



REPORTABLE

CASE NO: SA 53/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

JAN TSUMIB	First Appellant
MANNEETJIE GABISEB	Second Appellant
BANDU KOMOB	Third Appellant
DAWID WILLEM	Fourth Appellant
ANNA AIS	Fifth Appellant
ELIA !AOKOEOB GUXAB	Sixth Appellant
NIKODEMUS HABUE HAWASEB	Seventh Appellant
DAWID OASEB	Eighth Appellant

and

GOVERNMENT OF THE REPUBLIC OF NAMIBIA	First Respondent
NAMIBIA WILDLIFE RESORTS LTD	Second Respondent
HAI OM TRADITIONAL AUTHORITY	Third Respondent
NAMIBIA DEVELOPMENT CORPORATION	Fourth Respondent

!GAOBAUB HAI OM ASSOCIATION	Fifth Respondent
NAMIBIA POWER CORPORATION (PTY) LTD	Sixth Respondent
WEXFORD INVESTMENTS (PTY) LTD	Seventh Respondent
JOACHIM LENSSEN	Eighth Respondent
NAMIBIA HD MINING AND INVESTMENT (PTY) LTD	Ninth Respondent
ANDREAS TUTA RUNONE	Tenth Respondent
NAMIBIA WATER CORPORATION LIMITED	Eleventh Respondent
EHIROVIPUKA CONSERVANCY	Twelfth Respondent
SHEYA SHUUSHONA CONSERVANCY	Thirteenth Respondent
KING NEHALE CONSERVANCY	Fourteenth Respondent
OSHIKOTO COMMUNAL LAND BOARD (CHAIRMAN)	Fifteenth Respondent
OHANGWENA COMMUNAL LAND BOARD (CHAIRMAN)	Sixteenth Respondent
ONDONGA TRADITIONAL AUTHORITY	Seventeenth Respondent
OUKWANYAMA TRADITIONAL AUTHORITY	Eighteenth Respondent
THE COUNCIL OF TRADITIONAL LEADERS	Nineteenth Respondent
ATTORNEY-GENERAL	Twentieth Respondent

Coram: SHIVUTE CJ, DAMASEB DCJ and SMUTS JA

Heard: 08 November 2021

Delivered: 16 March 2022

Summary:

The appellants (applicants *a quo*) are members of one of Namibia's ethnic groups, the Hai||om. They approached the High Court to seek leave to be authorised and certified to bring civil claims on behalf of the Hai||om people in a representative capacity because class actions are not permitted under Namibian law. The Hai||om

traditional community has a duly recognised juristic entity called the Hai||om Traditional Authority (HTA) recognised by the Government of the Republic of Namibia in terms of the Traditional Authorities Act 25 of 2000 (the TAA). The intended civil claims are, amongst others, against the Government of Namibia and the HTA for alleged violation of the constitutional rights of the Hai||om who are alleged to be a rights bearing entity under international law. The civil claims relate to precolonial dispossession of the Hai||om's alleged ancestral land and its post-independence marginalization and neglect by the Government of Namibia (GRN).

The applicants alleged that the HTA is not a suitable vehicle for the prosecution of the civil claims because under the TAA its members are required to cooperate with the Government and to carry out government policies.

The GRN and the HTA opposed the relief sought and maintained that the applicants were seeking to usurp the power and functions of the HTA which alone was competent under the TAA to act in litigation for and in the name of the Hai||om community.

The High Court upheld the objection by the opposing respondents and dismissed the application.

On appeal to the Supreme Court, held that the TAA did not have the effect contended for by the respondents and upheld by the High Court. Held further that the fact that the TAA did not bestow exclusive competence on a traditional authority such as the HTA did not mean that the applicants were entitled to the relief they seek. Since they are seeking a remedy hitherto not recognised by the legal system, they had to establish that other forms of legal personality to act in litigation were not appropriate or were inadequate.

Held that, it was incumbent upon the applicants to satisfy the court that the common law on standing should be developed to provide for a representative action along the lines they propose. They failed to do so because existing forms of legal organization could be deployed to litigate the contemplated action.

Held that, members of the affected community could have organised themselves in an unincorporated voluntary association of persons to pursue the intended civil claims.

Held further that, the community could also have adopted a constitution (or pass customary laws) regulating such matters as who is authorised to institute and defend litigation on behalf of the community.

Held further that, the mechanism proposed to determine who is a member of the Hai||om people and who should benefit from the proposed action is also not appropriate because this is to be determined by them subject to an untenable oversight burden placed upon the courts.

The applicants having failed to demonstrate the inadequacy of the available remedies under existing law, the appeal dismissed albeit for different reasons than those given by the High Court.

As regards costs, it is held that this is not a fitting case for awarding costs against an unsuccessful appellant.

APPEAL JUDGMENT

DAMASEB DCJ (SHIVUTE CJ and SMUTS JA concurring):

Introduction

[1] This appeal arises from a judgment and order of a full bench of the High Court delivered on 28 August 2019, wherein the court denied the appellants (who were applicants below and will henceforth be referred to as such) leave to institute, in a representative capacity, civil claims on behalf of the Hai||om people - an ethnic group in Namibia. The intended claims are against the Government of the Republic of

Namibia (GRN) and several institutions performing public functions, some voluntary associations and individuals.

[2] The Namibian nation is made up of different racial groups. The Black people who constitute the majority of the population in turn comprise several ethnic groups of which the Hai||om is one. These racial and ethnic groups each boast their own culture but are united under one political system as a 'sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all'. The sovereign power which vests 'in the people of Namibia' is to be exercised by them 'through the democratic institutions of the State'.

