

**REPUBLIC OF NAMIBIA**



**IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No: HC-MD-CIV-MOT-REV-2019/00395

In the matter between:

**RAPHAEL HIJANGUNGO KAPIA**

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

**SAMUEL PURIZA**

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

and

**MINISTER OF URBAN AND RURAL DEVELOPMENT**

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

**ZERUAERUA TRADITIONAL AUTHORITY**

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

**MANASSE MEUNDJU CHRISTIAN ZERAREUA**

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

**FABIANUS UASEUAPUANI**

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

**THE PRESIDENT OF THE REPUBLIC OF NAMIBIA**

**5<sup>TH</sup> RESPONDENT**

**Neutral Citation:** *Kapia v Minister of Urban and Rural Development* (HC-MD-CIV-MOT-REV-2019/00395) [2024] NAHCMD 239 (17 May 2024)

**CORAM:** **PRINSLOO J**

**Heard:** 01 November 2023

**Delivered:** 17 May 2024

**Flynote:** Motion Proceedings – Review – Customary Law – Traditional Authority – Traditional Authorities Act 25 of 2000 – Section 8 setting out procedure for succession of a Chief upon death or removal of a Chief or Head of a traditional community – Chief’s Council established in terms of s 9(1) and does not dissolve upon death of a Chief of traditional community as the Chief’s Council.

Customary law – The designation has to be done in accordance with the customary law of the community – The authorised members of a traditional community may designate one person from the royal family of the traditional community – A party relying on customary law must prove or establish such customary law – Failure to qualify expert on norms, customs and traditions is fatal.

Constitutional law – Article 10(1) and (2) of the Namibian Constitution – Constitutionality issue raised prematurely – Article 18 – Minister did not act arbitrarily, irrationally and contrary to Article 18 of the Constitution

**Summary:** This deals with a succession dispute that dates back to 2012. Previous review proceedings were served before Ueitele J, wherein he upheld review proceedings on 24 January 2014.

The succession dispute arose when the late Chief Christian Eerike Zeraeua passed away. The elders of the Ovakweyuva and Tjipepa royal families held a meeting and decided that the process of appointing a successor should begin. A committee was then formed to oversee the selection process. A further committee was called to live and also tasked with dealing with the succession issue and liaising with the royal houses in terms of the customary laws and norms. The latter committee nominated the third respondent, the son of the late Chief Christian, to be his father's successor.

Two clear factions developed within the traditional community and support was divided between the Raphael Kapia faction and Manasse Zeraeua faction.

The Ovakweyuva and Tjipepa royal families met and nominated Raphael Kapia as the successor to the late Chief Christian. The Chief's Council nominated Manasse Zeraeua as the successor to the Chieftaincy of the Zeraeua Traditional Community. The Minister of Regional and Local Government Housing Rural Development, the first respondent's predecessor, approved the designation of Chief Manasse Zeraeua as the Chief of the Zeraeua Traditional Community.

The Minister hereafter appointed an investigation committee in terms of s 12(2) of the Act in July 2014. The Ministerial Investigation Committee was not conclusive in its findings on the legitimate line of succession and recommended that the disputing parties restart the process through the mediator, who should be appointed by the Minister. It was further recommended that a reconciliation committee be formed.

The Minister directed that the disputing parties be subjected to mediation and appointed a Mediation Committee, the mediation proceeded during the period of 21 to 25 November 2016. The mediation process failed, the Mediation Committee noted that the Reconciliation Committee showed no commitment or interest in reaching a consensus on the issue.

The recommendations to the Minister by the Mediation Committee were inter alia that the Minister should find an expert or a knowledgeable person to verify the customary law guiding the chieftainship succession of the Zeraeua traditional community and to verify according to Zeraeua customary note or wish left behind by the late Chief is treated.

The Minister met with the Zeraeua and Kapia delegations and informed them that the prevailing customary law would guide him. The Minister also sought and obtained advice from the Attorney General's office.

On 22 August 2019, the application to appoint Mr Kapia as the successor to the late Chief Christian Zeraeua was disapproved. The application to designate Mr Manasse Zeraeua as the successor to the late Chief Christian Zeraeua was approved.

Mr Zeraeua was designated on 14 September 2019 in terms of s 5(7) of the Act. The President recognised the approval by publishing a proclamation to this effect on 15 October 2019 in terms of s 6(2) of the Act.

The applicants brought an application to this Court to declare that such a decision is null and void for being in conflict with Articles 1, 10 and 18 of the Namibian Constitution. Applicant further seeks to review and set aside all further processes and/or steps following the aforesaid decision.

*Held that* the Chief's Council was established when the Act came into operation. It does not say that a Chief's Council is established until the death of the chief, who is the chairperson of the council.

*Held that* one should not conflate the issues of who may designate and who may bring the application for designation. Section 4(1) provides that members of a traditional community who are authorised thereto by the customary law of that community may designate, and s 5(1) provides that if a traditional community intends to designate a chief, the Chief's Council shall apply on the prescribed form to the Minister for approval to make such designation.

*Held that* the application for Mr Kapia was made by Mr Puriza as an 'authorised member of the traditional community Zeraeua Royal Family'. This application was not made as provided for in s 5(1) of the Act.

Held that the application ought to have been made by the Chief's Council and not by the second applicant acting for and on behalf of the Royal family.

*Held that* the authorised members of a traditional community may designate one person from the royal family of the traditional community, where such a royal family is in place, who *shall* be instituted as the chief or head of the community.

*Held that* the person on whose evidence reliance is to be placed must qualify himself as an expert on the norms, customs and traditions of the traditional community whose customary law such person testifies about. Failure to do so is fatal.

*Held that* failure to apply to have this matter referred to oral evidence in that respect and have no expert evidence before this court to support their position on the succession lineage is fatal for the applicants' case.

*Held that* the court can inform itself of the customary law from history books, and a party can prove customary law through an ordinary person who has knowledge of the nature of the customs and the period over which they have been observed.

*Held that* it is not necessary to decide this issue on the prevailing customary law.

*Held that* the Minister acted in terms of s 12 of the Act by ordering an investigation.

*Held that* The Minister exhausted the remedies available to him.

*Held that* the applicants' application has no merit and stands to be dismissed.

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## ORDER

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1. The application is dismissed.
2. The first and second applicants are liable for the cost of the first, second, third and fifth respondents, jointly and severally, the one paying the other to be absolved.
3. Cost in respect of the second and third respondents to include costs consequent upon the employment of one instructing and one instructed counsel.

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## JUDGMENT

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PRINSLOO J:

### Introduction

[1] There are two main contenders for the position of Chief of the Zeraeua Traditional Community: Raphael Kapia and Manasse Zeraeua. They come from the same clan but are at loggerheads as to who would be eligible to be designated as chief. To exacerbate the dispute, Manasse Zeraeua was appointed as Chief of the Zeraeua clan on 22 August 2019. This appointment by the Minister led to the current review application, as well as the preceding review application dating back as far as 2013.

