Ombuku Traditional Community (Community) in terms of the Traditional Authorities Act (the Act).[2] Aggrieved by the decision the first respondent, who opposed this appeal, sought an order *a quo* reviewing and setting aside that decision primarily on the bases that the decision to designate the appellant failed to comply with the requirements of fair and reasonable administrative action entrenched in the Namibian Constitution and the common law principles of natural justice – *audi alteram partem (audi)* as well as certain provisions of the Act. The Minister was said to have acted *ultra vires*. The standing of the applicant who applied for the designation of the appellant was also challenged allegedly because of lack of authority.

Factual background

[2] It is not insignificant to mention from the outset, that the founding papers are replete with a narration of factual matrix not relevant for the determination of the

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[1] *Kapika v Minister of Urban & Rural Development* 2018(2) NR 432 (HC) (High Court Judgment).
[2] 25 of 2000.

issues. I will therefore restrict the factual background to what is apposite for the purpose of this judgment.

[3] At the centre of the dispute is the leadership feud between half-brothers, the appellant and first respondent. Their father (Muniomuhoro Kapika) who was the Chief of the Community died in 1982. The appellant was nominated in terms of customary law and practices of the Community to lead the Community. He had previously asked the Ministry to recognise him as Chief. Although there was a skirmish regarding the leadership of and other issues involving the Community, the appellant remained Chief until about 10 May 2014 when he was, allegedly, removed by certain members of the Community who favoured the first respondent. Ostensibly, in response to the discontent by some members of the Community a meeting was held. The first respondent attended the meeting halfway. Following the meeting the appellant was re-endorsed as Chief of the Community.

[4] During or about 2014 the appellant re-applied for recognition in terms of the Act. The re-application Form was annexed to the covering letter addressed to the Permanent Secretary of the Ministry of Regional and Local Government, Housing and Rural Development (for the attention of Hon Charles Namoloh) by the Governor of the Kunene Region (Mr Josua Hoebeb). The applicant was one Ms Peahama Tjindunda, a Traditional Councillor in the Chief's Council. Notably and evident from the minutes of the meeting between the members of the Investigating Committee established by the Minister (Committee), Ms Tjindunda played an important role regarding the issues of the leadership in the Community. She was part of the delegation that accompanied the 'Chief' (the appellant) and represented the Kapika

delegation at that meeting. The completed prescribed Form, signed on 8 April 2014 by her (as applicant), reflects the following:

‘1. Name of Traditional authority: Kapika Traditional Authority

2. Address of Traditional Authority:
P.O Box 280
Opuwo
Kunene Region

3. Name of Traditional Community represented:
Ombuku Traditional Community (Epupa area)

4. State or give a description of the Communal area inhabited by the above-mentioned Traditional Community:
The traditional Community inhabit the following main villages, Omuramba, Epupa, Orokane, Omuhonga, Ohanguati, Omuangiete, Enjandi Onungurura

5. Give the estimated number of the members comprising the above-mentioned traditional Community:
± 6000

6. Give the following particulars of the person in respect of whom this application is made for designation as *Chief/Head of Traditional Community):

Surname:	Kapika	First Name:	Hikuminue
Citizenship:	Namibian	Id:	33041500116
Date of birth:	15.04.1933	Sex:	Male

Office and Traditional title (if any): Ombara

7. Give the reason for the proposed designation:
There is no recognized Traditional Leader in the area of Ombuku

8. *Give summary of the customary law applicable in the Traditional Community in respect of the designation* of a *Chief/Head of the Traditional Community:
Succession is through paternity line’
(Emphasis added.)

Annexure B was completed and signed by the appellant on the same date on which the prescribed Form was signed. Annexure C was completed and signed by the Governor of Kunene on 22 May 2014.

[5] The first meeting of the Committee with the Community[3] was on 9 March 2015. The Deputy Director of the Ministry who was also a member of the Committee stated the purpose of the meeting as follows:

> 'Application for recognition has reached our office from your community, that's why this investigation committee has been compiled and appointed by the Minister to come and investigate whether *there is an area of jurisdiction and a traditional community of Ombuku in existence as per your application and that there is sufficient evidence for the [recognition].'* (Emphasis added.)

[6] Matters for discussion included the customary law applicable for the appointment of headmen and who, in the Community, had the right to elect a Chief. Also, the discussion involved the area of jurisdiction under the leadership of the appellant. One of the members of the Kapika delegation mentioned that the leadership in the Himba Oruzu (paternal) Muniomuhoro Kapika was the father of the appellant so the succession was 'inherited paternal [sic] from the father's side'. During the discussion the applicant for recognition, Ms Tjindunda, elaborated as follows:

> 'The following is how succession follow each other:
> 1. Mukupatjirongo Tjiuiju (Omukuendata-maternal)
> 2. Kahengoma Kapika (Mukupatjirongo was the uncle: Omukuendata)
> 3. Mbuanandjaja Kapika (brother of Kahengoma – Omukuendata)
> 4. Muniomuhoro Kapika (Ukuenatje)
> 5. Hikumuene Kapika (son of the Muniomuhoro – Omukuatjivi).'

[3] At the end of its investigation the Committee recommended the recognition of the appellant as Chief.

[7] During the discussion of the applicable customary law the Committee mentioned that they were informed that the designation of a Chief is done through the paternal line and questioned where the maternal line fitted in the succession. It was explained that Mukupatjirongo Tjiuju (Omukuendate – maternal), did not have a son hence his sister's son, Kahengoma Kapika, succeeded his uncle and that no matter where succession derives from the maternal line (Omukuendata) was the appointing authority of the Chief.

[8] As to why the 'current Chief' (appellant) was considered to be the right leader for the Community, a Kapika delegate, Mr Uakabara Tjindunda, explained:

> '*He is traditionally the son of the fathers and that leadership should come by succession and that's why he is the rightful son*. When you put someone outside the succession line that person may destroy our cultural norms and values. He is not a biased and a discriminating leader. We want the current Chief to lead us till death, just like the others that died while leading. And that he be succeeded by his brother or son.
> The succession is prioritised first by the son and only when he is unable to succeed the brother takes over.' (Emphasis added.)