[3] The Hai||om people are one of the original inhabitants of what now constitutes the land mass defined in Art 1(4) of the Namibian Constitution as the 'national territory of Namibia'. Prior to Namibia's Independence on 21 March 1990, the Hai||om occupied certain swathes of land on which they lived, made a living and practised their culture. That includes the famous Etosha National Park.

The Hai||om: historical backdrop

[4] In support of the application, the applicants rely on expert evidence by scholars who have studied the history of the Hai||om people. From the expert affidavits filed of record, the applicants justify the civil claims they intend to bring on behalf of the Hai||om on, amongst others, the following historical facts.

[5] In the first decade of the 20th century, the Hai||om's ability to maintain their traditional lifestyle became increasingly restricted by the settlement of white farmers

and other groups on the land they occupied. Many Hai||om were compelled to take refuge in what had been established in 1907 as 'Game Reserve Number 2', now known as the Etosha National Park (the Park).

[6] In 1919, Germany relinquished South-West Africa and the Union of South Africa assumed trusteeship over the territory. On 1 May 1954, all Hai||om people living in the Park (apart from 12 employed families) were forcibly evicted by the South African Native Commissioner of Ovamboland. Members of the Hai||om community, save those who worked in the Park were deprived meaningful access to this land ever since. That land included but is not limited to the Park which, by law, had become State land and excluded the rights of the Hai||om, collectively and individually, to live there and to practise their culture.

[7] The applicants seek to have this colonial injustice redressed by suing, principally, the post-independence Government of Namibia. If authorised by the court, they want to pursue the following civil claims in the Namibian courts:

- (a) The first is an ownership claim in respect of the Park, 11 farms situated in Manghetti West in northern Namibia or in its stead land of equal market value estimated to be N\$3 914 000 000.
- (b) The second, the natural resources claim, also concerns the Park and the revenue generated therefrom, including compensation for past loss of access to exploitation of its natural resources.

- (c) The third is a development claim which asserts the right to develop the land in the Park and compensation for past exclusion from its development.
- (d) The fourth, the non-exclusive claim, seeks beneficial occupation and use of the Park and the Manghetti West farms; and in the alternative allocation of land of equal extent and quality; or failing that financial compensation in the amount of N\$3 914 000 000.
- (e) The fifth claim is a cultural rights claim demanding exclusive, alternatively primary access to a part of the Park so as to empower members of the Hai||om people not only to participate in its management but to therein practise their culture and religion and to carry on their traditional way of life.
- (f) The sixth is the discrimination claim which, as compensation for the historical dispossession of the Hai||om people of their 'ancestral land', marginalization and ongoing discrimination, seeks allocation of land measuring in extent 23 000 square kilometres; and an undertaking that steps will be taken to compensate the Hai||om for the 'injustices they have suffered.

The relief sought

[8] In the proposed action, the applicants intend to lodge civil claims in three capacities: in their individual capacities; on behalf of the Hai||om people or the

minority group as a collective; and on behalf of the individual members of the Hai||om people.

[9] The applicants' case is that because Namibian law does not allow class action litigation and the traditional authority (third respondent) established by statute¹ to represent the interests of the Hai||om is, according to them, not a suitable vehicle through which to institute the civil claims, they have organised themselves as a group and, according to them, widely consulted with members of the affected community and obtained their consent in order to bring the claims on behalf of the Hai||om as a rights bearing minority group. However, they require leave of court to act as plaintiffs on behalf of the Hai||om people in respect of those six claims involving the community as a collective. It is common ground that they do not need such approval in respect of those claims that they can pursue in their individual capacities. That being the case I will say nothing further about the claims affecting them as individuals.

[10] The applicants seek the following relief in their notice of motion:

'1. Granting the applicants leave to represent:

1.1 The Hai||om people, alternatively, the Hai||om as members of a minority group; and

1.2 The individuals who constitute the Hai||om,

to institute and prosecute an action on their behalf in asserting and enforcing the rights described in draft form in the particulars of claim annexed hereto as annexure "A" ("the action"), including any interlocutory proceedings or

¹ The Traditional Authorities Act 25 of 2000 (the TAA).

proceedings incidental to the action, or any appeal proceedings, and to negotiate and conclude a full or partial settlement of the action or of any other such proceedings.

2. Authorising the applicants' legal representatives, the Legal Assistance Centre, to act as legal representatives for the Hai||om and the individual members of the Hai||om with the authority to represent them in legal proceedings to institute and prosecute the action referred to in paragraph 1 above, including any interlocutory proceedings or proceedings incidental to the action, or any appeal proceedings, and to negotiate and conclude a full or partial settlement of the action or any other such proceedings.
3. Directing that the following steps be taken by the applicants' legal representatives to give notice of the action to the members of the Hai||om, by publishing the notice attached as annexure "JT6" to the affidavit of Jan Tsumib ("the notice") in the [three local newspapers and reading a summary of the notice on the radio].
4. Directing:
 - 4.1 The applicant's legal representatives to add the names and further particulars of such persons who are accepted as Hai||om following the process envisaged in paragraph 6 of the notice, to the register of members of the Hai||om, a copy of which is annexed to the affidavit of Jan Tsumib as annexure "JT2" ("the register");
 - 4.2 That the register will close 6 months from the date of this court order or such other date as the court may determine.
5. Directing the applicant's legal representatives to file a report with the Registrar of this Honourable Court within 3 months after the closing of the register, setting out the particulars of the people recorded in the register as Hai||om, and the particulars of people whose applications for membership were rejected and the reasons for any such rejection.
6. Permitting any of the parties to re-enrol the matter, on reasonable notice and duly supplemented papers, to seek further or alternative relief pertaining to

the publication of the notice or the keeping of the register of members of the Hai||om, including the varying of this order.