### The parties

[2] The first applicant is Raphael Hijangungo Kapia, an adult male residing at Okaumbaaha, Dâures Constituency in the Erongo Region.

[3] The second applicant is Samuel Puriza, an adult male residing at Farm Kunig Suid in the Outjo district.

[4] 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, 2<sup>nd</sup> Floor, Sanlam Centre, Windhoek.

- b. The second respondent is the Zeraeua Traditional Authority, constituted as such in terms of the Traditional Authorities Act 25 of 2000 (the Act). The second respondent has its seat at Omatjete, Dâures Constituency Erongo Region. No relief is sought against the second respondent and is merely cited for its interest in the present application. The second respondent did not oppose the application.
- c. The third respondent is Manasse Meundju Zeraeua, an adult male residing in Windhoek and the current designated Chief of the Zeraeua Traditional Community.
- d. The fourth respondent is Fabianus Uaseupuani, an adult male residing at Omatjete, Dares Constituency in Erongo Region. The fourth respondent is a senior Traditional Councilor and a member of the second respondent. No relief is sought against this respondent and he did not oppose the application either.
- e. The fifth 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, 2<sup>nd</sup> Floor, Sanlam Centre, Windhoek.

#### Relief sought

[5] In his amended notice of motion dated 6 September 2023, the applicants seek the following relief:

'1. Reviewing and setting aside the decision taken by the first respondent on 22 August 2019, to approve the designation application in respect of the third respondent in terms whereof the third respondent was designated as Chief of the Zeraeua clan (the "decision");

2. Alternatively, declaring that such decision is null and void for being in conflict with Articles 1, 10 and 18 of the Namibian Constitution.

3. Reviewing and setting aside all further processes and/or steps flowing from the aforesaid decision, in particular:

3.1 the first respondent's notification to the fifth respondent [(in terms of section 6(1) of the Traditional Authorities Act, 2002) ("the Act")], of his decision;

3.2 the fifth respondent's recognition (in terms of section 6(2) of the Act) of the designation of the third respondent as the Chief of the Zeraeua clan by way of proclamation in the Gazette on 15 October 2019.

4. Directing the first respondent to direct and approve an election of the chief of the Zeraeua Traditional Community in terms of Section 5(10) and/or section 12(3) of the Act.

5. Alternatively, to paragraph 4 above, that the matter be referred back to the first respondent to consider and take a decision on whether or not an approval and direction should be granted to hold an election in terms of - and as contemplated by - section 5(10) and/or section 12(3) of the Act.

6. Further and/or alternative relief;

7. Costs of suit to include one instructing and one instructed counsel against 1st Respondent and any of the Respondents only in the event any of them oppose this application.'

[6] The first, second, third and fifth respondents opposed the application.

Historical background



[7] This matter has a lengthy history, as succession disputes typically do. I will provide only a brief summary of the historical context, as Ueitele J presented a comprehensive account in his ruling on 24 January 2014 regarding this matter. Further mention of the judgment will follow below.

[8] The saga dates back to 8 January 2012, when the late Chief Christian Eerike Zeraeua (Chief Christian) passed away. Since the Chieftaincy was now vacant, the elders of the Ovakweyuva and Tjipepa royal families held a meeting and decided that the process of appointing a successor should begin. A committee was then formed to oversee the selection process.

[9] During a later meeting between the Zeraeua Traditional Authority's Chief's Council (the Chief's Council) and the Zeraeua Traditional Authority, a further committee was called to live and also tasked with the responsibility of dealing with the succession issue and liaising with the royal houses in terms of the customary laws and norms. The latter committee nominated the third respondent, the son of the late Chief Christian, to be his father's successor.

[10] As time progressed, two clear factions developed within the traditional community, and support was divided between the Raphael Kapia faction and Manasse Zeraeua.

[11] Hereafter, despite the directions of the Chief's Council to the respective committees to postpone their meetings, which were scheduled for the same day, i e 28 April 2012, only one of the committees acceded to the request, whereas the other committee proceeded to nominate the third respondent a successor to the late Chief Zeraua.

[12] The Chief's Council would have none of that and indicated that the third respondent's nomination would not be recognised until the committees met and resolved the dispute. It seems that the two committees did not meet.

[13] At this point, there were two clear groups within the Zeraeua traditional community: the 'Raphael Kapia Group' and the 'Manasse Zeraeua Group'.

[14] On 23 June 2012, the Chief's Council called a meeting, and during that meeting, they supported the nomination of the third respondent as successor to the Chieftaincy. Then, on 29 June 2012, the fourth respondent sent a letter to the Minister, along with the application for approving the designation of the third respondent as the Chief of the Zeraeua Traditional Community.

[15] In the interim, on 30 June 2012, the Ovakweyuva and Tjipepa royal families met and nominated Raphael Kapia as the successor to the late Chief Christian. Mr Puriza communicated this decision in writing to the Minister on 2 August 2012.

[16] On 8 August 2012, the Minister of Regional and Local Government Housing Rural Development,<sup>1</sup> the first respondent's predecessor, approved the designation of Chief Manasse Zeraeua as the Chief of the Zeraeua Traditional Community. This decision triggered the first application in this drawn-out succession dispute.

[17] On 14 December 2012, the first applicant filed a review application under case number A 333/12 in terms of which the first applicant sought an order reviewing, correcting and or setting aside the Minister's decision of 8 August 2012, alternatively that the court should declare the said decision as null and void and in addition thereto

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<sup>1</sup> Ministry of Regional and Local Government, Housing and Rural Development was renamed in 2015 as the Ministry of Urban and Rural Development.

that the court should direct that the Minister give effect to the first applicant's designation as the Chief of the Zeraeua Traditional Community.

[18] The basis of the review was that the applicants maintained inter alia that a) the process followed by the Minister to approve the designation of the third respondent was unfair and unreasonable, b) the decision taken was arbitrary and unreasonable and c) that the applicants were not afforded audi before the Minister made his decision.

[19] In his well-reasoned judgment, Ueitele J, on 24 January 2014, held that the Minister misread the Act, which prevented him from properly exercising the power conferred on him in terms of s 5(2) of the Act. As a result, the court proceeded to set aside the Minister's decision.<sup>2</sup>

[20] The Minister hereafter appointed an investigation committee in terms of s 12(2) of the Act in July 2014. While the investigation was ongoing, Minister Sophia Shaningwa took over the reins from Minister Charles Namoloh. The Ministerial Investigation Committee was not conclusive in its findings on the legitimate line of succession and recommended that the disputing parties restart the process through the mediator, who should be appointed by the Minister. It was further recommended that a reconciliation committee be formed.

[21] On 7 December 2015, the applicants launched an application in this court to compel the Minister to designate Mr Kapia as the chief of the Zeraeua Traditional Community, alternatively, release the investigating committee's findings.<sup>3</sup>

[22] On 16 December 2015, the Minister directed that the disputing parties be subjected to mediation. The mediator would be mandated to ensure that the parties agree on a chief who would be designated within six months from the date of a notice to

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<sup>2</sup> *Kapia v Minister of Regional and Local Government, Housing and Rural Development & 2 Others* (A 333/2012) [2013] NAHCMD 13 (24 January 2014).

