

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2022/00346

In the matter between:

**OVAMBANDERU TRADITIONAL COUNCIL**  
**ALETHA KARIKONDUA NGUVAUVA**  
**APPLICANT**

**1<sup>ST</sup> APPLICANT**

**2<sup>ND</sup>**

and

**MINISTER OF URBAN AND RURAL DEVELOPMENT**  
**THE PRESIDENT OF THE REPUBLIC OF NAMIBIA**  
**COUNCIL OF TRADITIONAL LEADERS**  
**OVAMBANDERU TRADITIONAL AUTHORITY**

**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**

**3<sup>RD</sup> RESPONDENT**

**4<sup>TH</sup> RESPONDENT**

**Neutral Citation:** *Ovambanderu Traditional Council v Minister of Urban and Rural  
Development (HC-MD-CIV-MOT-GEN-2022/00346) [2024]*

NAHCMD

123 (20 March 2024)

**CORAM:** PRINSLOO J  
**Heard:** 23 November 2023  
**Delivered:** 20 March 2024

**Flynote:** Motion Proceedings – Review – Audi alteram partem rule ought to have been invoked by the Minister before making the decision – Article 18 – Breached.

**Summary:** The applicants in this matter seek to review the decision made by the first respondent on 20 October 2021. They additionally pray that the application for the approval of designation made by them in terms of section 5 (1) of the Traditional Authorities Act 25 of 2000 be remitted to the first respondent. The applicants premise their relief on the basis that the first respondent did not afford them audi before he took the purported decision. The respondent / Minister opposed the application and raised a point in limine to the effect that the application before the court is a rule 65 (the general applications rule) application and should be struck from the roll because it does not comply with the peremptory provisions of rule 76 (the review rule).

*Held that* the court associating itself with the sentiments expressed in *Namibia Financial Exchange (Pty) Ltd v Chief Executive Officer of NAMFISA and Others* found that the point in limine must fail.

*Held that* if the reasons for his recommendation to the President stem from the previous applications, which it appears to do, then the Minister had to determine if the impediments still exist, and the only way to do that is to properly consider the application of the applicants and give them the opportunity to address the issue with him. This inevitably means that he should have heard the applicants before reaching a decision.

*Held that* the applicants should have been afforded the opportunity to be heard before the Minister made the decision on 20 October 2021. Accordingly, the review application succeeds.

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**ORDER**

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1. The decision by the first respondent dated 20 October 2021 is hereby reviewed and set aside.
2. The application for the approval of designation made by the first and second applicants in terms of section 5 (1) of the Traditional Authorities Act 25 of 2000 is hereby remitted to the first respondent.
3. The respondents are ordered to pay the costs of the applicants jointly and severally, the one paying the other to be absolved. Such costs to include the costs of one instructing and one instructed counsel.

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## JUDGMENT

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PRINSLOO J:

### Introduction

[1] The first applicant is the Ovambanderu Traditional Council. The first applicant is an association made up of members of the Ovambanderu community. The first applicant's address of service is Messrs Ueitele & Hans Legal Practitioners, 28 Corner of Beethoven & Wagner Street, Windhoek West, Windhoek.

[2] The second applicant is the appointed head of the Ovambanderu Traditional Council, Aletha Karikondua Nguvauva. The second applicant's address for service is Messrs Ueitele & Hans Legal Practitioners, 28 Corner of Beethoven & Wagner Street, Windhoek West, Windhoek.

[3] The respondents are as follows:

- (a) The first respondent is the Minister of Urban and Rural Development (the Minister) duly appointed as such in terms of Article 32(3)(i)(dd) of the Namibian Constitution, whose address for service is the office of the Government Attorney, 2nd Floor, Sanlam Centre, Windhoek.
- (b) The second respondent is the President of the Republic of Namibia duly elected as such in terms of Article 28(2)(a) and (b) of the Namibian Constitution. The second respondent's address for service is the Government Attorney, 2nd Floor, Sanlam Centre, Windhoek. No relief is sought against the second respondent, who is merely cited for the interest he may have in the present application.
- (c) The third respondent is the Council of Traditional Leaders, duly constituted as such in terms of the Council for Traditional Leaders Act 13 of 1997. The third respondent's address for service is the office of the Government Attorney, 2nd Floor, Sanlam Centre, Windhoek. No relief is sought against the third respondent and is merely cited for the interest it may have in the present application.
- (d) The fourth respondent is the Ovambanderu Traditional Authority, constituted as such in terms of the Traditional Authorities Act 25 of 2000. The fourth respondent's address is at Omaozonjanda, Epukiro, district of Gobabis, Namibia. No relief is sought against the fourth respondent and is merely cited for the interest it may have in the present application. The fourth respondent did not oppose the application.