[9] The Committee enquired whether there is any challenge regarding the leadership of the current Chief, appellant. The answer was in the positive and the explanation was as follows:

> '[T]here is a dispute regarding the chieftainship between the Chief and his brother Mutaambanda Kapika, because the brother does not want development. After the development of conservancies permitted by the Chief the brother went to Windhoek with few followers and after that we just heard he's seeking for recognition. There was a demonstration in Epupa by his brother who claim he [the Chief-appellant] sold

> the land to government because he does not want development. Thus, they are still challenging his position.
> . . . The Otjikaoko is the one pushing the Community to overthrow [the appellant]. . . ’

[10] The delegates estimated the population of Ombuku as ranging between approximately 5000, 8500 and approximately 10 000. They said that they wanted their Chief to be recognised by the Government. They also mentioned that their area is known to fall under the leadership of the appellant and that different government organs knew that as well as the fact that they worked in close cooperation with him.

[11] The Committee held further meetings with other traditional communities who lived amongst the Community within the jurisdictional area concerned, specifically with the Otjikaoko Traditional Authority (at Opuwo on 11 March 2015 and the Kakurukouje Traditional Authority on 12 March 2015). The purpose of the meetings, attended by the Chiefs of those traditional communities and the members of such communities, is stated to have been intended to solicit views regarding the pending application for the recognition of the appellant – as Chief. The Otjikaoko Traditional Authority did not seem to support the recognition of the appellant while the Kakurukouje Traditional Authority unequivocally supported it.

[12] The first respondent’s application for recognition, completed and signed by one Ms Uemupiana Kapika (whose title is reflected as ‘Secretary’), is dated 17 March 2015. It was submitted to the Ministry, through the Regional Governor of Kunene Region (Ms Angelika Muharukua). Her letter, to which the application was annexed, is dated 21 May 2015. In that application the name of the Traditional

Authority is shown as 'Munomuhoro Kapika Traditional Authority'[4] and the address is P O Box 61, Opuwo, Kunene Region. The name of the Traditional Community in the letter is different from the one appearing in the prescribed Form submitted for the recognition of the appellant, Ombuku–Epupa Community. The Community is said to consist of approximately 3500 members. The reason for the application for recognition of the first respondent was that there was no recognised Traditional leader for the Ombuku-Epupa Community. As to the applicable customary law in the Community in respect of the recognition of the first respondent as Chief the Secretary wrote:

> '*The law requests the Ombuku Community to elect Chief* a descendant of the late Chief Munomuhoro Kapika to lead the community.' (Emphasis added.)

[13] The above narrative is the contextual background on which the decision was taken by the Minister and upon which the reasonableness and fairness of the decision was adjudged by the reviewing court. As will become clearer later in this judgment, the Act obliges certain requirements to be met before the Minister recognises the Chief-designate. In the protagonists' completed Forms, the names of the Traditional communities involved are different. There are disputes of fact regarding the names of the Community. However little, in my view, turns on them. The two protagonists are in any event half-brothers and one can reasonably assume that they both belong to the Community in question. In any event, the Community is ostensibly known also as the Muniomuhoro Kapika Traditional Community or OKapika (OKapika). Notably, in the designation letter the Minister refers to the Community as the 'Ombuku Community of Epupa'.

[4] According to the first respondent this was the other name of the Community, which was named after his father, Chief Munomuhoro Kapika, who was succeeded by the appellant.

[14] On 3 February 2016, having considered the application and the evidence in the report of the Committee the Minister designated the appellant as Chief. This is the decision which was the subject matter of the review in the High Court, also inter-changeably referred to in this judgment as the reviewing court or court *a quo*.

Proceedings in the High Court

[15] The first respondent (describing himself as a Chief and an expert in customary laws, norms, cultures, history and tradition) sought orders reviewing and setting aside the Minister's decision recognising the appellant as Chief of the Community (seemingly also referred to as the Muniomuhoro Kapika Traditional Community or OKapika (OKapika) Traditional Community),[5] alternatively, declaring the said decision null and void. The designation was published in the local newspaper and in Government Gazette No 6072.[6] It was by order of the President-in-Cabinet (under the Schedule in the Government Notice) with effect from 12 March 2016. It is common cause that the publication and presidential order were not challenged on review.

[16] The review application in the High Court was grounded on somewhat repetitive contentions. Mainly, it concerned whether the decision to designate the appellant satisfied certain provisions of the Act and the right to fair and reasonable administrative action in terms of Art 18 of the Namibian Constitution and the common law principles of natural justice – *audi alteram partem (audi).* It was contended that in exercising her discretion the Minister acted beyond the scope of her powers (*ultra*

[5] The Minister's letter of designation refers to 'Ombuku Community of Epupa'.
[6] Dated 15 July 2016.

vires). The first respondent contended that having been elected by a community at a meeting constituted by about 625/650 people he became the legitimate Chief of the Community and that the appellant had been ousted and replaced by him and was no longer a legitimate leader.

[17] The decision was allegedly taken without due consideration of the customary laws and norms that regulate the leadership succession of the Community as required by the Act. This was so, the contention went, because he (first respondent), the elders, councillors and Community were not consulted before the designation by the Minister. It was contended that there was no community participation in the appellant's appointment and that the Minister had no regard to the fact that the first respondent was legitimately appointed and that there was little support for the appellant to be Chief of the Community.

[18] The Minister is alleged to have misused her power to achieve an ulterior purpose. This allegation seems to have been based on the complaint that the appellant was favoured by the Minister because he was a member of the ruling party, SWAPO and had allegedly sold the Community land to the Government. Although these claims were persisted with even in the written submissions on behalf of the first respondent they do not, in my view, bear any relevance to the issues on review. Additionally, it was argued that the decision was not rationally connected to information before the Minister because she did not have regard, *inter alia*, to the information presented in the first respondent's application regarding the applicable customary succession law of the Community and that the appellant had been lawfully removed by the Community.