<sup>3</sup> Case A 342/2015.

that effect. There was no appointment of a mediator nor was the mediation finalised within the six months directed by the Minister. However, in an attempt to move the matter forward, the application was withdrawn on 16 July 2016, following an agreement that the parties would go to mediation, which process was expected to be finalised within six months from the date of the court order.

[23] The Minister hereafter appointed a Mediation Committee consisting of Reverend Ngeno Nakamhela, Reverend Salmon Tjakuapi and Mrs Euphrosine Muende. A Reconciliation Committee composed of eight members was also established. The Reconciliation Committee consisted of four members each from the two factions. The mediation proceeded during the period of 21 to 25 November 2016.

[24] The mediation process failed due to disunity and disagreement amongst members of the Reconciliation Committee. The Mediation Committee noted that the Reconciliation Committee showed no commitment or interest in reaching a consensus on the issue.

[25] The recommendations to the Minister by the Mediation Committee were, inter alia, that the Minister should find an expert or a knowledgeable person to verify the customary law guiding the chieftainship succession of the Zeraeua Traditional Community and to verify according to Zeraeua customs how the note or wish left behind by the late Chief is treated.

[26] On 18 and 28 March 2018, respectively, the Minister met with the Zeraeua and Kapia delegations and informed them that the prevailing customary law would guide him. The Minister also sought and obtained advice from the Attorney General's office.

[27] There was apparently a further meeting on 2 July 2018 between the Minister and the relevant parties. The Minister informed them that he had decided to recognise Mr Zeraeua as chief. However, the applicants claim that the Minister later retracted this decision. The Minister, on the other hand, denies having made any such decision or retracting it.

[28] On 22 August 2019, the Minister addressed a letter to Mr Puriza informing the Zeraeua Traditional Authority that the application to appoint Mr Kapia as the successor to the late Chief Christian Zeraeua was not approved. Additionally, the Minister sent another letter on the same date addressed to Mr Uaseupuani, notifying the Zeraeua Traditional Authority that the application to designate Mr Manasse Zeraeua as the successor to the late Chief Christian Zeraeua was approved.

[29] Mr Zeraeua was designated on 14 September 2019 in terms of s 5(7) of the Act. The President recognised the approval by publishing a proclamation to this effect on 15 October 2019 in terms of s 6(2) of the Act.

### The current application

### Grounds of review

[30] The first applicant refers to his grounds for review as set out in his first review application and maintains that those grounds are still extant.

[31] Ueitele J summarised these grounds as follows in para 8 of the judgment<sup>4</sup>:

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<sup>4</sup> Supra at footnote 2.

'a) The process that was followed to approve the designation of Mr Manasse Meundju Zeraeua as Chief of the Zeraeua Traditional Authority was unfair and unreasonable.

b) The Minister ignored the applicant's designation as Chief of the Zeraeua Traditional Authority and took an arbitrary and unreasonable decision to approve the designation of Mr Manasse Meundju Zeraeua as Chief of the Zeraeua Traditional Community.

c) The applicant was not given the opportunity, alternatively a proper opportunity to place his view before the Minister and to present his side of the case either before or after the Minister made his decision.'

[32] The first applicant advances the following further reasons, which I will summarise, in support of his contention that the decision of the Minister should be reviewed and set aside:

- 1) The process was unfair and in breach of Article 18 of the Constitution.
- 2) His designation complied with s 4 of the Act, whereas the third respondent's did not.
- 3) It was the late Chief's will that the dominant clan, Tjipepa/Ovakweyuva, should make the designation. This clan designated him, and the Minister ignored it or did not appreciate it.
- 4) The Minister initiated a dispute resolution process in terms of s 12, which was not concluded. Instead, the Minister appointed a mediation committee, which he was not authorised to do, and when he received the recommendation, he did not follow it in any event.
- 5) He had no opportunity to give his input pursuant to the legal advice from the Attorney-General on which the Minister relied.
- 6) The Minister was not authorised to make a decision on two competing designations and could not comply with s 6 of the Act.
- 7) The Minister made the decision based on the wrong facts and advice and had a misperception of the applicable customary law.

- 8) The Minister and the third respondent are friends, leading to an apprehension of bias.

[33] The applicant expanded on the grounds of review in their supplementary affidavit and introduced a constitutional challenge to their application. The additional grounds of review are as follows:

- a) The application for the approval of the third respondent's designation is defective because it was made by a non-existent Chief's Council. According to the applicants, the Chief's Council could not exist without a chief in terms of s 9 of the Act, and the designation of Manasse Zeraeua was thus ultra vires and a nullity.
- b) The Minister's failure to invoke s 5(10) to direct that an election be held to elect the chief is flawed, which renders his decision to designate Manasse Zeraeua as chief a nullity or, at the very least, caused it to be reviewable.

[34] The applicants also raised a constitutional challenge. Their constitutional challenge is based on the judgment of *Witbooi v Minister of Urban and Rural Development*,<sup>5</sup> in which the court held that disqualifying an applicant for designation as chief because he or she stems from the matrilineal lineage of the royal family is discriminatory and violates Articles 10(1) and (2) of the Namibian Constitution.

[35] It should be noted that the applicants did not deal with the original grounds of review in their heads of arguments. These grounds were, however, not formally abandoned, and it is clear that the applicants are of the view that the grounds raised in the supplementary affidavit would be dispositive of the matter. Four specific issues were identified in the applicants' heads of argument, which I will deal with below.

#### The founding and answering affidavits

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<sup>5</sup> *Witbooi and Others v Minister of Urban and Rural Development* 2022 (2) NR383 (HC).

[36] Due to their voluminous nature and numerous annexures, I will not summarise the founding and answering affidavits. However, it is evident from these affidavits that the majority of the facts are undisputed. In instances where there may be a disagreement, I will address and clarify them.

[37] It is common cause that the disputing parties are polar opposites to the ascertainment of the prevailing customary law of succession. The parties are ad idem that succession is hereditary but that is as far as the common cause goes. The issues between the parties are basically as follows:

[38] The applicants contend that the authority to designate a chief resides with the Tipepa/Ovakweyuva vOmuzi clan of the Zeraeua Traditional Authority and, that all chiefs come from the maternal line of the clan, and that there is no rule that the son succeeds his father. The applicants further contend that the second applicant, Mr Puriza, is the head of the Tipepa/Ovakweyuva clan and, thus, the correct appointing authority.

[39] The applicants further aver that the late Chief Christian gave directions in his dying notes regarding his succession, which is binding and should be complied with. The applicants contend that the suggestion that all the chiefs of the Zeraeua Traditional Authority are from the Zeraeua Royal Family is incorrect.

[40] The second and third respondents strongly oppose this view and assert that succession is hereditary for the Zeraeua Traditional Community and follows the paternal line, except in exceptional circumstances.