7.
 - 7.1 The first respondent and any other party or parties opposing this application to pay the costs of this application irrespective of the outcome;
 - 7.2 alternatively, that there will be no adverse costs order against the applicants in the event that the applicants are unsuccessful in the application;
 - 7.3 in the further alternative, that there shall be no order as to costs irrespective of the outcome of this application.
8.
 - 8.1 that the first respondent and any other party or parties who defend the proposed action to pay the costs of the action irrespective of the outcome;
 - 8.2 alternatively, that there will be no adverse cost order against the applicants in the event that the applicants are unsuccessful in the proposed action;
 - 8.3 in the further alternative, that there shall be no order as to costs irrespective of the outcome of the proposed action.
9. Granting such further or alternative relief as the court deems appropriate.'

The founding affidavit

[11] The first appellant (Mr Tsumib) deposed to a founding affidavit in support of the relief the applicants seek. The affidavit sets out in great detail the envisaged claims, the prospective defendants against whom they will be brought and the legal

basis underpinning the claims. The latter is founded on the Namibian Constitution and international law.

[12] The essence of the intended civil claims is that the Hai||om had before Namibia's Independence been dispossessed of their 'ancestral land' and, after Independence, been marginalised as a minority group. It is alleged that for that violation of their constitutional rights and rights protected under international law, they are entitled to legal redress.

[13] The applicants contend that the third respondent cannot represent the Hai||om in litigation against the GRN, because of the role it plays in terms of the TAA which, amongst others, requires it to support the policies of the GRN– the very government against whom the intended claims are directed.

[14] It is necessary therefore to set out at the outset the relevant statutory framework before dealing further with the allegations in support of the relief sought.

[15] Namibian law recognises the ethnic diversity of the country and the importance of regulating the exercise by communities of collective customary practises. A notable example is the Traditional Authorities Act 25 of 2000 (the TAA). Some of its salient provisions are set out next as a backdrop to the proper appreciation of the legal issues involved in this appeal.

[16] Namibia's indigenous social groupings sharing certain basic criteria² and who recognise a common traditional authority and inhabit a common communal area, are

² Such as a common ancestry, language, cultural heritage, customs and traditions.

recognised under Namibian law as 'traditional communities'. A traditional community may³ (it is not obliged to) seek government recognition to create a 'traditional authority' led by a chief. The GRN may also refuse recognition of a designated traditional authority if satisfied that the criteria for recognition are not met.⁴ I make this point early in the judgment so that it is clear that not all traditional communities have been recognised as traditional authorities in terms of the TAA.

[17] Once recognised, a traditional authority enjoys 'jurisdiction over the members of the traditional community.' In terms of s 3 of the TAA, a traditional authority has, the following powers, duties, and functions:

(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, protect and preserve the culture, language, tradition and traditional values of that traditional community;
- d) preserve and maintain the cultural sites, works of art and literary works of that traditional community;
- e) perform traditional ceremonies and functions held within that traditional community;

³ TAA, s 2(1).

⁴ TAA, s 5(3).

- f) advise the Council of Traditional Leaders in the performance of its functions as provided under Article 102(5) of the Namibian Constitution, the Council of Traditional Leaders Act, 1997 (Act No. 13 of 1997), or under any other law;
 - g) promote affirmative action amongst the members of that traditional community as contemplated in Article 23 of the Namibian Constitution, in particular by promoting gender equality with regard to positions of leadership; and
 - h) perform any other function as may be conferred upon it by law or custom.
- (2) A member of a traditional authority shall in addition to the functions referred to in subsection (1) have the following duties, namely –
- a) to assist the Namibian police and other law enforcement agencies in the prevention and investigation of crime and, subject to the provisions of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), the apprehension of offenders within their jurisdiction;
 - b) to assist and co-operate with the Government, regional councils and local authority councils in the execution of their policies and keep the members of the traditional community informed of developmental projects in their area;
 - c) to ensure that the members of his or her traditional community use the natural resources at their disposal on a sustainable basis and in a manner that conserves the environment and maintains the ecosystems for the benefit of all persons in Namibia;
 - d) to be ordinarily resident in the communal area of the traditional community which he or she leads, failing which such traditional leader may be removed from office, if he or she is a chief or a head of a traditional community, under section 8(1) or, if he or she is a senior traditional councillor or traditional councillor, in accordance with the applicable customary law, but a person who is not so resident at his or her

designation and recognition or appointment or election as a traditional leader in terms of this Act shall not be disqualified to be so designated and recognized or appointed or elected; and

- e) to respect the culture, customs and language of any person who resides within the communal area of that traditional authority, but who is not a member of the traditional community which such member leads.

(3) In the performance of its duties and functions under this Act, a traditional authority may –

- a) in addition to any contributions contemplated in section 18(3), raise funds on behalf of its traditional community, which funds shall be paid into the Community Trust Fund of that community;
- b) hear and settle disputes between the members of the traditional community in accordance with the customary law of that community;
- c) make customary laws; and
- d) use on all its correspondence an office stamp of its own design.

(4) Where a traditional authority referred to in section 2(1) has been established for a traditional community, and a group of members of that traditional community establishes in conflict with the provisions of this Act another authority purporting to be a traditional authority for such group, and any member of such last-mentioned authority exercises or performs any of the functions contemplated in paragraphs (b) and (h) of subsection (1) and paragraphs (a) and (b) of subsection (3) of this section-

- a) any such act shall be null and void; and
- b) such member shall be guilty of an offence, and upon conviction be liable to a fine of N\$4 000 or to imprisonment for a period of twelve months or to both such fine and imprisonment. (My underlining for emphasis).