[19] The first respondent maintained that the leadership passed along the Kapika extended family bloodline (patrilineal lineage ie descent through the male line) but not by inheritance title. Notably, the answer supplied to the question in the Form regarding the customary law applicable in the Community in respect of the recognition of the first respondent as Chief was that '[*T]he law requests the Ombuku Community to elect Chief* a descendant of the late Chief Munomuhoro Kapika to lead the community.' Elaborating on the said law in his founding papers the first respondent mentioned, as an example, that a sitting Chief may, in his old age or for reasons of ill-health, appoint someone to assist him and may, subject to the approval or consent of the majority of the elders and the community in general, direct that an assistant should succeed him as Chief upon his death. According to the first respondent, prior to his death his late father told the elders that he wanted him (first respondent) to succeed him as Chief but because he was too young the elders and some councillors decided that his elder brother (the appellant) should be the Chief.

[20] The respondents *a quo*[7] opposed the application. The Minister's authority to oppose the application on behalf of the other respondents *a quo* was challenged. It is unquestionable that the Minister had standing to oppose the application on her own behalf as the decision maker. The appellant, who was the fourth respondent, opposed the application and filed an answering affidavit. The third respondent *a quo*, the Kapika Traditional Authority, did not file opposing papers.

[21] In her opposition the Minister denied the first respondent's contentions and pleaded that he failed to make out a case for setting her decision aside. More

[7] The Minister, appellant and the Kapika Traditional Authority.

specifically, she denied that the first respondent was the Chief of the Community. The Minister maintained that the appellant was the sitting Chief and that the statutory prescripts for the designation (ss 4 and 5 of the Act) had been satisfied.

[22] The Minister explained that in March 2015 and after the dispute about the legal existence of the Traditional Community had arisen, an investigation committee (Committee) was established to determine whether the Community met the recognition requirements as stipulated in the Act. She explained the steps that are normally taken to designate a member of a Traditional Authority as Chief and the requirement for removal in terms of s 8 of the Act. She referred also to s 12 which deals with the settlement of disputes. According to her, mention had been made of the dispute between the appellant and first respondent for the first time when the Committee reported on its mandate regarding the existence of the Community. She said that she was neither notified of the dispute nor received a petition (in terms of section 12) regarding any such dispute. These contentions were not gainsaid in the replying affidavit.

[23] Addressing the *ultra vires* point, the Minister denied that she lacked authority to consider an application for designation when an incumbent traditional leader is already a sitting Chief. She attested to the lawfulness of her decision – stating that in exercising her discretion she considered the applicable customary law including what was contained in the application and the report of the Committee. The majority members of the Community, according to the report, supported the appellant whom they said was the first son of the late Chief whose forefathers were also Chiefs. The Minister further said that there was no complaint to the Committee that the appellant

did not fulfil his obligations to the Community or that the Community was dissatisfied with his performance.

[24] In the supplementary replying affidavit by the first respondent to the Minister's answering affidavit, the former remained steadfast that the appellant was not elected by the whole Community. Curiously, the first respondent was, even on his own *ipse dixit*, demonstrably not elected by even a quarter of the Community.

[25] The appellant also opposed the application. He filed an answering affidavit on the same day on which the first respondent (applicant *a quo*) filed his replying affidavit to the Minister's answering affidavit. The first respondent later filed a supplementary affidavit stating that the appellant's answering affidavit was late. He neither challenged the filing thereof as an irregular step nor sought an order to strike it out. Be that as it may, the Court *a quo* made no order regarding the contentions raised in that regard.

[26] In his opposition the appellant raised two points *in limine*: the delay in the lodgement of the review application and the standing of the first respondent. On the merits the appellant denied that the first respondent was the legitimate Chief or acting Chief. The appellant explained the customary law eligibility and appointment process of a Chief through a matrilineal lineage and how it came about, as an exception, through a patrilineal lineage. He explained the procedure for nomination after consultation and the announcement of the nomination at the funeral of the late Chief as well as when the nominated Chief would be inaugurated or presented to the Community. That, the explanation went, would later be followed by a celebration.

[27] The appellant explained further that the traditional governing structure of the Community has two important pillars by way of which, so it would seem, consultation with the Community happened: The Ovakwendata (the Highest Pillar) represented by the elder of the family and the Chief's Council (headed by the Chief himself). He said that if there were disputes these pillars, and not the Community as the first respondent implied, had to be approached. According to him, unless the Chief is removed by the Ovakwendata, he remains Chief. Safe to deny that leadership succession is based on the 'Royal family model' and to state that the alleged involvement of the Ovakwendata family in determining the eligibility of the chief is a recent fabrication, the first respondent did not deal with the individual allegations in the appellant's affidavit. In the written argument, the first respondent submitted that a community is held hostage to the whim of a member of a family with exclusive appointing or approval power. That, so the argument went, is repugnant to the principles of democracy enshrined in the Namibian Constitution. I do not understand the first respondent to expect this Court to make any decision on this submission. The issue raised is for another day.

[28] The appellant mentioned that on 10 May 2014, almost a month after signing his application for designation (on 8 April 2014) and approximately 10 months before the signing of the application for designation by the first respondent (on 17 March 2017), a meeting attended by the media, police, army and community members was convened where it was resolved that the Ovakwendata must convene a separate meeting to resolve the issue of the leadership of the Community. The first respondent attended the meeting. Then, the Ovakwendata held a meeting where the

majority (apart from two people who were seemingly in minority) resolved that he (the appellant) is the Chief. Confirmatory affidavits of two members of the Ovakwendata family, who had attended the meeting, were filed. The first respondent confirmed that the first meeting took place and that he attended but left the meeting halfway.

[29] The appellant denied that the first respondent was appointed as Chief and contended that he failed to indicate which elders of the community took the decision to appoint him. He denied that leadership ever passed along the Kapika extended family bloodline unless by way of exception, as mentioned above. The appellant said that his father could not have by-passed him as the eldest son because that would have been contrary to tradition. He stated that the first respondent would have received the 'holy fire' if he was appointed while his father was still alive. He denied the allegation contained in the first respondent's prescribed Form, marked MK3, including the allegations constituting the grounds for review. Unfalteringly, the appellant said that there was extensive consultation with the Community including consultation with the first respondent even though he was not entitled to be consulted.