[41] The second and third respondents contend that Mr Kapia is not, and never has been, the designated successor of the late Chief Christian. They further claim that the first applicant is not a member of the Zeraeua Royal Family and, consequently, was never eligible to become the successor. On the other hand, the third respondent is the



rightful person to succeed the late Chief Christian as he meets all the criteria for eligibility as successor prescribed by the Zeraeua Traditional Community's Customary Laws.

[42] The second and third respondents submitted that there was no decision by the Chief's Council authorising Mr Puriza to lodge an application for approval of the designation of Mr Kapia as chief.

### Statutory framework

[43] The designation of a chief of a traditional community is both a matter of customary and statutory law.<sup>6</sup> The applicable statutory framework within which an appointment of a new chief is made in terms of the Traditional Authorities Act 25 of 2000. For purposes of the discussion that will follow hereunder, ss 4, 5, 6, and 12 are of importance.

[44] The provisions pertaining to the designation of a chief or head of the traditional community are to be found in s 4(1), which provides as follows:

#### **'4 Designation of chief or head of traditional community**

(1) Subject to sections 5 and 6, members of a traditional community who are authorised thereto by the customary law of that community, may designate in accordance with that law-

(a) one person from the royal family of that traditional community, who shall be instituted as the chief or head, as the case may be, of that traditional community; or

(b) if such community has no royal family, any member of that traditional community, who shall be instituted as head of that traditional community.

(2) The qualifications for designation and the tenure of, removal from and succession to the office of chief or head of a traditional community shall be regulated by the customary law of the traditional community in respect of which such chief or head of a traditional community is designated.'

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<sup>6</sup> *Minister of Urban and Rural Development and Others v Haindaka and Another* (SA 78/2021) [2023] NASC 19 (16 June 2023) at para 18.

[45] The next relevant section is s 5, to which s 4 is subject (per s 4(1) above), which provides as follows:

**'5 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  
 (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) . . .

(4) . . .

(5) . . .

(6) . . .

(7) On receipt of any written approval granted under subsection (2) or (6), the Chief's Council or Traditional Council or, in a situation contemplated in subsection (1)(b), the members of the traditional community, as the case may be, shall in writing give the Minister prior notification of

the date, time and place of the designation in question, whereupon the Minister or his or her representative shall attend that designation, and shall-

- (a) witness the designation of the chief or head of the traditional community in question; and
- (b) satisfy himself or herself that such designation is in accordance with the customary law referred to in paragraph (vi) of subsection (1).

(8) The chief or head of the traditional community shall at his or her designation under subsection (7), make or subscribe to such oath or solemn affirmation with regard to his or her office as chief or head as the relevant customary law may require.

(9) If-

- (a) the provisions of subsection (1) or (7) have not been complied with; or
- (b) the designation of a chief or head of a traditional community has not been conducted in accordance with the customary law referred to in paragraph (vi) of subsection (1), the designation of the chief or head of the traditional community concerned shall be invalid.

(10) If, in respect of a traditional community-

- (a) no customary law regarding the designation of a chief or head of a traditional community exists; or
- (b) there is uncertainty or disagreement amongst the members of that community regarding the applicable customary law, the members of that community may elect, subject to the approval of the Minister, a chief or head of the traditional community by a majority vote in a general meeting of the members of that community who have attained the age of 18 years and who are present at that meeting.'

[46] Section 6 reads as follows:

**'6 Recognition of chief or head of traditional community**

(1) If the Minister is satisfied that a chief or head of a traditional community has been designated in accordance with the requirements of this Act, he or she shall notify the President of such designation in writing, specifying the name, office, traditional title, if any, date of designation of

such chief or head, and the name of the traditional community in respect of which such chief or head has been designated.

(2) The President shall on receipt of a notice referred to in subsection (1) recognise the designation of the chief or head of the traditional community concerned by proclamation in the Gazette, setting out in such notice the particulars referred to in subsection (1) with regard to such chief or head.

(3) Notwithstanding any other provision to the contrary in this Act contained, a chief or head of a traditional community shall be deemed not to have been designated under this Act, unless such designation has been recognized under this section.

(4) Any application in terms of section 5 of the repealed Act for the designation of a chief or a supreme traditional leader of a traditional community which does not have a chief, which has not been finalized prior to the repeal of that Act by this Act shall be dealt with and finalized in terms of the corresponding provisions of this Act.'

[47] Lastly, I intend to refer to s 12 which refers to the settlement of disputes. It reads as follows:

**'12 Settlement of disputes**

(1) If a dispute arises amongst the members of a traditional community as to whether or not a person to be designated as-

- (a) chief or head of the traditional community in terms of section 4 is the rightful or a fit and proper person under the customary law of that community to be so designated; or
- (b) successor in terms of section 8 is the rightful or a fit and proper successor to the office of chief or head of the traditional community under the customary law of that community, and the members of that traditional community fail to resolve that dispute in accordance with such customary law, they may submit to the Minister a written petition, signed by the parties to the dispute, stating the nature of the dispute.

(2) On receipt of a petition referred to in subsection (1), the Minister may appoint an investigation committee consisting of such number of persons as he or she may determine, to

investigate the dispute in question and to report to the Minister concerning its findings and recommendations.

(3) The Minister shall on receipt of the report referred to in subsection (2) take such decision as he or she may deem expedient for the resolutions of the dispute in question.

(4) In the investigation or resolution of a dispute under this section regard shall be had to the relevant customary law and traditional practices of the traditional community within which the dispute has arisen.'

#### Arguments advanced on behalf of the parties

[48] This court received comprehensive heads of arguments in this matter and wishes to thank the respective counsel for their industry herein, as it greatly assisted this court. However, because of the extent of the arguments advanced, it is not possible to replicate them for purposes of this judgment. I will highlight the most important points made and elaborate on them during my discussion. The mere fact that I do not refer to specific issues does not mean I did not consider it.

#### *On behalf of the applicants*

[49] Mr Töttemeyer emphasised from the onset that it is not the first applicant's case that he seeks to be designated as the chief. He seeks that the court directs that there be an election in terms of the Act, alternatively that the matter be referred back to the Minister for him to conclude the mediation process.

[50] Mr Töttemeyer contended that there are four relevant issues which will be decisive of the matter and the relief sought by the application, which is as follows:

50.1 Firstly, the application for the designation of Manasse Zeraeua was purportedly made on behalf of the "Chief's Council". No Chief's Council for the traditional community existed. This renders the application for designation, as well as the designation itself

and all subsequent steps whereby Mr Zeraeua was recognised and appointed as chief, a nullity.

50.1.1 Mr Töttemeyer argued that if regard is to be had to ss 5, 8 and 9 of the Act, it is clear that once the chief dies, no Chief's Council can exist as the chief is an indispensable member of the Chief's Council. Therefore, the new chief needs to be designated in order to re-establish the Chief's Council.

50.1.2 This further implies that authorised members of the traditional community, and not any other entity, should then apply for the designation of the successor chief in terms of s 5(1) of the Act. Mr Töttemeyer argued that the Chief's Council sought to make an application to the Minister to designate Manasse Zeraeua as chief. The designation could not follow, in his view, as there was neither a Chief's Council at the time nor was the procedure authorised in terms of s 8(2).