[4] The applicants in this matter seek the following relief: I quote verbatim from the Notice of Motion:

‘1. That the decision by the First Respondent dated 20 October 2021 be and is hereby reviewed, corrected and set aside.

2. That the application for the approval of designation made by the first and Second Applicants in terms of section 5 (1) of the Traditional Authorities Act 25 of 2000 be and is hereby remitted to the First Respondent.

3. Further and/ or alternative relief.
4. Costs of suit of one instructing and one instructed counsel.'

### Historical Background

[5] Right from the onset, I must point out that the current application is just one in a long list of succession dispute cases relating to the Ovambanderu traditional community. When I discuss the historical background that led to the succession dispute, I will remind myself that this has been the subject of discussion in many cases in this court and the Supreme Court. I will thus endeavour to keep it brief.

[6] After the death of Chief Munjuku Nguvauva II on 16 January 2008, the Ovambanderu traditional community was divided into two factions regarding the succession of the late Chief. One faction supported Kilus Karaerua Nguvauva, while the other supported Keharanjo II Nguvauva. The half-brothers, Kilus and Keharanjo, were biological sons of the late Chief Munjuku Nguvauva II.

[7] The royal family of the Ovambanderu Traditional Community failed to agree on a successor for Chief Munjuku Nguvauva II. This resulted in two different factions applying for the same position, each seeking the approval of their respective candidates, Kilus Nguvauva or Keharanjo II Nguvauva. The Minister advised the parties to settle their dispute in accordance with customary law or, alternatively, to petition him under s 12(1) of the Traditional Authorities Act. However, despite the advice, the parties failed to find a resolution, and in September and December 2008, respectively, the Minister received petitions from both parties through their legal representatives.

[8] In June 2009, the Minister appointed an Investigating Committee to investigate the dispute between the two Ovambanderu factions in terms of s 12 (2) of the Act. Having done the investigation, the Investigation Committee, in its findings, recommended that Keharanjo Nguvauva be designated as Chief succeeding his late

father, Munjuku Nguvauva II. The Investigation Committee concluded that in accordance with Ovambanderu customs, the son who was born of a Chief's marriage is considered senior for purposes of succession to one born out of wedlock, and the senior son becomes the rightful successor should the chieftainship become vacant. However, the Investigating Committee recommended in the alternative that in the event that there is an objection to the senior son succeeding his father, the dispute be resolved by invoking s 5(10)(b) of the Act. This implied that in the event of uncertainty or disagreement amongst the members of a traditional community regarding the applicable customary law, the community members may elect, subject to the approval of the Minister, a chief or head of the community by a majority vote.

[9] Initially, the Minister accepted the committee's recommendation that Keharanjo II Nguvauva be appointed Chief of the Ovambanderu Traditional Community. However, the Minister later changed his stance and proposed an election in terms of s 5(10)(b) of the Act to determine whether Keharanjo II Nguvauva or Kilus Nguvauva should be recognised as the Chief of the Ovambanderu Traditional Community.

[10] Both factions were dissatisfied with the Minister's decision and brought review and counter-review applications to the High Court for the court to review, correct and/or set aside the decision of the Minister.

[11] Whilst the litigation in the High Court was ongoing, Keharanjo II Nguvauva passed away. In light of his passing, the High Court ruled in favour of Kilus Nguvauva as the surviving applicant for the designation of chief. He was confirmed as the Chief of the Ovambanderu Community in terms of s 5(2) of the Traditional Authorities Act.<sup>1</sup>

[12] In light of the passing of the late Keharanjo II Nguvauva, Aletha Nguvauva, his mother and wife of the late Chief Munjuku Nguvauva II, stepped into the fray. At this point, there was a clear rift within the traditional community that cut to the core of its

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<sup>1</sup> *Nguvauva v Minister of Regional and Local Government Housing* (A 254/2010) [2014] NAHCMD 290 (2 October 2014).

customs, culture, and traditions. The faction who supported the late Keharanjo II Nguvauva broke away from the recognised Ovambanderu Traditional Authority and formed their own traditional authority. The members of the first applicant were not only disassociated from the fourth respondent, but its members moved away from the common communal land inhabited by the Ovambanderu Traditional Authority.

[13] The Ovambanderu Traditional Council (the first applicant) came into existence. The first applicant took the view that Keharanjo II Nguvauva became its first paramount Chief, and it decided to designate the second applicant to succeed the late Keharanjo II Nguvauva.

[14] The first applicant applied for the approval of Ms. Aletha Nguvauva as the Chief of the Ovambanderu Traditional Council. In 2015, this faction requested the Minister to consider her application for recognition and approve her as the Chief of the Ovambanderu Traditional Community. However, the Minister apparently did not consider her application.