High Court's approach

[30] The High Court set out the statutory framework regarding, *inter alia,* the designation and recognition of a traditional leader in terms of ss 4,5,6,8 and 12 of the Act. It dealt with common cause facts and mentioned, among other things, that the Community was led by the protagonists' father until his death in 1982; that the appellant succeeded his late father as the Chief of the Community from 1982 but that

the appellant's applications for recognition during 1997 and 2001 and under the Traditional Authorities' enactments of 1995, 1997 of 2000 were unsuccessful. Accepting that the first respondent was a *de facto* 'legitimate' Chief, presumably because of the alleged removal of the appellant and the former's appointment at the meeting of about 625 people (some of whom were on his own version not the members of the Community) the reviewing court rejected the Minister's contention that the appellant's application satisfied the statutory prescripts. The Court held that the person who submitted the application for the designation of the appellant had no authority in terms of customary law to submit the application in terms of s 5. It said that while s 4 requires designation to be in accordance with the customary law of the Community the appellant's application simply stated that succession is through paternal line. The court *a quo* merely remarked that the Minister could not have been satisfied that the appellant's designation was in accordance with customary laws of the Community.

[31] Addressing the first respondent's contentions including that the decision was not rationally connected to information before the Minister the Court remarked that there was no significance in the Minister's contention that she was not authorised by the law to consider first respondent's application for designation when there was already a sitting Chief. The court *a quo* held that when the decision was made there was no sitting Chief.

[32] The Court also rejected the Minister's reliance on the report of the Committee and remarked that she could not have satisfied herself that the designation was in accordance with customary law. It relied on the South African Constitutional Court

decision in *Zondi v MEC for Traditional and Local Government Affairs & others* (*Zondi)*[8] for the proposition that as the *de facto* Chief of the Community the first respondent ought to have been consulted to vindicate his right to fair and reasonable administrative justice in terms of Art 18 and the *audi* point. The court *a quo* therefore held that the Minister failed to establish that the jurisdictional facts required under s 12 of the Act existed for the establishment of the Ministerial committee and thus acted *ultra vires*.

On appeal

[33] The appeal is grounded, essentially on the bases that the High Court erred in fact and in law by concluding, among other things, that: (a) there was no evidence to satisfy the requirements of s 4 read with s 5(1) of the Act – that is to say that the Minister failed to give consideration to customary laws and norms that regulated the leadership succession of the Community; (b) the first respondent, who had also applied to be designated as Chief, was not afforded a fair and reasonable administrative process. The appellant argued, among other things, that the designation of a chief is not exclusively a customary law issue because the process is also regulated by the Act.

[34] The first respondent maintained that he was chosen as the leader of the Community prior to the appellant's re-application and subsequent designation as Chief. He submitted that the appellant's newly appointed councillors were not duly authorised to make any application for his appointment on behalf of the Community. The first respondent argued that the customary law stated by the appellant was not the same as that which the latter had presented to the Minister in his previous

[8] *Zondi v MEC for Traditional and Local Government Affairs & others* 2005 (3) SA 589 (CC) (*Zondi*).

applications and that there was thus no consensus demonstrated, either in the Committee's report or by the appellant himself on which the Minister could reasonably rely to designate him. He stated that the Minister did not afford him or his councillors *audi* whereas she was constitutionally obliged to do so when exercising her administrative duties.

Issues

[35] Apart from the preliminary issues regarding standing and delay, the issue that arise on appeal may succinctly be characterised as relating to whether the reviewing court misdirected itself on the facts and the law when it set aside the Ministerial decision to designate the appellant as Chief of the Community, specifically because of the alleged (a) non-compliance with Art 18 of the Constitution together with the common law principles of natural justice; (b) failure to comply with the requirements of ss 4 and 5 of the Act; and (c) lack of authority of the members of the Community/Royal family who completed the prescribed Form for the designation of the appellant. The further issue is whether the court *a quo* was correct that the Minister acted beyond her powers.

The Law

[36] In determining the issues identified, it is necessary to set out the law: the relevant constitutional provisions *in tandem* with the common law principles of natural justice (*audi*) then the legislative framework as well as the law on the exercise of discretion by the reviewing court.

[37] The administrative justice provision of the Constitution in Art 18 provides:

> 'Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies by the common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.'

[38] The right in Art 18 entrenches the common law principle of natural justice but is not necessarily limited to it.[9] This principle is buttressed in the Latin maxims *audi alteram partem*[10] and *nemo iudex in sua causa*.[11] It is worthy to mention that under the common law procedural fairness had always been distinguished from substantive fairness and the said right remained restricted to the procedural fairness and not to the merits of the decision.[12]

[39] It is important to mention also that judicial review of administrative action ensures that the exercise of the discretion by a functionary is procedurally judicious. Likewise, the common law does not seek to scrutinise the correctness or otherwise of the decision or the merits of the matter but the fairness, regularity and reasonableness of the procedure. Differently put, the review court does not and ought not to concern itself with the substantive fairness of the impugned decision. This aspect was made plain in *Bel Porto School Governing Body & others v Premier, Western Cape & another (Bel Porto)* that:

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[9] See in this regard the decision of the South African Constitutional Court in *Bel Porto School Governing Body & others v Premier, Western Cape & another* 2002 (3) SA 265 (CC) at para 84 (*Bel Porto).* See also *Chairperson of the Immigration Selection Board v Frank & another* 2001 NR 107 (SC) at 170 – 171 (J-A) and *Minister of Health and Social Services v Lisse* 2006 (2) NR 739 (SC) para 25).

[10] Meaning that persons affected by a decision should be given a fair hearing by the decision-maker prior to the making of the decision.

[11] Meaning that the decision-making process must be, and must be reasonably perceived to be, impartial.