50.1.3 Mr Töttemeyer referred the court to *Witbooi and Others v Minister of Urban and Rural Development*<sup>7</sup> and argued that Masuku J held that if the application for the approval of designation has been made by a body not authorised to do so by law, such application is defective, unlawful and cannot bring about legal consequences and is on that very basis a nullity and thus bound to be set aside.<sup>8</sup> Counsel contended that as a result, the decision taken by the Minister on 22 August 2019 to approve the designation application with respect to the third respondent should be set aside.

50.2 Secondly, the Minister, in recognising Manasse Zeraeua as chief of the Traditional Community, applied customary law that discriminates against women and violates Article 10 of the Namibian Constitution. On this basis, the designation of

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<sup>7</sup> Supra footnote 5.

<sup>8</sup> Supra footnote 5 para [60] read with paras [52] to [59].

Zeraeua and all steps taken pursuant thereto (or flowing therefrom) are likewise nullities.

50.2.1 On the application of the customary law by the Minister with respect to the succession by Manasse Zeraeua in the patrilineal lineage, Mr Töttemeyer argued that the customary law may not conflict with the Namibian Constitution.

50.2.2 In this regard, the court was again referred to the *Witbooi*<sup>9</sup> matter, wherein the court held that customary law, which requires that a candidate for chieftainship must hail from patrilineal lineage is discriminatory against women because a candidate can be disqualified for no other reason than he or she being from the matrilineal line, which discrimination is a violation to the right to equality as embodied in Article 10(1) and (2) of the Namibian Constitution. Counsel contended that for this reason, all the decision-making flowing from the Minister should likewise be set aside.

50.3 Thirdly, given the longstanding irreconcilable and insoluble dispute that exists between the two factions of the Traditional Community, the Minister should have determined that an election be held to determine chieftainship within the Traditional Community as contemplated by the relevant provisions of the Act and should be directed to direct and approve such an election.

50.4 Fourthly (and as an alternative to what is stated in para 50.3 the matter should be referred back to the Minister to consider and take a decision on whether or not approval and direction should be granted to hold an election as aforementioned.

50.4.1 Finally, Mr. Töttemeyer addressed the question set out in paras 50.3 and 50.4 together. In his submission, Mr Töttemeyer highlighted that there exists a serious division among the members of the Traditional Authorities, which has persisted for many years without a solution in sight.

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<sup>9</sup> *Witbooi and Others v Minister of Urban and Rural Development* 2022 (2) NR383 (HC).

50.4.2 Mr Töttemeyer argued that s 5(10) permits an election subject to the approval of the Minister. The jurisdictional fact that the holding of such an election, will bring uncertainty or disagreement amongst the members of the community regarding the applicable customary law, is without a doubt present in the current matter. Mr Töttemeyer disagrees with the interpretation of s 5(10) by the respondents. They claim that the section allows for a decision by the Traditional Community to hold an election, which is subject to the Minister's approval, and that the Minister cannot invoke the section to hold an election. However, Mr Töttemeyer has a different viewpoint on this matter. Mr Töttemeyer argued that the Minister had a wider range of permissible options to resolve the dispute at hand, and an election is an option to consider. Mr Töttemeyer specifically referred to s 12 in this regard.

50.4.3 Counsel submitted that the question that remains is whether the court should direct the holding of an election or whether this aspect should be referred back to the Minister for decision, given the fact that courts would not likely take a decision in the place of the decision maker and refer the matter back unless there are special circumstances not to do so.

50.4.4 Special circumstances in the current context, according to Mr Töttemeyer, would favour the court to take the decision itself, such as the extensive delay in resolving the issue between the parties as a result of the arbitrary nature of the Minister's decision-making.

*On behalf of the first and fourth respondents*

[51] Mr Ncube highlighted the long history of this matter and the extensive engagement by the Minister (and his predecessors) with the parties that started in 2012



with no end in sight. He submitted that even if the matter went to an election, it would still not resolve the dispute between the parties.

[52] Mr Ncube submitted that throughout the process, the applicants' rights to fair administrative justice were observed without derogating from their rights to be heard, as there were broad and consultative interactions at all pertinent stages. Mr Ncube, therefore, urged this court not to exercise its review power by substituting its own discretion for that of the administrative official whose decision is reviewed. The court should consider if the requirement of procedural fairness, incidental to natural justice, was met and if the administrative official failed to exercise his discretion, or if he did so, whether it was actuated by improper motives or determined if an irregularity appears on record.

[53] Mr Ncube contends that in the context of the relevant legislation, the members of the Zeraeua traditional community, authorised by their customary law, designated Mr Zeraeua as chief. Hereafter, the Chief's Council of the Zeraeua Traditional Authority submitted the application for approval in compliance with the provisions of s 5(1) of the Act. The Minister approved the designation in line with the authorities of this court.<sup>10</sup>

[54] Mr Ncube submitted that there is no merit in the applicants' complaint that they did not receive audi in this matter as there were various meetings held by the Minister. In addition, there was mediation, and an investigation committee was appointed and tasked to investigate the matter and file a report. In this regard, Mr Ncube referred the court to the *Nelumbu and Others v Shikumwah and Others*,<sup>11</sup> wherein the Supreme

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<sup>10</sup> *Kapia v Minister of Urban and Rural Development and Others* 2018 (2) NR 432 (HC) at 442D and 443 B-H; *Nguvauva v Minister of Regional and Local Government, Housing and Rural Development* 2013 (4) NR 932 (SC) at 938E -940, *Kahuure and Another in re Nguvauva v Minister of Regional and Local Government and Housing and Rural Development and Others* 2013 (4) NR 932 (SC) at 938E-940D paras 1201 to 1231.

<sup>11</sup> *Nelumbu and Others v Shikumwah and Others* (SA 27 of 2015) [2017] NASC 14 (13 April 2017) at para 54.

Court held that audi is a flexible principle and ‘what fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects’.

[55] Mr Ncube submitted that it is clear that the applicants want the process to be restarted. He referred the court to *Minister of Urban and Rural Development v Haindaka*,<sup>12</sup> where the facts are similar to the matter at hand. Mr Ncube pointed out that the Supreme Court frowns at matters of this nature that continue *ad infinitum* without any finality in sight as it is not in the interest of the community who haven’t had a recognised chief for many years.

[56] Mr Ncube further strongly disagreed with the argument that the Chief’s Council ceases to exist at the death of the chief and again referred to the *Haindaka*<sup>13</sup> matter in this regard.

[57] Mr Ncube submitted that in the current instance the Zeraeua Traditional Community, who are authorised by their customary law to designate Mr Zeraeua, where after the Chief’s Council of Zeraeua Traditional Authority submitted the application for approval. All the requirements of s 5(1) were complied with. Contrariwise, the applicants did not comply with the requirements set out in s 5(1). Therefore, the Minister acted lawfully when he approved the application to designate Manasse Zeraeua. He further argued that the facts clearly show the steps that the Minister took, inclusive of the reports that were submitted.