#### Facts leading to the current review application

[15] On 20 January 2017, the first applicant, led by the second applicant, lodged another application for approval of the designation of Ms Aletha Nguvauva as the Chief under the traditional authority name Ovambanderu Traditional Council. On 29 July 2019, the Minister responded to the application and indicated that he stood by the decision of his predecessors. He indicated that he was of the view that the application by the applicants was in contravention of s 5(3) of the Act.

[16] In response, Ms Aletha Nguvauva lodged an application for review with the High Court on 19 November 2021. She sought the review and set aside the decision by the Minister dated 29 July 2019 on the basis that the Minister dismissed her application. In the same application, she asked the High Court to remit the matter to the Minister for the Minister to comply with the provisions of s 5 of the Act, specifically that the Minister

must be directed to provide his advice, as contemplated by s 5 (3)(b) of the Act to the President.

[17] On 22 July 2021, the High Court delivered its order and reasons on 27 July 2021 and dismissed the points in limine raised on behalf of the respondents with costs.<sup>2</sup> Hereafter, the matter became settled between the parties, and in its subsequent order dated 10 August 2021, the Court made the following order:

'IT IS HEREBY RECORDED THAT:

1. The parties, in view of the ruling of the court in respect of the points of law in limine, expressed the view that the matter be referred to the Minister for him to make a decision on the application for designation.

IT IS ORDERED THAT:

1. The matter is referred back to the Minister for Urban and Rural Development for him to make a decision on the Applicants' application for designation in terms of the Traditional Authorities Act No. 25 of 2000.

2. The Minister of Rural and Urban Development is directed to make his decision on the said application within a period of sixty (60) days from the date of this order.

3. The matter is removed from the roll: Case Finalised.'

[18] On 20 October 2021, the Minister, by way of a letter, made a decision to act in terms of s 5 (3) of the Traditional Authorities Act by referring the application to the second respondent, the President of the Republic of Namibia. On 28 October 2021, the applicants' current legal practitioner directed correspondence to the Minister requesting reasons for the decision to refer the matter in terms of s 5(3) of the Act.

[19] In response to this request, the Minister directed a letter dated 23 October 2022 to the said legal practitioner, wherein he responded as follows:

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<sup>2</sup> *Ovambanderu Traditional Council v Minister of Urban and Rural Development* (HC-MD-CIV-MOT-REV-2019/00475) [2021] NAHCMD 343 (22 July 2021).



'3. Subsequent to me having considered the application for approval to designate Ms Aletha Nguvauva dated 19 December 2016, I specifically considered and noted that:

3.1 That the application indicates that the community represented by Ms Aletha Nguvauva as the Ovambanderu Traditional Community (paragraph 3 thereof). This is the same community for which the late Chief Kilus Nguvauva's designation was approved and recognized under the Act,

3.2 The application further indicates the description of the communal area inhabited by the above Ovambanderu Traditional Community and the number of the members comprising the traditional community, which is indicated as about 30 000. Once again, the areas and the number of members of the community is the same as the one in which the late Chief Kilus Nguvauva was designated and approved as Chief under the Act.

4. This suggested to me that Ms Aletha Nguvauva represents a group of persons who are members of a traditional community in respect of a chief or head or a traditional community that has already been designated and recognized under the Act.

5. It is thus on the above basis the application was in terms of section 5 (3) referred to His Excellency, the President of the Republic for his further action in accordance with the law.'

[20] With reference to the aforementioned correspondence it is the applicants' case that the Minister considered information that did not stem from their application for the approval of the designation of the second applicant under s 5(1) of the Act in order to make a decision. The Minister seems to have based his decision on the application that served before him or his predecessors at some stage, which related to the approval of the designation of the late Chief Kilus Nguvauva instead. This approach, according to the applicant, is flawed as they were never made aware that the Minister gave consideration to the latter application and were not given the opportunity to provide any input or representation regarding this matter. This is especially so because the applicants did not know what information contained in the said application the Minister relied upon to reach his decision.

[21] The applicants contend that relying on information that did not emanate from the application by the first applicant, the Minister erroneously arrived at the decision not to approve the designation of the second applicant. According to the applicants the

application in respect of the late Chief Kilus Nguvauva was not included in their application which was submitted to the Minister.

[22] The applicants press the fact that they were never given the opportunity to make representations and demonstrate that the first applicant and the fourth respondent are two distinct traditional communities. This, in the view of the applicants, is an important factor as the first respondent concluded that the traditional community that the applicants sought approval for the designation of the second applicant was the same traditional community as the members of the fourth respondent.