[12] See *Bel Porto* para 86-87.

> 'The unfairness of a decision in itself has never been a ground for review. Something more is required. The unfairness has to be of such a degree that an inference can be drawn from it that the person who made the decision had erred in a respect that would provide grounds for review. . . .
> The role of the Courts has always been to ensure that the administrative process is conducted fairly and that decisions are taken in accordance with the law and consistent with the requirements of the controlling legislation. If these requirements are met, and the decision is one that a reasonable authority could make, Courts would not interfere with the decision.'[13]

[40] In *Trustco Insurance Limited*[14] this Court held that a contextual enquiry will constitute reasonable administrative conduct for purposes of Art 18 and whether such conduct is reasonable will depend on the circumstances of each case. A review court may interfere if the exercise of discretion by the administrative functionary or decision-maker was based on a wrong appreciation of the facts or wrong principles of law. The Court further said:

> 'A court will need to consider a range of issues including the nature of the administrative conduct, the identity of the decision-maker, the range of factors relevant to the decision and the nature of any competing interests involved, as well as the impact of the relevant conduct on those affected. At the end of the day, the question will be whether, in the light of a careful analysis of the context of the conduct, it is the conduct of a reasonable decision-maker. The concept of reasonableness has at its core, the idea that where many considerations are at play, there will be often be more than one course of conduct that is acceptable. *It is not for judges to impose the course of conduct they would have chosen.* It is for judges to decide whether the course of conduct selected by the decision-maker is one of the courses of conduct within which the range of reasonable course of conduct available.' (Emphasis added.)

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[13] Id.

[14] *Trustco Insurance Limited t/a Legal Shield Namibia & another v Deeds Registries Regulation Board & others* 2011 (2) NR 726 (SC) (*Trustco)* para 31. See also the South African Constitutional Court decision in *Giddey NO v JC Barnard & Partners* 2007 (5) SA 527 (CC) at p535 quoted with approval by this Court in *Shaanika & others v Windhoek City Police & others* 2013 (4) NR 1106 (SC).

[41] The remarks above endorse the view that a review court should not exercise its review power by substituting its own discretion for that of the administrative official whose decision is reviewed.[15] The review court is entitled to set aside the impugned decision or action if it satisfied that the requirement of procedural fairness – the incident of natural justice – was not met[16] and that the administrative official failed to exercise its discretion or, if it did, was actuated by improper motives or an irregularity appears on the record, for example, where there is failure to hear or consider one party's evidence.[17]

[42] Consideration of irrelevant matters on review of an administrative action might be a ground to vitiate the reviewing court's decision.[18]

[43] It is important to remind all and sundry that the Constitution recognises the customary law and common law. Art 66(1) provides that both customary and common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with the Constitution or any other statutory law.

[44] As to the statutory framework, ss 4, 5, 6, 8 and 12 are significant. They are dealt with in the judgment of the court *a quo*[19] and need not be restated in detail safe in text. It suffices to mention that, broadly, section 4 deals with the requirements for designation by members of the traditional community authorised by customary law to

[15] See *De Vries v Du Plessis* 1967 (4) SA 469 (SWA) *and Lewis Stores & others v Greytown Council & others* 1964 (1) SA 90 (N).
[16] *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) para 219; *Nelumbu & others v Hikumwah & others* 2017 (2) NR 433 (SC) para 59.
[17] *Tshungulwana v Brownlee NO* 1911 EDL 136. *President of the Republic of Namibia v Anhui Foreign Economic Construction Group Corporation Ltd & another* 2017 (2) NR 340 (SC).
[18] *Eskom Holdings Ltd & another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA).
[19] See High Court Judgment specifically paras 35, 36, 37 and 46.

designate one person from the royal family to be instituted as the Chief.[20] Section 5 deals with the procedure for the notification of the designation of a chief or head of a traditional authority while s 6 contains substantive and procedural aspects of the recognition of a chief or head of the traditional community.

[45] After one person has been appointed in terms of customary law then, in terms of s 5(1), the Chief's Council of the Traditional Authority or if there is no Chief's Council or Traditional Council, the members of that Community authorised thereto by the customary law of that Community may apply to the Minister in prescribed Form to designate the appointee.[21] The prescribed Form must state: (a) the name of the traditional community in question; (b) the communal area inhabited by the Community; (c) the estimated number of members comprising such community; (d) the reasons for the proposed designation; (e) the name, office and

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[20] For completeness and ease of reference section 4 reads:

> '(1) Subject to sections 5 and 6, members of a traditional community who are authorised thereto by the customary law of that community, may designate in accordance with that law—
> (a) one person from the royal family of that tradition community, who shall be instituted as the chief or head, as the case may be, of that traditional community; or
> (b) if such community has no royal family, any member of that traditional community, who shall be instituted as head of that traditional community.
> (2) The qualifications for designation and the tenure of, removal from and succession to the office of chief or head of a traditional community shall be regulated by the customary law of the traditional community in respect of which such chief or head of a traditional community is designated.'

[21] For completeness and ease of reference section 5(1) reads:

> '(1) If a traditional community intends to designate a chief or head of a traditional community in terms of this Act -
> (a) the Chief's Council or the Traditional Council of that community, as the case may be; or
> (b) if no Chief's Council or Traditional Council for that community exists, the members of that community who are authorised thereto by the customary law of that community, shall apply on the prescribed form to the Minister for approval to make such designation, and the application shall state the following particulars:
> (i) The name of the traditional community in question;
> (ii) the communal area inhabited by that community;
> (iii) the estimated number of members comprising such community;
> (iv) the reasons for the proposed designation;
> (v) the name, office and traditional title, if any, of the candidate to be designated as chief or head of the traditional community;
> (vi) the customary law applicable in that community in respect of such designation; and
> (vii) such other information as may be prescribed or the Minister may require.'

traditional title, if any, of the candidate to be designated as chief or head of the traditional community; (f) the customary law applicable in that community in respect of such designation; and (g) such other information as may be prescribed or the Minister may require.