[58] Mr Ncube submitted that the decision taken by the Minister was both rational and lawful and that the Minister had exhausted all the remedies available to him.

[59] Counsel further raised the issue of dispute of fact and submitted that where there is a genuine dispute of fact on the papers, and these have not been referred to oral

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<sup>12</sup> *Minister of Urban and Rural Development v Haindaka* (SA 78/2021) [2023] NASC 19 (16 June 2023).

<sup>13</sup> Supra footnote 12.

evidence, the version of the respondent prevails unless it is so farfetched that it can be rejected on the papers. In this instance, the applicants failed to apply to have the matter referred for oral evidence despite the knowledge that there is a genuine dispute of fact between the parties. Therefore, the entrenched principle in motion proceedings that a party must stand or fall by its papers must apply. Mr Ncube contended that considering what was set out in the respondents' answering papers as well as their heads of argument, the applicant cannot succeed with this review.

[60] On the issue of the constitutionality of the decision of the Minister, Mr Ncube first and foremost argued that the *Witbooi* matter<sup>14</sup> finds no application to the current facts as the remarks by the court were obiter because the issue of constitutionality was not before the court. He further contended that the issue the court remarked on concerned the absolute barring of females from ascending to chieftaincy positions. This, in his view, has no bearing on the ascendancy to chieftaincy under customary law, either through the patrilineal or matrilineal customary law determinations. The *Witbooi* matter is, therefore, distinguishable from the matter at hand.

[61] To reinforce his point, Mr Ncube further pointed out that the establishment and recognition of customary law is reasonable, clear and consistent with statutory law and it should be uniformly observed and long established. This is premised on the nuances and applicability to the specific homogenous traditional authority pertaining to succession.

*On behalf of the second and third respondents*

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<sup>14</sup> Supra footnote 9.

[62] Ms Bassingthwaighte submitted that it would appear that the applicants abandoned their original grounds of review but did not formally do so, but the applicant's counsel only argued the grounds raised in the supplementary affidavit.

[63] Ms Bassingthwaighte contended that the argued case for the applicants is different from the case management report.

[64] Ms Bassingthwaighte further pointed out that the respondents raised the issue of locus standi, as Mr Kapia says that his application was made by Mr Puriza and submitted on the approval of the Chief's Council. Counsel argues that this is an interesting point to make, given the fact that the applicants make an effort to emphasise the fact that Mr Zeraeua's designation is a nullity because the Chief's Council did not exist at the time. Counsel submitted that if that point is upheld, it would mean that the application of Mr Kapia would also be a nullity for the very same reason, causing the applicants to have no locus standi to bring this application.

[65] She was further of the view, that the applicants are conflating the question of who may designate with the question of who may bring the application for such designation in terms of s 5 of the Act.

[66] Counsel pointed out that the existence of the Chief's Council was previously considered in *Haindaka v The Minister of Urban and Rural Development and Others* when the matter served before Angula DJP. This was not the judgment that was taken on appeal, in the Supreme Court judgment referred to earlier. Ms Bassingthwaighte submitted that Angula DJP found that the death of the chief would not cause the Chief's Council to dissolve as the Council is responsible for the day-to-day running of the affairs of the Traditional Authority. This would cause a state of uncertainty and stagnation in the affairs of that community, resulting in a situation where nobody attends to the day-to-day affairs of the community.

[67] Ms Bassingthwaighte put forth the argument that once the Chief's Council is established, there is no specific reference in the Act regarding its dissolution. However, if the applicants' argument is accepted, it would imply that when the chief is promoted to the position of Minister, it would result in the dissolution of the Council by implication.

[68] In respect of the relief sought by the applicants, Ms Bassingthwaighte submitted that the applicants misread s 5(10) or misunderstood the role of the Minister as far as this is concerned. She contended that s 5(10) does not impose any obligation on the Minister to order or direct that the community holds an election when there is uncertainty or disagreement amongst the members of the community regarding the applicable customary law.

[69] Counsel submitted that the section provides a remedy to the members of the community in the event that there is uncertainty or disagreement amongst those members regarding the applicable customary law. In that circumstance, the community may elect a chief. The role of the Minister is to approve such an election. Therefore, if the community does not make a decision to hold an election, there is nothing the minister can approve. In this regard, Ms Bassingthwaighte submitted that there is no evidence before the court that the Zeraeua Traditional Community took a decision to elect a chief and that, in any event, such a decision would be contrary to the customary law of Zeraeua Traditional Community as succession is hereditary.

[70] On the constitutionality issue, Ms Bassingthwaighte submitted that the remarks by the court in the *Witbooi* matter<sup>15</sup> were obiter as the court did not need to deal with the particular issue. Furthermore, the court made it clear that it did not decide the matter directly.

[71] In addition thereto, the issue before the court is not discrimination against women. Ms Bassingthwaighte submitted that there was no evidence placed before this

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<sup>15</sup> Supra footnote 9.

court that women would be disqualified from becoming a chief. Whether it is a woman or a man who is from the matrilineal line is irrelevant as neither would qualify to be chief. She contended that the relevant customary law does not discriminate between men and women in this regard.

[72] Ms Bassingthwaighte pointed out that if applicants' arguments in this respect are accepted, then the succession, which, according to the applicant, is always from the matrilineal line, would then be equally unconstitutional.

## Discussion

### *General*

[73] The applicants listed approximately ten grounds on which the administration of the Minister should be reviewed and set aside. These are over and above the challenge to the constitutionality of the Minister's decision. The arguments advanced on behalf of the applicants were largely limited to the grounds of review raised in the supplementary affidavit and focused on the four issues highlighted by Mr Tötemeyer. I will, however, briefly touch on the original grounds for review hereunder.

[74] The applicants now no longer seek an order that Mr Kapia's designation be approved in terms of s 5(2) and directing the Minister to inform the President of such designation. The applicants also amended the relief they seek in the alternative, which should follow the decision of 22 August 2019 being set aside.

[75] The amendments introduced, as alternative relief, is that the decision be declared null and void for being in conflict with Articles 1, 10 and 18 of the Namibian Constitution and that the first respondent be directed to "direct and approve" an election of the chief of the Zeraeua Traditional Community in terms of s 5(10) and/or s 12(3) of the Act.

### *General principles of review*

[76] In *Kanime v Minister of Justice*,<sup>16</sup> the Judge-President quoted with approval the dictum in *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board and Others*<sup>17</sup> wherein the court stated as follows:

'The purpose of judicial review is to scrutinize the lawfulness of administrative action in order to ensure that the limits to the exercise of public power are not transgressed, not to give the courts the power to perform the relevant administrative function themselves. As a general principle, therefore, a review court, when setting aside a decision of an administrative authority, will not substitute its own decision for that of the administrative authority, but will refer the matter back to the authority for a fresh decision. To do otherwise would be contrary to the doctrine of separation of powers in terms of which the legislative authority of the State administration is vested in the Legislature, the executive authority in the Executive, and the judicial authority in the courts.'