[23] In support of their review application, the applicants plead that the Minister carried out his duties in terms of the Act when he declined to approve the designation of the second applicant. He was acting as an administrative official and exercising public power granted by the Act. Therefore, when the Minister denied the applicants the opportunity to make representations when he considered information not contained in their application but rather that which was contained in the application regarding the approval of Chief Kilus Nguvauva's designation, he violated Article 18 of the Namibian Constitution. Therefore, the decision made by the Minister on 20 October 2021 to refer the application in terms of s 5(3) of the Act stands to be reviewed and corrected and/or set aside.

#### Issues for determination by this court

[24] The issues for determination by this court can be summarised as follows:

- (a) Whether the decision made by the first respondent dated 20 October 2021 stands to be reviewed, corrected and set aside.
- (b) Whether the application for approval of designation made by the first and second applicants in terms of s 5(1) of the Traditional Authorities Act should be remitted to the first respondent?

### Point in limine

[25] In his answering affidavit, the respondents / Minister contends that the application before the court is a rule 65 (the general applications rule) application and should be struck from the roll because it does not comply with the peremptory provisions of rule 76 (the review rule). The applicants, in contrast, argue that the point in limine is not sustainable in the face of the Supreme Court decision in *Namibia Financial Exchange (Pty) Ltd v Chief Executive Officer of NAMFISA and Others*,<sup>3</sup> and the point in limine should be dismissed.

[26] Before determining the main issues, I will first deal with the point raised by the respondents in limine.

[27] The first respondent raised the question of whether a party seeking relief against an administrative body is compelled to proceed under the review rule. In other words, when filing this application, whether the applicants were compelled to proceed in terms of rule 76.

[28] Rule 65 governs general applications, and it states in the relevant part as follows:

'Requirements in respect of an application

65. (1) Every application must be brought on notice of motion supported by affidavit as to the facts on which the applicant relies for relief and every application initiating new proceedings, not forming part of an existing cause or matter, commences with the issue of the notice of motion

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<sup>3</sup> *Namibia Financial Exchange (Pty) Ltd v Chief Executive Officer of NAMFISA and others* (SA 43 of 2017) [2019] NASC 590 (31 July 2019).

signed by the registrar, date stamped with the official stamp and uniquely numbered for identification purposes.’

[29] Rule 76 governs administrative law reviews, and it states in the relevant part as follows:

‘Review application

76. (1) All proceedings to bring under review the decision or proceedings of an inferior court, a tribunal, an administrative body or administrative official are, unless a law otherwise provides, by way of application directed and delivered by the party seeking to review such decision or proceedings to the magistrate or presiding officer of the court, the chairperson of the tribunal, the chairperson of the administrative body or the administrative official and to all other parties affected.’

[30] Assuming for the present purposes that what the applicants seek is in the nature of a review as contemplated in the review rule, I associate myself with the sentiments expressed by the Apex court in the matter of *Namibia Financial Exchange (Pty) Ltd v Chief Executive Officer of NAMFISA and others*<sup>4</sup> where the court held that:

[39] Significantly, and as recognised by the court below, the review rule steers clear of using words ordinarily understood to convey peremptory nuance and nullity for disobedience. One would have assumed, in view of the existing body of case law on the repealed review rule, that the rule maker would have used a language which was stronger and clearer, if what was intended was that all challenges to administrative decision-making must be by means of the review rule.

[40] The review rule as formulated in the new rule 76 has not brought about a significant change as understood by the court *a quo*. I therefore come to the conclusion that not only is it not a requirement for a review applicant to proceed under rule 76 but there is no reason that a principle now firmly embedded in our common law should be changed. The High Court therefore

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<sup>4</sup> *Namibia Financial Exchange (Pty) Ltd v Chief Executive Officer of NAMFISA and others* (SA 43 of 2017) [2019] NASC 590 (31 July 2019).

misdirected itself in concluding that an applicant seeking review is compelled to proceed under the review rule and that the failure to do so amounts to a nullity.’

[31] I therefore find that the point in limine must fail.

Arguments advanced on behalf of the parties

[32] If, in the course of this judgment, I use the words ‘submit’ and ‘argue’ and their derivatives, they must be understood to encompass both the heads of arguments and the oral submissions made in court.

*On behalf of the applicants*

[33] The argument advanced by Mr Chibwana is that the Minister does not dispute the fact that he utilised the information contained in a separate and distinct application of the late Chief Kilus Nguvauva when he made his decision. He also does not dispute that he did not provide the applicants with that application or provide the applicants with an opportunity to make representations in relation to the averments in the earlier application lodged by the late Chief Kilus Nguvauva and any adverse material contained therein.