[46] Section 8 of the Act provides for the removal and succession of a Chief.[22] Section 12 makes provision for the petition to the Minister if there is a dispute involving the leadership of a traditional community.[23]

Application of the law

[22] For completeness section 8 reads:

> '(1) If there is sufficient reason to warrant the removal of a chief or head of a traditional community from office, such chief or head may be removed from office by the members of his or traditional community in accordance with customary law of that community.
> (2) If, by reason of removal from office as contemplated in subsection (1) or death, a chief or head of a traditional community ceases to perform the functions of his or her office, the members of that traditional community, who are authorized thereto by customary law, may designate in accordance with this Act a member of that traditional community to replace such chief or head.
> (3) If a chief or head of a traditional community has been removed from office as contemplated in subsection (1), the Minister shall notify the President of such removal in writing, specifying the name, office, traditional title, if any, date of removal of the chief or head concerned, and the name of the traditional community in respect of which such chief or head has been removed from office.
> (4) The President shall on receipt of a notice referred to in subsection (3) recognize the removal from office of the chief or head of the traditional community concerned by proclamation in the Gazette, setting out in such notice the particulars referred to in that subsection with regard to such chief or head of the traditional community.'

[23] For completeness, section 12 provides:

> '(1)If a dispute arises amongst the members of a traditional community as to whether or not a person to be designated as:
> (a) chief or head of the traditional community in terms of section 4 if the rightful or a fit and proper person under the customary law of that community to be designated; or
> (b) successor in terms of section 8 is the rightful or a fit and proper successor to the office of chief or head of the traditional community under the customary law of that community,
> and the members of that traditional community fail to resolve that dispute in accordance with such customary law, they *may submit to the Minister a written petition, signed by the parties to the dispute, stating the nature of the dispute*.
> (2) On receipt of a petition referred to in subsection (1), the Minister may appoint an investigation committee consisting of such number of persons as he or she may determine, to investigate the dispute in question and to report to the Minister concerning its findings and recommendations.
> (3) The Minister shall on receipt of the report referred to in subsection (2) take such decision as he or she may deem expedient for the resolution of the dispute in question.
> (4) In the investigation or resolution of a dispute under this section regard shall be had to the relevant customary law and traditional practices of the traditional community within which the dispute has arisen.

[47] The first question for determination is whether the court *a quo* misdirected itself when it concluded that the procedure followed by the Minister when appointing the appellant was devoid of procedural fairness, in violation of the *audi* principle and Art 18 of the Constitution.

[48] It is indeed so that the Minister derived her power to designate a person as Chief from the Act and was therefore an administrative functionary. Relying on *Zondi*[24] the reviewing court held that the Minister acted unreasonably and unfairly in terms of the common law. Context is everything and whether a decision is reasonable will depend on the circumstances of each case. The question above should thus be considered on the contextual analysis of this case mentioned above, whether the context was such that the decision taken was one of the courses within the range of reasonable courses of conduct that were available in the circumstances of the enquiry by the Minister. In my view, the answer is in the affirmative. The circumstances in *Zondi* are distinguishable from the present context.[25]

[49] The first respondent's purported right that is held to have been adversely affected was based on the incorrect finding that he was a legitimate Chief in terms of the customary law because he had been appointed by the community following the alleged removal of the appellant. As the context shows, he was not a legitimate Chief. He was appointed neither in terms of the customary law described by the appellant, which was confirmed by the elders in their confirmatory affidavit and the

[24] Above n 13.

[25] In Zondi, the notice made provision for the person affected to make representation. Mr Zondi was adversely affected by the decision of the MEC. The failure by the MEC to afford him that opportunity was unreasonable and unfair. Here, the Community was heard and its views were recorded in the Committee's report and were subsequently taken into account by Minister. The context reveals that the first respondent attended a meeting where the issue of the leadership of the Community was discussed but left on his own accord.

Community delegates with the Committee, nor the prescripts of s 8 of the Act. The first respondent submitted that s 8 has no application to the Traditional Authorities which have not been established as such in terms of the Act. The submission is devoid of merit. It is now settled that the designation of a Chief or Head of a traditional community is not exclusively a customary law issue. As this Court pronounced in *Kahuure & another in re Nguvauva v Minister of Regional and Local Government, Housing and Rural Development* (*Kahuure),*[26] the process is indeed regulated by the Act. Be that as it may, the first respondent does not explain the relevance of other provisions of the Act which he suggests were not complied with by the Minister.

[50] Safe to maintain that the applicable customary law was that the Chief was appointed by the faceless elders and the Community, the first respondent did not refute the elaborate explanation proffered by the appellant regarding the applicable customary law. One wonders: if the appellant succeeded his late father as his first son and by choice of the royal family - the Ovakwendata members, it would be far-fetched that the applicable customary law would entitle the Community (as was suggested by the first respondent) as opposed to that family to be involved in his removal.

[51] It is unquestionable that when making the decision the Minister considered the context mentioned above including the report of the Committee as well as the fact that the appellant was a sitting Chief as he had not been removed neither by the Ovakwendata members (the Royal family) nor in terms of the prescripts of the Act. Members of the Community were consulted at the meeting with the Committee on 9

[26] *Kahuure & another in re Nguvauva v Minister of Regional and Local Government, Housing and Rural Development* 2013 (4) NR 932 (SC) para 20 (*Kahuure).*

March 2015 including members of other communities who lived among the Community in the jurisdictional area concerned. This much is common cause.

[52] As the Minister pointed out in her affidavit, there was nothing in the Act that obliged her to hear the first respondent exclusively when he was not even a sitting Chief and to consider his application when there was already a sitting Chief. To the extent the High Court concluded that there was no sitting chief it misdirected itself on the facts. The true position, on the facts, is that there was a sitting Chief who was not yet recognised. This appears in the Forms signed by the parties. After the skirmishes between the two protagonists and more specifically after the community meeting in May 2014 the appellant was re-confirmed as Chief of the Community and was never removed in terms of the prescripts of the Act. Besides, appellant was seemingly not part of the meeting at which he was removed.