[18] In terms of s 16 of the TAA:

'A traditional authority shall in the exercise of its powers and the performance of its duties and functions under customary law or as specified in this Act give support to the policies of the Government, regional councils and local authority councils and refrain from any act which undermines the authority of those institutions'.

[19] The HTA was established in terms of the TAA. The proper interpretation and ambit of principally ss 3 and 16 of the TAA are at the core of the outcome of the appeal.

[20] According to Mr Tsumib, the provisions of s 16 of the TAA make the HTA and indeed all traditional authorities subject to State policies and directives, making it an extension of the GRN. The contention goes that if a traditional authority is obliged to cooperate with the GRN, and is effectively an organ of GRN, it cannot have the exclusive power to represent members of traditional communities in suits against the government.

[21] He alleges that the HTA has failed since its establishment to do anything about the plight of the Hai||om, in particular to have their ancestral land restored to them and to assist them to benefit from the GRN's development programs. Since the HTA cannot act in the best interests of the Hai||om people by asserting their rights, the Hai||om people's right of access to court guaranteed by Art 12(1)(a) of the Namibian Constitution is being infringed. The only way in which that defect can be cured is if the applicants are granted leave to prosecute the civil claims on behalf of the Hai||om people.

[22] The envisaged claims are pegged on the following pillars:

- (a) In pre-colonial times the Hai||om had been in occupation of the subject land which had thereby become their ancestral land;
- (b) Successive colonial administrations recognised the Hai||om's occupation of the subject lands and later dispossessed them of it;
- (c) The new government which came into being after independence on 21 March 1990 failed to restore to the Hai||om their ancestral land and instead consummated the Hai||om's dispossession from their land;
- (d) The post-colonial administrations failed to develop the Hai||om as a minority group and in fact accelerated their marginalisation;
- (e) The Hai||om's ancestral land is being beneficially occupied by others, including the government, companies and other 'dominant groups';
- (f) The Hai||om's claim to the subject land is guaranteed under the Namibian Constitution in terms of Arts 16 and 19 and under international law.

[23] Article 16 guarantees the right to property and obliges an organ of State expropriating anyone's property to pay just compensation to the owner. Article 19 guarantees every person the right to enjoy, practise, profess, maintain, and promote any culture, language, tradition or religion.

[24] Under international law, Mr Tsumib relies on Arts 2(3)(a) and (b) of the International Covenant on Civil and Political Rights (ICCPR)⁵ which enjoin States to ensure that any person whose rights or freedoms have been violated an 'effective remedy' by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy. Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination⁶ is similar in effect.

[25] The reliance on these international instruments suggests that the Hai||om are entitled to the 'right to self-determination'.

[26] According to Mr Tsumib, the High Court has inherent power to regulate its own procedure. Hence the approach to that court to (a) certify that the applicants will adequately represent the Hai||om people and the individual members thereof in the action to determine their rights over the land they claim and (b) to issue directions concerning the appropriate procedures to be followed in prosecuting the Hai||om people's intended claims.

[27] The applicants further allege that they can fairly and adequately represent the interests of the Hai||om people because they are representative of the diverse composition of the Hai||om people and represent the majority of the communities that make up the Hai||om people. According to Mr Tsumib, the applicants are fit and proper persons who are committed to diligently represent their people and who do

⁵ UN General Assembly, International Covenant on Civil and Political Rights, (Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1955, entry into force on 23 March 1976, in accordance with Article 49).

⁶ UN General Assembly, International Convention on the Elimination of All forms of Racial Discrimination (Adopted and opened for signature and ratification by the General Assembly resolution 2106 (XX) of 21 December 1965 entry into force on 4 January 1969, in accordance with Article 19.

not harbour any conflict of interest that would harm the interests of the other members of the Hai||om people. They further contend that they have the time, means, inclination and ability to prosecute the proposed claims.

[28] It is further alleged that in view of the geographic dispersal and the sheer number of the Hai||om people, it is impracticable to join the individual members as parties in the proposed actions. Mr Tsumib avers that the overwhelming majority of the Hai||om people were dispersed and marginalised and are, as such, not sufficiently possessed of educational, economic and social opportunities and that in the circumstances the representative action the applicants seek to have authorised is the only viable medium to secure their rights and interests.

[29] The applicants contend that the issues raised in the application are of general public importance and of great moment in this country and therefore seek a protective costs order in the event that they are unsuccessful.

Opposition in the High Court

The GRN

[30] The main affidavit on behalf of the GRN was deposed to by the Prime Minister (the PM). The PM denies the allegation that the Hai||om have been marginalised by the GRN and that they have not benefitted from GRN's development projects. The PM also denies that the Hai||om people acquired rights as a single, collective rights-holder and that even if the Hai||om are an 'indigenous people' or 'minority group', they do not, and never did, hold and exercise land rights in common, as a collective rights-holder.

[31] The PM further contends that even if the Hai||om people acquired land rights collectively as 'a people' these rights were extinguished before independence in March 1990. The protection of land rights, under the Constitution and in international law, is only prospective and by the time the Constitution came into force and the relevant treaties were ratified, the eviction and extinction of any collectively-held land rights of the Hai||om in the Park were complete. It is further asserted that any rights the Hai||om people might have had in the Manghetti lands were extinguished by the Communal Land Reform Act 5 of 2002.

[32] That Act which was discussed by this court in *Kashela v Municipality of Katima Mulilo & others*⁷ and since nothing turns on it in this appeal nothing further needs to be said about it in this judgment.