[34] Mr Chibwana contended that the Minister, by way of his answering affidavit, had an obligation to dispute the facts that they relied upon. In this regard, applicants rely on the decision of the Court in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*<sup>5</sup> where the Court held that:

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for

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<sup>5</sup> *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA).

disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents inadequate as they may be and will only in exceptional circumstances be permitted to disavow them. There is this a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes dully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

[35] In response to the Minister's argument that applicants were granted audi by way of constant engagements with the applicants' legal practitioners, and this is reflected in two correspondences dated 29 October 2021 and 23 March 2022, respectively, Mr Chibwana argued that audi should have taken place before a decision was made.

[36] Mr Chibwana submitted that it is common cause that the Minister's decision was made on 20 October 2021. Therefore, any opportunity to make representations should have been given before that date. The applicants aver that the documents relied upon by the Minister, which supposedly reflect the audi, are actually a request for reasons made by the applicants on 29 October 2021 and the response thereto on 23 March 2022. This correspondence came well after the Minister's decision of 20 October 2021. The applicants claim that this is a failure to comply with Article 18 of the Constitution and that the adverse evidence was not provided to them before the decision was made.

[37] In bolstering his argument, Mr Chibwana referred the court to the matter of *Mouse Properties Ninety Eight CC v Minister of Urban and Rural Development and Others*,<sup>6</sup> wherein the court addressed audi and stated as follows:

[34] It is common cause that the appellant was not apprised of the objections to the intended sale. Neither the objections nor a summarised version thereof was provided to the appellant so as to seek the appellant's response to the matters raised in the objections. Neither was the appellant approached to comment or make representations in respect of information the Minister intended to act on to make findings contrary to the interests of appellant.

[35] The fact that the appellant through its legal practitioners engaged with the Town Council and Minister spelling out the stance of the appellant in respect of the interpretation of ss 30(1)(t) and 63 of the Act and exhorting the Minister to make a decision does not assist the Minister in this regard as submitted on the Minister's behalf. As pointed out by the legal practitioner for appellant, these letters contained legal submissions and did not deal with any factual averments or objections to the sale. It was simply not possible for the appellant to deal with such factual averments as he was not provided with the information to enable a response to such averments.'

[38] Counsel further referred to *Auas Valley Residents Association and Others v Minister of Environment and Tourism and Others*,<sup>7</sup> wherein the court held that:

[25] The fact that the Minister, as Mr Chibwana submitted so eloquently, had high-level consultations with scientific minds on such highly scientific matter and also had various public consultations cannot whittle away appellants' common law and constitutional right to audi. It is not the case of appellants that the Minister did no such thing. They have come to court to vindicate their right to audi. With respect, it is not good enough to say that because the Minister exercised discretion he could decide in what way he would comply with audi. The Minister could do so in 'the absence of any prescription of the Act' (see *Frank and Another (SC) loc. cit.*). For

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<sup>6</sup> *Mouse Properties Ninety Eight CC v Minister of Urban and Rural Development and Others* (SA 14 of 2020) [2022] NASC 13 (11 April 2022).

<sup>7</sup> *Auas Valley Residents Association and Others v Minister of Environment and Tourism and Others* (HC-MD-CIV-APP-ATL 3 of 2018) [2018] NAHCMD 267 (4 September 2018).

a hearing to comply with the natural justice rule of audi, there must truly be a hearing. The nature of the hearing will depend on the facts and circumstances of the particular case; and above all, the procedure must be fair and it must not defeat the purpose of the Act in question. (Frank and Another (SC))'

[39] Mr Chibwana submitted that there was no hearing of any kind prior to the Minister making his decision and that the review application is instituted to vindicate the applicants' right to make representations and to be afforded audi. He further emphasised that the applicants do not request the court to usurp the authority of the Minister, nor do they request the court to interpret the Traditional Authorities Act. Mr Chibwana submitted that the applicants seek to review the decision of the Minister on a limited basis, i.e. that the decision was made in breach of Article 18 of the Constitution by denying the applicants the opportunity to make representations. He contended that the issue of the merits will only arise once the minimum requirements of Article 18 have been met.

*On behalf of the respondents*

[40] In contrast with the brief argument made by the applicants, Mr Ncube submitted comprehensive heads of arguments that primarily focused on the interpretation and application of the Act. He argued that it is not competent for this court to recognise the applicants as that is not within the court's power. He submitted that the court is in a better position to determine whether or not the period within which the President should have arrived at the decision is sufficient. Mr Ncube submitted that is a discretion which the court exercises if it is satisfied by the applicant who bears the onus that there is reason for the court to intervene.