[53] The High Court's approach to the review was misguided. It misdirected itself on the facts. It decided that the first respondent was the legitimate Chief of the Community and not heard and/or consulted when the impugned decision was taken by the Minister. Failure to do so by the Minister, the court held, was in contravention of Art 18. Obviously and in view of the context here the reviewing court failed to discharge its review function.

[54] The legitimacy or otherwise of the first respondent as Chief or acting Chief was not a matter for determination before the court *a quo*. In any event, the Court *a quo* lost sight of certain relevant considerations including the following, that: the appellant was the chosen Chief following the bereavement of his father; the appellant remained Chief until his purported removal at the instance of the first respondent himself; the appellant stated emphatically that unless the Chief was

removed by the Ovakwendata, he remained Chief (I pause to mention, at the risk of repetition, that safe to deny that succession leadership is based on the 'Royal family model' and to state that the alleged involvement of the Ovakwendata family in determining the eligibility of the chief was a recent fabrication, the first respondent did not deal with the individual allegations in the appellant's affidavit. One can safely assume that they are admitted); the important pillars regarding the traditional governing structures of the Community as explained by the appellant and not refuted by the first respondent were not part of the members who allegedly removed the appellant as Chief; the first respondent failed to name the elders who allegedly partook in the decision to remove the appellant; there was a Community meeting where the issue of leadership was discussed with the community and that, on his own saying so the first respondent attended that meeting but elected to leave while the meeting was underway and that the appellant was re-confirmed as the Chief of the Community. If the first respondent was not a sitting Chief in terms of customary law, it is inconceivable how the Minister was obliged to hear him exclusively.

[55] It is noteworthy that when making the decision the Minister also took into account that there was no information to the effect that the appellant had not fulfilled his obligations to the Community or that there was dissatisfaction with his performance. This observation by the Minister is buttressed by the first respondent's version in the founding papers where he stated:

> 'During my tenure as a senior councillor under the [appellant] it is common cause that the [appellant] was admired and respected by the community as the chief. He displayed good leadership skills, he was intrinsically involved in the affairs of the community. He had always displayed staunch loyalty with unfailing integrity towards the community. His fierce and unwavering stance in protecting the interests of the

> community is recognised and appreciated by the community and others. He always fully engaged with his community and remained accessible to all.'

[56] The High Court rejected the Minister's reliance on the report of the Committee and remarked that she could not have satisfied herself that the designation was in accordance with customary law. There can be no doubt that the Minister, as an administrative functionary, exercised a discretion. The basis for the rejection of the reliance on the report is unsound and was plainly mistaken. In any event, the Minister was, in law, obliged when exercising a discretion, to have regard to all the courses available to her failing which her decision may have been considered unreasonable.

[57] Given all these considerations, which fell within the range of the reasonable courses available to the Minister, the court *a quo* misdirected itself on the facts.

[58] On the law, the reviewing court misdirected itself by deciding that on the documents filed, there was no evidence that the requirements set out in s 5(1) of the Act had been met. The Court further said that the Minister failed to establish the jurisdictional facts for establishing the Committee on whose report she relied upon to designate the appellants as Chief. This aspect can be dealt with briefly by stating that the reason for establishing the Committee was set out in the terms of reference and reiterated in the Minister's answering affidavit. In my view, the Minister could not have made an informed decision without satisfying herself, among other things, that the Ombuku Traditional Community satisfied the recognition requirements as stipulated in the Act, including that: (a) the Traditional Authority in question existed: (b) the communal area concerned was indeed inhabited by the Community and that

(c) the customary law briefly stated in the Form in respect of the designation of the appellant was the applicable law. In order to exercise her discretion judicially the Minister was entitled to investigate and satisfy herself that the information required in terms of the Act and supplied in the Form was sufficient for her to make an informed decision.

[59] Regarding the failure to satisfy the requirements of the Act, the reviewing Court held that its difficulty in accepting the Minister's contention that the application met the requirements of the Act was that the applicant (Ms Peihamaa Tjindunda) did not allege that she was authorised by the customary law of the Community to apply for the designation of the appellant. It is not clear to me why the applicant had to state in the Form that she had been authorised in terms of the applicable customary law to apply for the designation of the appellant. Ms Tjindunda was a Councillor of the Traditional Authority of the Community. Evidently from the record, she participated in the running of the affairs of the Traditional Authority. For an example, as a Councillor,[27] Ms Tjindunda was part of the delegation of the Community at the meeting with the Committee. The context also makes it clear that during the discussion regarding the issues raised by the Committee she expounded on the applicable customary law of the Community in respect of the designation as Chief. The fact that she did not explicitly state that she was authorised – when the context showed that she had standing – is of no moment for the purpose of determining the reasonableness or otherwise of the decision of the Minister. That would otherwise have been tantamount to an elevation of form over substance.

[27] This is born by her title reflected in the Form itself. Interestingly, the first respondent stated that as a Councillor during the administration of the appellant he was entitled to have been heard. By the same token it is mindboggling why the applicant, who applied for the designation of the appellant and who, likewise was a Councillor, was not entitled to apply for the recognition of the appellant.

[60] The second difficulty the reviewing court had with the decision of the Minister was that although the appointment of a Chief was, under the tradition of the Community, according to a matrilineal lineage the applicant simply stated that succession was through paternal line and that the Minister also said that it was established that leadership succession followed the paternal line. It needs to be stressed that the designation of a Chief or head of a traditional community is not exclusively a customary law issue.[28] It bears mentioning that the prescribed Form in terms of s 5 required the applicant to '[g]ive summary of the customary law applicable in the Traditional Community in respect of the designation of a Chief/Head of the Traditional Community.' The reviewing court made much of the fact that the information that was supplied by the applicant for designation and the Minister was that succession was through paternal line. In any event the first respondent maintained that nomination of the successor to Chieftainship was along the Kapika extended family blood-line (patrilineal lineage). I pause to restate that an administrative functionary is entitled to exercise her discretion based on, among other things, a range of factors relevant to the decision and the nature of any competing interests involved. What is important is indeed to ensure that, in the end, the decision is – in the light of a careful analysis of the context – a reasonable one.