[33] The PM further asserts that there is no basis for a claim to compensation for the historical dispossession of land rights under the Constitution, legislation, the common law or international law.

[34] According to the PM even if the Hai||om people acquired land rights which they have retained, they can only exercise and enforce those rights in terms of the TAA. That legislation, the PM states, was enacted to govern the holding and exercise of collective rights by all traditional communities in Namibia, and does so exclusively. The PM maintains that the applicants cannot invoke international law as a parallel system of law to bypass the TAA. They must either employ the

⁷ *Kashela v Municipality of Katima Mulilo & others* 2018 (4) NR 1160 (SC).

mechanisms in the TAA or challenge its provisions if they do not adequately provide for the representation of the Hai||om people.

[35] In opposing the relief sought, the PM maintains that the right to acquire and hold immovable property vests in the HTA in terms of s 18 of the TAA and that the right vests exclusively in that body. Section 18 of the TAA empowers a traditional authority, with the consent of its traditional community, to acquire purchase, lease, sell or dispose of moveable and immoveable property in trust for the community. It may also establish a Community Trust Fund to be held in trust for the members of the traditional community from which fund the community can finance projects to uplift its culture and other activities. It follows that if it were a plaintiff in the intended claims and if successful, the HTA may hold any land awarded or monetary award made in trust for the community over which it has jurisdiction.

[36] According to the PM, there is no constitutional or legislative basis for the applicants instituting the representative action contemplated and that the common law of Namibia does not recognise representative standing for which the applicants seek leave. The GRN further states that even if the court saw the need to develop the common law in this regard, this is not a proper case in which to do so.

[37] It is contended on behalf of the GRN that the applicants failed to satisfy and to fully address the procedural requirements for representative standing, namely, that the representative action is the most appropriate means of determining the claims; that they are suitable persons to be permitted to represent the Hai||om people; that it

is possible to determine objectively who the applicants represent and who the beneficiaries of the intended representative action will be; that there is an appropriate procedure for allocating any monetary award to those identified as members of the Hai||om people and that the funders of the litigation and the legal representatives are not conflicted.

[38] The PM maintains that the contemplated representative action will serve to circumvent the election and dispute resolution mechanisms embedded in the TAA which govern who is authorised by the community and recognised by GRN to represent the Hai||om traditional community. The best manner in which to prosecute the intended claims, it is alleged, would be for the Hai||om traditional community, acting in its name, or the traditional authority, an entity recognised by law, to prosecute the claims in a single action that would benefit the entire community.

The HTA

[39] The HTA also opposed the application. The opposing affidavit is deposed to by the duly recognised Chief of the Hai||om traditional community. The thrust of his opposition is that what the applicants seek to do is to usurp the functions of the traditional authority which he leads. According to the deponent, what the applicants seek to achieve is only possible if they approach court and obtain an order declaring as unconstitutional those provisions of the TAA which they consider frustrate what they seek to achieve; or remove the Chief and his Council in the manner prescribed by the Act and Hai||om customary law.

[40] The deponent denies that the intended claims are those of the Hai||om people as a whole, but those of a sprinkling of members who went around and exploited social issues, which the GRN is addressing, as a basis for the intended claims.

[41] The Chief maintains that the HTA is vested with exclusive jurisdiction over all the Hai||om people, irrespective of their geographical location and questions the propriety of the applicants arrogating to themselves the right to represent the Hai||om people.

The High Court

[42] The High Court dismissed the application on the basis that permitting the applicants to act on behalf of 'the Hai||om people' would circumvent the TAA and the representative decision-making structure that it creates for the Hai||om community and that the effect of the order the applicants seek would be to establish a parallel representative and decision-making structure for the Hai||om.

[43] The court *a quo* also rejected the applicants' contention that the HTA cannot be a proper body to represent the rights and interests of the Hai||om community. The court held that in terms of the TAA, the traditional authority is the appropriate vehicle through which the intended civil claims must be lodged and that if the view is taken that by so doing the legislature has limited the right of the applicants, the onus is on them to challenge what is regarded as constitutionally offensive provisions of the TAA.

The appeal

The applicants

[44] According to Mr Corbett on behalf of the applicants, an important issue in the appeal is whether the High Court correctly interpreted the TAA as vesting the HTA with the exclusive competence to represent not only the traditional community, but all groups overlapping with the traditional community that have their own rights. According to the applicants nothing in the text, context, and purpose of the TAA suggests that the Hai||om, either as a people or minority group or traditional community, are barred from bringing the intended civil claims except through the HTA. It is argued that the approach adopted by the High Court has the effect of impermissibly limiting the constitutional right of access to court and a denial of an effective remedy, contrary to international law.

[45] It is submitted that there is nothing in the TAA that shows that the legislature intended that the Hai||om cannot enforce their rights themselves and must only do so through the HTA. In any event, the argument proceeds, a traditional authority's jurisdiction is limited in two ways. Firstly, to members of a traditional community. The implication is that it has no jurisdiction over independent rights bearing bodies like the Hai||om people or minority group from enforcing their own rights. Secondly, by its powers, duties and functions under the TAA. In that regard, it is pointed out that a traditional authority created under the TAA does not have the function nor the power to litigate on behalf of the community and accordingly lacks the jurisdiction over the community's litigation.

[46] Another strand of the argument is that the provisions of s 16 of the TAA which require a traditional authority to cooperate with the GRN and to support its policies is a clear pointer that the HTA is not a suitable body to represent the interests of the

Hai||om community in litigation as that provision makes a traditional authority an extension of the GRN.