[41] Counsel further submitted that s 5(6)(a) of the Act provides that where the President receives a recommendation from the Council of Traditional Leaders, he shall, in his discretion and in writing, either reject the proposed designation in terms of the



grounds set out in ss 3(a) or (b). The President may grant or may not grant the approval for such designation to the members of the traditional community in question.

[42] Mr Ncube submitted that the Minister, in arriving at a fair, just, rational and equitable decision, had the application forms and relevant supporting documentation in his possession. Counsel argued that the audi alteram partem principle takes various forms, and the written representations in the application form submitted on 18 September 2020 were sufficient under the circumstances.

[43] The court was referred to the matter of *Fire Tech System CC v Namibia Airports Company Limited*,<sup>8</sup> where the court, in dealing with what constitutes reasonable administrative conduct for the purposes of Article 18, stated the following:

'The Supreme Court of Namibia has expressed itself as follows as regards the scope of Article 18 of the Namibian Constitution:

[131] What will constitute reasonable administrative conduct for the purposes of art 18 will always be a contextual enquiry and will depend on the circumstances of each case. 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 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 the range of reasonable courses of conduct available.'

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<sup>8</sup> *Fire Tech Systems CC v Namibia Airports Company Limited* (A 330-2014) [2016] NAHCMD 220 (22 July 2016) para 40.

[44] Mr Ncube further referred the court to the matter of *New Era Investment (Pty) Ltd v The Roads Authority*,<sup>9</sup> wherein it was held that:

[15] There is no onus on the first respondent whose conduct is the subject matter of the review to justify its conduct. On the contrary, the onus rests on the applicant for review to satisfy the court that good, that is cogent and relevant, grounds exist to review the conduct complained of.

[16] The burden of this court is, therefore, to determine whether the applicant has established that good grounds exist to review the first respondent's decision to reject the applicant's tender....., I should signalize the crucial point that such grounds should have been set out in the founding affidavit because that is the case the applicant has brought to court and which the opposing parties have been called upon to meet . . . .'

[45] On the principle of *audi alteram partem*, Mr Ncube directed the court to para 31 in the *New Era* matter, where the court further stated that:

[31] It must be remembered that natural justice (of which *audi alteram partem* is one of the rules) is a flexible doctrine whose content may vary according to the nature of the power exercised and the circumstances of the case. (*Re Pergamon Press Ltd* 1971 Ch 388 at 399) In the words of Lord Denning MR, The rules of natural justice — or of fairness — are not cut and dried. They vary infinitely'. (*R v Home Secretary ex parte Santillo* [1981] QB 778) Baxter throws in his authoritative statement thus: The principles of natural justice are flexible. The range and variety of situations to which they apply is extensive. If the principles are to serve efficiently the purposes for which they exist, it would be counterproductive to attempt to prescribe rigidly the form the principles should take in all cases'. Baxter refers to the dictum of Tucker LJ in *Russel v Duke of Norfolk* [1949] 1 All ER 109 at 118 for support where the Lord Justice stated:

[32] Generally, it conduces to fairness for the administrative body or administrative official to give a person affected by information it has at its or his or her disposal a fair opportunity to correct or contradict any relevant statement or information prejudicial to the case he is seeking to establish by bringing such information to that person. But a

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<sup>9</sup> *New Era Investment (Pty) Ltd v The Roads Authority* (A 05/2014) [2014] NAHCMD 56 (20 February 2014).

careful distinction should be drawn between the information and evaluation thereof during the process of the decision itself. . .

[36] I have observed previously that fairness in the shape of the audi principle (or the bias principle) is a variable concept. It would, therefore, not be in the interest of justice to prescribe a one-size-fit-all formula for it. (See Cora Hoexter, *Administrative Law in South Africa* (2007): p 328, and the cases there cited.)'

[46] Mr Ncube submitted that the Minister incorporated the relevant information from the applications after the parties concluded the settlement agreement.<sup>10</sup> It is thus inconceivable that the applicant would raise the issue of audi in her papers when the Minister considered the new information in her applications.

[47] In conclusion, Mr Ncube was of the view that the broader scheme of the Act does not permit the existence of two traditional authorities within the same area for the same homogenous group. According to Mr Ncube, the President and the Council of Traditional Leaders are statutorily empowered to adjudicate upon this dispute.

#### Relevant legal principles and discussion

[48] As stated earlier in this judgment, the applicants seek to review and set aside the decision of the Minister dated 20 October 2021 on the premise that they were not afforded an opportunity to make representations prior to the decision being made. Coupled with this relief is that this court remit to the Minister the applicants' application for approval of the designation of the second applicant in terms of s 5(1) of the Act.