[77] This court is called upon to scrutinize the lawfulness of the administrative action taken by the Minister. In *Fire Tech System CC v Namibia Airports Company Limited*,<sup>18</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:

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<sup>16</sup> *Kanime v Minister of Justice and Others* (Appeal 166 of 2011) [2013] NAHCMD 73 (19 March 2013) at para 48.

<sup>17</sup> *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board and Others* 2001 (12) BCLR 1239 (C) at 1259D-E.

<sup>18</sup> *Fire Tech Systems CC v Namibia Airports Company Limited* (A 330-2014) [2016] NAHCMD 220 (22 July 2016) para 40.

[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.'

### *Onus*

[78] On the issue of onus, this court, in *New Era Investment (Pty) Ltd v The Roads Authority*,<sup>19</sup> 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, . . . . '

### *Chief's Council*

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<sup>19</sup> *New Era Investment (Pty) Ltd v The Roads Authority* (A 05/2014) [2014] NAHCMD 56 (20 February 2014).



[79] It is the case of the applicants that the designation of Mr Zeraeua was a nullity because the application was made by a non-existing Chief's Council. The applicants relied on the *Witbooi* judgment in support of their contention that if the application for the approval of a designation has been made by a body not so authorised to do so by law, such application is defective, unlawful and cannot bring about legal consequences. The *Witbooi* matter in this regard is distinguishable as the issue before the court was whether the Traditional Authority could make the application for designation instead of the Traditional Council.

[80] The argument by the applicants is not that the wrong entity applied for the designation of the new chief. They contend that the Chief's Council essentially dissolved at the passing of the late Chief Christian and could only be re-established with the designation of the new chief. No authority was advanced for the argument apart from saying that the chief is an integral part of the Chief's Council and, therefore, no chief equals no Chief's Council.

[81] This argument is self-defeating, as pointed out by Ms Bassingthwaighte. The applicants in paras 3 and 26 of Mr Kapia's founding affidavit stated as follows:

'This applicant, acting with the authority of the Chief's Council and the Zeraeua Royal Family, lodged the application with the 1<sup>st</sup> respondent for the approval to designate me as Chief of the Zeraeua Traditional Community on or about 3 March 2014.'<sup>20</sup>

and

'Thereafter on or about 3 March 2014 2<sup>nd</sup> applicant duly authorised by the Chief's Council for the Royal House of the Zeraeua again filed an application in terms of the Act to the 1<sup>st</sup> respondent to approve my designation as Chief.'<sup>21</sup>

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<sup>20</sup> Para 3 of the Founding affidavit.

<sup>21</sup> Para 26 of the Founding affidavit.

[82] Interestingly enough, Mr Puriza identified himself in the confirmatory affidavit as a member of the Chief's Council of the Zeraeua Traditional Community, and he confirmed what Mr Kapia stated in the founding affidavit as true and correct, therefore confirming the authorisation by the Chief's Council.

[83] Section 9(1) 'There is hereby established-

(a) for every traditional community which has a chief, a Chief's Council' (my emphasis)

[84] The section is clear: the institution of the entity called the Chief's Council was established when the Act came into operation. It does not say that a Chief's Council is established until the death of the chief, who is the chairperson of the council. Nowhere from my reading of the Act is there any provision for the re-establishing of the Chief's Council or an indication under which circumstance the Chief's Council would dissolve.

[85] The Chief's Council is responsible for the day-to-day administration of the affairs of the Traditional Authority with respect to which it has been established. If the argument by the applicants holds true, it would mean that for seven years (from the date of the passing of Chief Christian until the designation of Manasse Zeraeua), nothing happened with respect to the day-to-day administration as everything would have ground to a halt at the death of the late chief. In my view, that could never have been the intention of the Legislature.

[86] I must agree with Angula DJP when he stated as follows in this regard:

[80] The Chief's Council, on the other hand, is in terms of s 9(4) of the Act responsible for the day-to-day administration of the Traditional Authority. . . In my judgment, the fact that a chairperson or chief dies does not dissolve the Chief's Council. I would expect that in the event of the death of the chairperson or chief, the normal rules of meetings take effect: That is, that

the members of the council in office shall appoint an ad hoc chairperson to preside over the meetings of the Chief's Council until such time that a chief is designated and recognized.

[81] It follows therefore from the foregoing that the argument by Mr Nekwaya that the Chief's Council ceases to exist following the death of the chief cannot stand. To uphold this argument would result in a state of uncertainty and stagnation in the affairs of affected members of that community, resulting in a situation where there is nobody attending to the day-to-day affairs of that community.'

[87] I am of the view that this point raised by the applicants cannot stand as it has no merit. As pointed out by Ms Bassingthwaighe, one should not conflate the issues of who may designate and who may bring the application for designation.

[88] Section 4(1) provides that members of a traditional community who are authorised thereto by the customary law of that community may designate, and s 5(1) provides that if a traditional community intends to designate a chief, the Chief's Council shall apply on the prescribed form to the Minister for approval to make such designation. I am not referring to the other alternatives that s 4 and 5 provide, as they are not relevant to the facts of the current matter. What is relevant are the provisions that deal with a traditional community that has a chief and a Chief's Council.

[89] The application for Mr Kapia was made by Mr Puriza as an 'authorised member of the traditional community Zeraeua Royal Family'. Clearly, this application was not made as provided for in s 5(1) of the Act. The application ought to have been made by the Chief's Council<sup>22</sup> and not by the second applicant acting for and on behalf of the Royal family.

### *Customary law applicable to succession*

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<sup>22</sup> See s 5(1)(a) of the Act.

[90] This brings me to the next issue, which is customary law applicable to the succession of the Chief of the Zeraeua Traditional Community and whether the Minister's decision was unconstitutional.

[91] In the application for the designation of the first applicant, the summary provided in respect of the customary law applicable in respect of the designation of the chief was indicated thus: 'Royal family meet to select from among the identified off-spring born to the line of succession and present candidate to the Traditional Community for endorsement'.

[92] This succession dispute is underlined by two conflicting versions of the applicable customary law on the succession of the chief issue, which resulted in the Zeraeua Royal Family having split into two factions. One of the two factions represents the paternal family, and the other represents the maternal family. The paternal faction favoured the designation of Manasse Zeraeua, whereas the maternal faction favoured the designation of Raphael Kapia.

[93] The applicants contend in their papers that the authority to designate a chief resided with the Tjipepa/Ovakweyuva vOmuzi clan ("the Royal Family") of the Zeraeua Traditional Community, that all chiefs came from the maternal line of this clan and that there is no rule that the son succeeds his father. The applicants further contend that the decision of who should become chief is determined by the aforesaid Royal Family and that such a person does not necessarily have to come from the Zeraeua Royal Family.

[94] In *Haindaka*, the Supreme Court stated that in terms of s 4 of the Act, the power to designate a chief or head of the community is vested in the members of a traditional community who are authorised by the customary law of the community to do so. The designation has to be done in accordance with the customary law of the community. The authorised members of a traditional community may designate one person from the

royal family of the traditional community, where such a royal family is in place, who *shall* be instituted as the chief or head of the community<sup>23</sup>.