[47] It is contended on behalf of the applicants that the fact that s 18 empowers the HTA to acquire and own property does not prevent others from holding land on behalf of a traditional community.

The GRN

[48] The GRN supports the judgment and order of the High Court. According to Mr Trengrove SC on behalf of the GRN, the TAA covers the field in the sense that it comprehensively regulates the manner of exercise of collective rights by traditional communities in Namibia and creating a holistic regime which must be relied upon when seeking redress on matters affecting traditional communities. On this approach, the applicants were required to pursue the intended claims via the traditional authority representing the Hai||om people and if they considered that to be a limitation of the right as alleged, to mount a challenge against the TAA to the extent that it is considered to be unconstitutional.

The HTA

[49] The HTA too supports the High Court's order and the underlying *ratio*. Mr Shikongo argues on its behalf that the alleged rights bearing entity that the applicants purport to represent is no different from the traditional community over which the HTA has jurisdiction including the authority to litigate for and on its behalf.

[50] The HTA contends further that the role that the applicants seek to assume by being authorised to litigate on behalf of the HTA will amount to usurping the duties and functions of the traditional authority. That, it is said, is evidenced by some of the actions already undertaken by the applicants and which, under the TAA, is the exclusive preserve of the HTA. For example, that the applicants arrogated to themselves the power to determine who are members of the Hai||om by, for the purposes of the application, compiling a list of individuals to be represented by them in the intended litigation.

[51] That concern is heightened by the fact that in terms of the relief they seek, they want the court to authorise them to decide on a case by case basis who qualifies to be a Hai||om so as to be added to the litigation as a potential beneficiary from any award to be made in favour of the community they purport to represent.

Discussion

[52] The first issue to be resolved is whether the High Court was correct to conclude that the TAA covers the field. In other words, must whoever of the Hai||om that wishes to pursue civil claims for 'ancestral land' or alleged violation of human rights have to do so via the recognised traditional authority?

[53] If the High Court's conclusion on that issue is not correct, does it follow that the applicants must be granted the leave they seek? Put differently, is the manner in which the applicants have constituted themselves a good enough basis for bringing the civil claims on behalf of the Hai||om? Is there some other legally cognisable form

in which, outside the traditional authority, the Hai||om people could pursue the claims foreshadowed in the application that served before the High Court?

[54] I now proceed to discuss the issues that I have identified.

Does the TAA cover the field?

[55] The opposing respondents' objection against the relief sought by the applicants seems twofold. The first is that the TAA covers the field and that only the HTA may act for and on behalf of the Hai||om community. The second leg is that even if the traditional authority is not vested with the exclusive competence to act on behalf of the affected community, the present cohort of prospective plaintiffs lack the necessary capacity to acquire rights and obligations to litigate and moreover have not demonstrated that they are authorised to act on behalf of the community whose interests they profess to represent.

[56] A view put forward by the opposing respondents is that assuming the HTA is reluctant to litigate against the GRN, those aggrieved by such conduct may approach court for relief, presumably to compel the traditional authority to act as plaintiff on their behalf.

[57] I have a difficulty with this approach which found favour with the High Court.

[58] The first concern is the most obvious one. The intended claims are directed principally against the GRN. At the end of the day, if any of the claims are to be made good upon success, the GRN will bear the financial responsibility. That is

obvious from the manner in which the claims are conceived. That should be viewed in the light of the reality that it is the GRN which through the Government Attorney's office pays for the traditional authority's litigation costs and also bears financial responsibility for the proper functioning of the traditional authority. Even with the best of intentions, these responsibilities are bound to create conflict.

[59] There is no reason to believe that the GRN will frustrate the HTA to pursue such claims by withholding the finances needed to do so. Equally, and perhaps more importantly, the possibility that the traditional authority may not be allowed all the resources they need to pursue such claims as best as they see fit cannot be excluded – not necessarily out of malice but for reasons of affordability. If for no other reason, that alone might create the impression that the GRN against whom the claims are primarily directed is determining the legal strategy which the affected community pursues in the litigation.

[60] The stakes are quite high in this case given the unprecedented and far-reaching claims foreshadowed in the application, which amongst others, locate the relief sought on an allegedly internationally recognised, yet emotive, right of the Hai||om to 'self-determination'.

[61] The proposed claims are based on circumstances which are not unique to the Hai||om and have implications for most indigenous communities in Namibia. It is an understatement therefore that the GRN will defend the intended litigation with vigour. Yet, the respondents contend, that an agency of the State which is funded by the

GRN in some respects⁸, will be able to prosecute the proposed claims with equality of arms with the GRN.

[62] It is inevitable that those in whose name such litigation will be conducted by the traditional authority will, rightly or wrongly, perceive that in the event of failure they were given the short end of the stick. After all, as the adage goes, justice must not only be done but it must be seen to be done.

[63] What I have set out above is a particularly compelling consideration against implying exclusivity in favour of the HTA.

[64] The opposing respondents put up a persuasive argument that the HTA is empowered by the TAA to bring the intended claims. The High Court sets out in detail why that is so, and I do not propose to regurgitate those reasons. What I do not agree with is that it necessarily follows that any other person or body with the necessary attributes in law to sue and to defend is barred thereby from representing the interests of the Hai||om community.

[65] The solution proffered by the respondents to overcome any non-cooperation that the HTA may show towards members of the community who want to litigate compounds the problem further. It is suggested that any such non-cooperation can be challenged in court. In other words, a frustrated member of the community must first approach court to compel the traditional authority to act. That seems more of a

⁸ For example, in terms of s 17 of the TAA traditional leaders are paid allowances appropriated by Parliament. Those funds, it is public knowledge, are administered by the Ministry of Urban & Rural Development.

hindrance than a solution. In my view, the proposed solution therefore limits rather than facilitates access to court.