[49] The relevant portion of the Traditional Authorities Act for purposes of this judgment is s 5 of the Act, which reads as follows:

'Prior notification of designation of chief or head of traditional community

(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

<sup>10</sup> Presumably under case HC-MD-CIV-MOT-REV-2019/00475.

(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.

(2) On receipt of an application complying with subsection (1), the Minister shall, subject to subsection (3), in writing approve the proposed designation set out in such application.

(3) Notwithstanding subsection (2), if in respect of an application referred to in subsection (1) the Minister is of the opinion that-

(a) (i) the person sought to be designated as a chief or head of a traditional community represents a group of persons who are members of a traditional community in respect of which a chief or head of a traditional community has been designated and recognised under this Act; or

(ii) such group of persons do not constitute an independent traditional community inhabiting a common communal area detached from another traditional community; or

(iii) such group of persons do not comprise a sufficient number of members to warrant a traditional authority to be established in respect thereof; and

(b) that there are no reasonable grounds for recognizing such group of persons as a separate traditional community, the Minister shall advise the President accordingly.

(4) The President shall on receipt of the Minister's advice under subsection (3) refer the matter to the Council of Traditional Leaders for its consideration and recommendation.

(5) The Council of Traditional Leaders shall submit to the President any recommendation it may wish to make in respect of any matter referred to it in terms of subsection (4) not later than 12 months after the date of referral of that matter to it.

(6) to (9)...

[50] The first applicant applied repeatedly for the approval of the designation of the second applicant, which has continuously been met with opposition, resulting in drawn-out litigation. There is a long history involving the second applicant, dating back to the death of her son, the late Keharanjo II Nguvauva, in 2011 and the matter remains unresolved to date.

[51] The latest attempt by the first applicant to gain approval for the designation of the second applicant appears to be, for now, the latest chapter in this saga. I emphasise 'the latest' because, in my view, it will not be the last. It is merely a pause in the litigation.

[52] The central theme of the current review application is a narrow one, namely that the Minister, as an administrative official, made a decision without complying with a cardinal requirement of the common law and natural justice, i.e. the *audi alteram partem* rule. As a result, I do not intend to concern myself with the interpretation of the Act as I do not deem it necessary for purposes of the current proceedings.

[53] The applicants made strong allegations in their papers that the Minister did not consider their application but, in fact, made a decision based on facts set out in an unrelated application, which did not form part of the first applicant's application. The Minister chose not to deal with these allegations in his answering affidavit. The extent of the Minister's response to the allegation was the following:

'The applicant was provided with full reasons for my decision which constitutes part of her right to be heard.'

I am advised that the audi alteram partem takes various forms and there was constant engagement with the legal practitioners of the applicant as epitomized in my letter dated 29 October 2021 and the reasons of 23 March 2022. Under those circumstances referral to the President is peremptory as I formed an opinion that there were no reasonable grounds for the recognition of a separate traditional authority in the same community. Further argument on this point will be made at the hearing of the application. The President will in return refer the dispute to the Council of Traditional Leaders to adjudicate upon the matter.'

[54] The letters 'epitomising' the engagement is indeed, as argued by the applicants, the request for reasons for the decision to refer the application in terms of s 5(3) of the Act to the President and the response to that letter from the Minister wherein he provided very cryptic reasons. Interestingly, the reasons advanced by the Minister for his recommendation, which are quoted verbatim in para 19 above, stand in direct contrast to facts contained in the applicant's application, both in fact and in substance.

[55] In the letter dated 22 March 2022, the Minister refers to an application dated 19 December 2016, whereas the applicants aver that their application was dated January 2017. However, even if the application was dated 19 December 2016, it could not have been the same one the Minister purportedly considered. Nowhere in the application filed on behalf of the applicants are any of the facts set out in paras 3.1 and 3.2 of that letter. In fact, the first applicant's application explains how its headquarters were established in Tallismanus in the Otjombinde Constituency, where there is no other traditional authority, Otjiherero speaking or other, and that the first applicant's community consists of 6000 people. No mention is made of 30 000 people, and no reference has been made to the late Chief Kilus Nguvauva.

[56] It is not clear where the Minister obtained this information that he considered for purposes of making a decision. It is common cause that a number of similar applications have been launched since 2011, and they either served before the current minister or his predecessors. In *Ovambanderu Traditional Authority v Minister of Urban and Rural*

*Development*,<sup>11</sup> where the court was also faced with a matter where there were a number of prior unsuccessful applications for recognition, Masuku J said the following:

'[82]..[T]here are matters, which might serve before him or her, which might have served before his or her predecessors. Where applications had been made previously and were similar to one placed before him or her, he is required to engage the institutional memory at his disposal and inform himself of the reasons of previous refusals and consider those in the light of the new information placed before him or her.