[61] As far as one can tell from the context, it is not correct that there was no due consideration of the customary laws and norms that regulated the leadership succession of the Community as the first respondent conveyed in his papers and was held by the court *a quo*. The Minister did have regard not only to what was contained in the Form but also to the range of considerations including the

[28] See *Kahuure* above.

information in the report of the Committee when making the decision.[29] The report clarified certain aspects including where the maternal line fitted in the leadership succession of the Community.

[62] Clearly, the High Court was unmindful of the fact that the information contained in the Form for designation was not the only material available for consideration by the Minister. As the undisputed evidence of the appellant and the report of the Committee demonstrated, the Ovakwendata's nomination of a Chief from the patrilineal lineage did not happen as a rule, but as an exception. The appellant's uncontradicted evidence regarding the applicable customary law, the family tree and the successive history of the Kapika Royal House (as per the report) was worthy of consideration. The review court lost sight of that context. It relied on the first respondent's self-serving contention that the appellant had been removed and that there was thus no sitting Chief. It was also unmindful of certain common cause facts, including that the appellant had been the sitting Chief since 1982 (until his perceived removal), the reconfirmation of his leadership, that the alleged removal was not in accordance with the prescripts of the Act, the first respondent's alleged appointment was by a mere 625/650 people (not all of whom were the Community members) out of a Community constituted of about 6000 – 10 000.

[63] Not only that: The first respondent's untested evidence to the effect that he was appointed by the Community in terms of his professed expertise in customary law and practice seemed to have influenced the review court's decision that he was a legitimate Chief. What's more, the appellant's distinct clarification in the answering affidavit about the applicable customary law was simply overlooked by the Court

[29] This information is summarised in paras [6], [7] and [8] above.

despite that his explanation was consistent with the Community views reflected in the report of the Committee.

[64] The reviewing court's rejection of the Minister's reliance on the report – holding that she could not have satisfied herself that the designation (based on the report) was in accordance with customary law – eludes me. The Court sought, in my view, to substitute the Ministerial exercise of her discretion with its own without explaining the basis upon which the Minister's consideration of the report was faulted. This was an impermissible usurpation of an administrative function. Unavoidably, in the light of these misdirections alone the decision *a quo* is bound to be set aside.

Irrelevant considerations

[65] It needs to be stressed that the appointment of the appellant by way of customary law of the Community took place in 1982 and the Community recognised him until the issues regarding the construction of the Dam and the appellant's membership of SWAPO arose. The first respondent submitted that the issue of the dam building was an issue that deeply affected the Community and that the betrayal of that Community's mandate by the appellant was sufficient cause for a democratic community decision-making process to cause the first respondent to become leader. This submission is revealing: If my understanding of the submission is correct it therefore means that the alleged removal of the appellant and appointment of the first respondent were disguised to have been in terms of the applicable customary law. In other words, the removal and appointment were it was triggered by irrelevant consideration. The reliance on the democratic community decision-making process

does not automatically render the applicable customary law of the Community redundant. If that were the case, as one of the elders categorically said before the Committee, preferring or selecting someone outside the succession line might destroy the cultural norms and values of the Community. That, in my view, will go against the recognition of customary law in terms of Art 66 of the Constitution.

[66] The issues concerning the construction of the dam and the appellant's membership of SWAPO are of no relevance for determining the issues in this case even though the first respondent raised them to portray an unsound ulterior motive on the part of the Minister.[30] It is also common cause that the appellant had, previously but unsuccessfully, applied to the Ministry to be designated as Chief under the repealed Acts. Even so, it is not clear why this evidence was considered relevant by the court *a quo* for the determination of the issues.

Points *in limine*

[67] The High Court, correctly in my view, dismissed the preliminary points raised by the appellant, firstly that the first respondent lacked capacity to institute the review proceedings because he was not the Chief of the Community and was not resident in the area of the Community. The first respondent was a senior councillor in the appellant's administration and sought to vindicate his constitutional right. Indeed, as

[30] Annexure 'MK-4' sought to explain the alleged motive. This letter was intended to stop the approval and recognition and or designation of the appellant as Chief in terms of the Act. As stated in the letter, signed by about nine people, the appellant had **'jumped ship and [joined] Swapo-Party'** and it is mentioned that if the application was approved they would conclude that Government used discriminating laws just as the apartheid regime by recognising only traditional chief affiliated to **Swapo-party**' and that 'if it is true then [they] must do away with [their] Constitution' and with the slogan **'One Nation One Namibia and National Reconciliation and Nationhood'**.

the High Court correctly held, rules of standing should not ordinarily operate to prevent citizens from obtaining legal clarity as to their legal entitlements.[31]

[68] The second point *in limine* related to the delay in lodging the review. The determination of this point involved the assessment of the facts that presented before the review court. Ordinarily, appellate courts do not interfere with the lower court's factual findings unless they are demonstrably erroneous and the exercise of discretion is injudicious. That's not the case here. I would endorse the High Court's reasoning underpinning its decision also on this point.

Conclusion

[69] On the mentioned misdirections the appeal should be upheld. The order of the reviewing court should be set aside. The order should be replaced with an order dismissing the application.

Order

[70] In the event, the following order is made:

(a) The appeal is upheld.

(b) The order of the High Court reviewing and setting aside the decision by the Minister is set aside and replaced with the following order:

'The application is dismissed'.

[31] See in this regard *Trustco Ltd t/a Legal Shied Namibia & another v Deeds Registries Regulations Board & others* 2011 (2) NR 726 (SC) at 733.

(c) There is no order as to costs.

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NKABINDE AJA

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DAMASEB DCJ

_____
MOKGORO AJA

APPEARANCES:

APPELLANT:	E M Angula Of Angulaco Inc.
FIRST RESPONDENT:	W Odendaal Of Legal Assistance Centre
SECOND, THIRD & FOURTH RESPONDENTS:	M Malambo-Iiunga Of the Government Attorney