[66] Mr Corbett for the applicants quite correctly pointed to the absurd situation that will arise from a finding that the TAA covers the field. As counsel submitted, if the TAA covers the field, what about those communities which do not have recognised traditional authorities?

[67] There are two possible answers to that question: The first is that such a community will then not be able to sue. The second possible answer is that because it has no recognised traditional authority, such a community may have recourse outside the TAA. If the argument is that such a community may sue other than through a traditional authority, it would undermine the argument that the TAA covers the field. If the solution offered is that such a community is without recourse, the respondents' case becomes even more untenable because it would deprive a community of the constitutional right of access to court.

[68] The considerations that I have pointed out above in my view demonstrate that it is not correct that the TAA grants the HTA exclusive competence to pursue the proposed claims. Therefore, the High Court erred in concluding that it did.

Did the applicants make out a case for the relief?

[69] As already pointed out, even if it is found that the TAA does not cover the field, the respondents do not accept that the applicants made out the case for the relief they seek.

[70] Under the common law, apart from natural persons (unless they labour under a legal disability) only juristic (artificial) persons possess the capacity to sue and to be sued. Unlike the HTA which by statute is a juristic person, in relation to the collective claims envisioned for the Hai||om people, the applicants lack the attributes necessary to acquire legal capacity to litigate.

[71] Obviously, except in relation to those claims where they can act in their personal capacities, the applicants lack the legal capacity to act on behalf of the Hai||om people who, on the applicants' own version, are the rights bearing entity. It is to overcome that problem that the applicants seek the court's authorisation to act in a representative capacity. Their case is that what they seek is a matter of procedure which is within the court's inherent jurisdiction.

[72] This court has previously said that standing is a matter both of procedure and substance. Apart from sufficiency and directness of interest, it must be demonstrated that the party litigating is the rights bearing entity and if not itself that the party litigating in its name is authorised.⁹

[73] As Boezaart writes:¹⁰

'Capacity to litigate is the judicial capacity that enables a person to act as a plaintiff, defendant, appellant or respondent in a private lawsuit (or civil action).'

⁹ *Council of the Itireleng Village Community & another v Madi & others* 2017 (4) NR 1127 (SC) para 19.

¹⁰ T Boezaart *Law of Persons* 5 ed (2014), at 8.

According to *Boberg*, juristic persons are:¹¹

'those entities or associations of persons which, having fulfilled certain requirements, are allowed by the law to have rights and duties apart from the individuals who compose them or direct their affairs'.

A juristic person can be –

'a community or group of persons . . . having legal personality and therefore the capacity to be the bearer of rights and duties and the ability to participate in the life of the law in its own name'.¹² (My underlining for emphasis).

[74] The applicants state that they have come to court to be authorised to act in a representative capacity because Namibian law does not permit class action. Class action may not be part of our law but that does not mean no other form is available to pursue the claims. The applicants have not at all addressed the question why, failing the class action route, other forms of legal capacity to act do not offer the Hai||om sufficient recourse to pursue their claims rather than reliance on the amorphous form in which they seek to act – a form which, like the class action is not recognised in our law.

[75] Where an aggrieved person asks the court to forge a remedy not recognised in law, the court must be satisfied that the existing remedies in the legal system are inadequate to assist that person and that the form of remedy proposed should be recognised. That principle informed this court's decision in *Visagie*¹³ rejecting a plea

¹¹ U R Boberg *Law of Persons and the Family* (1977) at 4.

¹² W J Hosten et al *Introduction to South African Law* (1995) at 553-4.

¹³ *Visagie v Government of the Republic of Namibia & others* 2019 (1) NR 51 (SC) paras 91, 113, 115 and 116.

for the court to create a new remedy of delictual liability against the State for the wrongful conduct of judicial officers.

[76] In the final analysis, the matter is one of public policy. If there are adequate remedies available in the legal system, there would be no justification for forging a new remedy.

[77] I will briefly discuss forms of legal organisation which could have been considered to overcome the unavailability of a class action. I do so only for the purpose of demonstrating that the applicants were not without any other available remedy as to justify granting them what they sought.

Universitas

[78] A *universitas* is a legal fiction or incorporeal abstraction which may be created in terms of legislation (eg, companies and close corporations, or other juristic persons specifically created by a statute, such as traditional authorities under the TAA, the Law Society, and various State-owned enterprises). Another form of *universitas* is an unincorporated association of natural persons also known as a voluntary association.¹⁴ The main characteristics of the *universitas* are its existence as a separate entity with rights and duties independent from the individual members' rights and duties and that it has perpetual succession.¹⁵

[79] The attractiveness and versatility of the voluntary association is that it is not necessary for it to be created by statute or to be registered in terms of statute to

¹⁴ A C Cilliers, C Loots & S C Nel *Herbstein & Van Winsen The Civil Practice of the High Courts of SA* Vol 1 5 ed (2009) at 150.

¹⁵ W A Joubert *The Law of South Africa Vol 1* (1980) at 464 para 618.

possess the attributes of a legal person. Its members can by the constitution or agreement of them *inter se* give it all the attributes of a *universitas*, that is: an entity with rights and duties independent from the individual members and a perpetual succession. This fiction is used in everyday life to create church organisations, clubs and such like.

[80] The voluntary association's versatility is augmented by its recognition in the rules of court. The rules of court provide for the manner in which service of court process may be effected on a voluntary association.¹⁶ In terms of High Court rule 42(1) "association" means any unincorporated body of persons, not being a partnership'. And according to rule 42(2) of the High Court Rules, an association may sue or be sued in its own name.