[83] In the instant case, it is clear that the HTA had filed previous applications for recognition, which had failed. It was incumbent upon the Minister, in that regard, to consider the reasons for the previous refusals and inform himself accordingly as to whether or not, those previous impediments still exist. He cannot adopt the position, which he appears to, that he is not required to consider previous relevant information and decisions which are, in any event, not binding on him. One of the reasons previously given for refusal, was that the OTA was part of the applicant.' (my emphasis)

[57] If the reasons for his recommendation to the President stem from the previous applications, which it appears to do, then the Minister had to determine if the impediments still exist. The only way to do that is to properly consider the application of the applicants and give them the opportunity to address the issue with him. This inevitably means that he should have heard the applicants before reaching a decision.

[58] Masuku J, in deciding the aforementioned *Ovambanderu* matter, dealt with the audi principle with reference to *Matador Enterprises (Pty) Limited v Minister of Trade And Industry and Others*,<sup>12</sup> wherein Smuts J stated the following:

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<sup>11</sup> *Ovambanderu Traditional Authority v Minister of Urban and Rural Development* (HC-MD-CIV-MOT-REV-2019/00239) [2023] NAHCMD 525 (25 August 2023).

<sup>12</sup> *Matador Enterprises (Pty) Limited v Minister of Trade and Industry and Others; In Re: Clover Dairy Namibia (Pty) Ltd and Another v Minister of Trade and Industry and Others* (A 352/2013, A 386/2013) [2014] NAHCMD 156 (16 May 2014).

'The right to be heard after all contemplates that those affected by a decision should be in a position to address relevant material which is adverse to them. This did not occur by not disclosing the cabinet decision to them. This certainly lacked transparency and adversely impacted upon the right to be heard. The right to be heard and fairness demand that persons adversely affected by a decision be afforded the opportunity to be heard with a view to producing a favourable result and require that they are apprised of factors which they need to address. As was stressed by this court –

“art 18 of the Constitution of Namibia pertaining to an administrative justice requires not only reasonable and fair decisions based on reasonable grounds, but inherent in that requirement, fair and transparent procedures which are transparent.” (my emphasis)

[59] I can do no better and unequivocally associate myself with the remarks expressed by Smuts J and agree with my Brother Masuku J that these remarks are an accurate reflection of the proper approach to administrative justice in Namibia.

[60] Having considered the facts before me, I am of the view that the applicants should have been afforded the opportunity to be heard before the Minister made the decision on 20 October 2021. In my view, the argument advanced by Mr Ncube that it is inconceivable that applicants can argue that they were not afforded audi in light of the litigation history holds no merit. The circumstances changed since the initial litigation was instituted way back when the succession dispute arose. Failure by the Minister to hear the applicants, who would be adversely affected by his decision, in my view, is a violation of Article 18 of the Constitution, and for that reason, the decision of 20 October 2021 stands to be reviewed as set aside.

[61] During the argument, Mr Ncube raised several new issues that were neither in line with the first respondent's answering affidavit nor his written heads of argument. The first issue that he raised is that the applicants appear to seek a mandamus. Having carefully considered the papers before me, I am of the view that there is no merit in this argument.

[62] Secondly Mr Ncube raised an issue of ripeness or prematurity of the review application. Mr Ncube submitted that the matter no longer lies for decision in the hands



of the Minister. The application was directed to the President in terms of s 5(3) of the Act, who in turn would direct the application to the Council of Traditional Leaders in terms of s 5(5). He argued that the court should allow the decision of the Minister to stand as the decision by the Minister is not a final decision. I have taken this issue up with the parties, and it would appear that three years later, this matter still remains in limbo as no further decisions were made pursuant to the referral in terms of s 5(3) of the Act. The argument of ripeness or prematurity, therefore, does not find application herein.

[63] What is of importance in my view is the fact that in terms of s 5(3), the Minister made a recommendation to the President, which is not borne out by the facts as the Minister failed to afford the parties a hearing in accordance with the rules of natural justice. The applicants' application must thus succeed.

#### Cost

[64] I am of the view that the costs should follow the event.

#### Order

[65] My order is, therefore, as follows:

1. The decision by the first respondent dated 20 October 2021 is hereby reviewed and set aside.
2. The application for the approval of designation made by the first and second applicants in terms of section 5 (1) of the Traditional Authorities Act 25 of 2000 is hereby remitted to the first respondent.
3. The respondents are ordered to pay the costs of the applicants jointly and severally, the one paying the other to be absolved. Such costs to include the costs of one instructing and one instructed counsel.

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JS Prinsloo

Judge

For the 1<sup>st</sup> and 2<sup>nd</sup> applicants:

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