[81] Mr Trengrove for the GRN also offered another alternative that was open to the Hai||om in pursuit of redress for the alleged rights violations. They could, on the authority of the TAA, make customary law¹⁷ rules which govern the manner in which decisions are made by the community on such matters as who would represent the community in litigation. It is now settled that a community may adopt a constitution for itself and spell out how its affairs are to be conducted.¹⁸ Counsel submitted that the applicants failed to demonstrate in the application that there does not exist within the Hai||om community customs that govern how litigation may be instituted in the name of the community.

¹⁶ High Court Rule 8(b).

¹⁷In terms of s 3(1)(a) of the TAA.

¹⁸*Mbanderu Traditional Authority & another v Kahuure & others* 2008 (1) NR 55 (SC) paras 41-43.

[82] I have endeavored to demonstrate the existence in the Namibian legal system of other forms of legal organisation which could with great ease have been deployed to capacitate the applicants and those similarly circumstanced to pursue the intended claims, barring any other legal impediments which may be raised and can only be resolved in an actual dispute.

[83] These potentially available remedies which do not for their pursuit rely on the involvement of the recognised traditional authority as a plaintiff are to be contrasted with the remedy sought which has the potential to impose a supererogatory burden on the court and has the potential for incessant disputes arising.

[84] The burden it will place on the court is obvious from two orders that it is asked to grant. The orders asked of the court include:

‘4.1 The applicants’ legal representatives to add the names and further particulars of such persons who are accepted as Hai||om following the process envisaged in paragraph 6 of the notice, to the register of members of the Hai||om, a copy of which is annexed to the affidavit of Jan Tsumib as annexure "JT2" ("the register");

5. Directing the applicants’ legal representatives to file a report with the Registrar of this Honourable Court within 3 months after the closing of the register, setting out the particulars of the people recorded in the register as Hai||om, and the particulars of people whose applications for membership were rejected and the reasons for any such rejection.’

[85] In other words, the applicants ask the court to grant them the power to decide on an *ad hoc* basis who is or is not a Hai||om and to refer such matters to court where disputes arise. Not only is that function reserved by the legislature to a

traditional authority where one is recognised but it is bound to give rise to highly contested matters which inevitably will result in incessant litigation.

[86] In terms of s 2(2) of the TAA, once recognised a traditional authority 'has jurisdiction over the members of the traditional community in respect of which it is established'. In terms of s 3(1), a traditional authority administers and executes the customary law of that traditional community. It can only do that if it is able to determine who is a member of the traditional community. The definition of 'traditional community'¹⁹ in s 1 of the TAA makes plain that a traditional authority has the competence to decide who is or who is not a Hai||om. If taken out of the realm of the TAA, the court will become embroiled in what are bound to be hotly contested factual issues about who qualifies to participate in and to benefit from the intended claims.

[87] If disputes contemplated by proposed orders 4.1 and 5 are litigated outside the purview of the TAA, the courts run the risk of usurping the role of a statutory body instead of it sitting as a court of review from decisions taken by such a body.

[88] The applicants in effect are seeking the court's recognition of a status other than juristic personality in order for them to litigate, or at best to clothe them with juristic personality in the exercise of its inherent jurisdiction. In so doing, they have not demonstrated that the existing forms of legal organisation which can make it possible for them to litigate, barring any other legal impediment, are inappropriate in the circumstances.

¹⁹ See fn 3 above.

[89] Quite apart from these factors which would preclude the granting of their application to act outside of the HTA, the applicants have not established the existence and delineation of the Hai||om people or minority group:

- (a) as a distinct collective rights holder capable of holding and exercising the rights asserted in the contemplated action;
- (b) as having representative and decision-making structures separate from the HTA;
- (c) as a recognised indigenous minority group with its own collective structure and established rules for membership as envisaged under international law which they have invoked.

[90] Furthermore, the applicants have failed to satisfy the court that they are suitable persons to represent the Hai||om and to determine who are members of that community and who should benefit from the proposed action. They also failed to set out clear and objective criteria for doing so.

[91] For all these reasons, the applicants could not succeed with their application in the High Court.

Disposal

[92] The GRN's case is that even if the current cohort of applicants were a *universitas* they would still not be entitled to litigate in that capacity because that power (or competence) is exclusive to the traditional authority. As Mr Trengove on

behalf of the GRN put it, the TAA 'covers the field' and does not permit any other juristic person litigating in a representative capacity. For reasons that I have already set out, I do not agree with that contention.

[93] But as I have reasoned elsewhere, potentially available alternative avenues were not shown to be inappropriate, and it would in the circumstances not have been proper for the High Court to have granted the relief the applicants sought. The present case is not about whether the intended civil claims are good in law but whether the applicants are entitled in law to act on behalf of the Hai||om people. As presently constituted that a cohort of individuals is incapable of acquiring rights and obligations and the capacity to sue on behalf of the community they purport to represent. Therefore, the High Court's order dismissing the application cannot be faulted, albeit for different reasons.

Costs

[94] The High Court quite properly did not order costs against the applicants. Although the applicants' appeal fails this is not an appropriate case to order costs against them. The issues raised are of great moment in contemporary Namibia. Besides, the applicants were able to demonstrate that the basis on which the High Court rejected their application is not correct. There will therefore be no order of costs in the appeal.

Order

[95] The appeal is dismissed and there is no order of costs.

DAMASEB DCJ

SHIVUTE CJ

SMUTS JA

APPEARANCES:

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