[95] As indicated earlier in the judgment, it is common cause between the parties that succession is hereditary, but each party holds different views as to what the applicable customary law of the community is.

[96] It is, therefore, essential to determine each party's position on the applicable customary law. A party relying on customary law must prove or establish such customary law.

[97] The person on whose evidence reliance is to be placed must qualify himself as an expert on the norms, customs and traditions of the traditional community whose customary law such person testifies about. Mtabwanengwe AJA held in *Mbanderu Traditional Authority and Another v Kahuure and Others*<sup>24</sup> that a failure to do so is fatal.

[98] In support of their claims in respect of the customary law applicable to the traditional community in question, the applicants filed with the founding affidavit an affidavit of Reverend Sondaha Kanguuehi. This affidavit served as a confirmatory affidavit in the initial review proceedings that served before Ueitele J. During interlocutory proceedings in 2022, Annexures 1 and 2 to the founding affidavit were struck out, and this affidavit was filed under Annexure 1 to Mr Kapia's founding affidavit.<sup>25</sup> The affidavit of Reverend Sondaha Kanguuehi is, therefore, of no assistance as it cannot be considered for the current proceedings.

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<sup>23</sup> Supra at footnote 11 at para [55].

<sup>24</sup> *Mbanderu Traditional Authority and Another v Kahuure and Others* (2007) [2008] NASC 7 (14 July 2008) at para 58.

<sup>25</sup> *Kapia v Minister of Urban and Rural Development* (HC-MD-CIV-MOT-REV-2019/00395) [2022] NAHCMD 250 (19 May 2022).

[99] The applicants further filed the affidavit of Dr Immanuel Banda Hijangaruu Vessevete, on which they would rely in support of their contentions on the succession lineage. This affidavit was filed together with Mr Kapia's replying affidavit and not in confirmation of the founding affidavit. This affidavit was filed without leave of court, and the respondents did not have the opportunity to respond thereto. This court cannot take cognisance of this affidavit.

[100] There is a clear factual dispute as to the customary law that regulates succession in the Zeraeua Traditional Community. However, there is no expert evidence on behalf of the applicants.

[101] In *Haindaka*,<sup>26</sup> the Supreme Court further found that 'in an application of this nature, where factual disputes arose on affidavit and were not resolved by reference to oral evidence, those disputes fall to be determined on the approach adopted in the *Plascon-Evans* case.'<sup>27</sup> The Supreme Court pointed out that 'this approach was followed by our courts in numerous cases, including *Rally for Democracy and Progress*<sup>28</sup> where it was stated that such conflicts of fact should be resolved on the admitted facts and the facts deposed to by or on behalf of the respondent.'<sup>29</sup> It was further stated there that the facts set out in the respondent's papers are to be accepted unless a court considers them to be far-fetched or untenable.<sup>30</sup>

[102] The second and third respondents filed the affidavit of Mr Alfons Edward Tjiurutue with their answering affidavit. The third respondent qualified himself as an expert but also relied on the expertise of Mr Alfons Edward Tjiurutue, whose affidavit was filed with the second and third respondents' answering affidavits. Mr Tjiurutue was appointed as a Traditional Councilor under the late Chief Christian. Mr Tjiurutue is 83

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<sup>26</sup> Supra footnote 11 at [46].

<sup>27</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

<sup>28</sup> *Rally for Democracy and Progress v Electoral Commission for Namibia & others* 2013 (3) NR 664 (SC).

<sup>29</sup> Para 99.

<sup>30</sup> Ibid.

years old and was brought up with the traditions and customs of the Zeraeua Traditional Community.

[103] The third respondent and Mr Tjiurutue referred to history books in support of their versions of the applicable customary law as well as the history of the chieftainship within the Zeraeua Traditional Community. According to Mr Tjiurutue, succession in the Zeraeua Traditional Community is always along paternal lines, and this has been recorded in several books. In this regard, he referred specifically to the book titled *Customary Law Ascertained Vol 3*, authored by Manfred Hinz and assisted by Alex Gairiseb. These authors pertinently refer to the customary laws of Zeraeua and record the rules of succession as first priority the younger brother of the Chief, and if none is available, then the community has to look at the second choice, which is the firstborn of the Chief born within wedlock or the brother of the firstborn son.<sup>31</sup>

[104] Mr Tjiurutue further referred to a report prepared by the then Administrative Office in Windhoek, South West Africa, in January 1918 on the treatment of 'The Natives of South West Africa by Germany'. In this report, on the issue of succession, it is stated that 'the chief derives his rights through the "Oruzo" or paternal order to which he belongs. The report further explains that a chief will always be the eldest son of the chief by his principled wife; failing, his surviving brother would become chief and, failing him, the eldest son of the brother.

[105] Mr Tjiurutue stated that this line of succession is the general custom among the different Ovaherero communities. The difference in respect to the Zeraeua Traditional Community is that the first person in line to succeed the chief is the chief's younger brother. Where there is no younger brother and no sons, the chief would be succeeded by a nephew.

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<sup>31</sup> Prof Manfred O Hinz assisted by Alex Gairiseb *Customary Law Ascertained Volume 3: The Customary Law of the Nama, Ovaherero, Ovambanderu, and San Communities of Namibia* Published 2016 University of Namibia Press at p 400.

[106] Mr Tjiurutue stated that it would be wrong to state that succession is always along the maternal line. The chief would only be chosen from the members of the Zeraeua Royal family.

[107] In response to the list of chiefs set out by Mr Kapia in his founding papers, the third respondent states that these people were not chiefs but, indeed, Headmen under the apartheid regime. In support of this contention, he filed correspondence by the Magistrate of Omaruru dated October 1922 to the then Secretary of South West Africa, where the Magistrate recommended Philemon Kapia be appointed as Headman. The third respondent maintains that the community did not select the headmen. Both the third respondent and Mr Tjiurutue set out the line of succession from the first chief, who was identified as Chief Wilhelm Zeraeua.

[108] In the report by the Ministerial Investigation Committee (period from 7 to 13 October 2014), they also recorded the historical background and the Zeraeua Royal Leadership family tree, where it is indicated that the last 'Ombara' or chief before the late Chief Christian was in 1904. Thereafter, there were a number of Headmen, and the late Chief Christian was appointed headman in 1979 but became Chief in 1998.

[109] Although the applicants dispute the correctness of the position as to succession as set out by the respondents, they failed to apply to have this matter referred to oral evidence in that respect and have no expert evidence before this court to support their position on the succession lineage. This, in my view, is fatal for the applicant's case.

[110] The criticism raised with respect to the literature and reports referred to is, in any event, unfounded. In *Kaputuaza and Another v Executive Committee of the*



*Administration for the Hereros and Others*,<sup>32</sup> the court held in respect of Herero customary law that such customary law is part of the law of South West Africa and, therefore, the court can take judicial notice of it, and it does not need to be proved in the same manner as foreign law. The court can inform itself of the customary law from history books and a party can prove customary law through an ordinary person who has knowledge of the nature of the customs and the period over which they have been observed.<sup>33</sup>

### *Constitutionality*

[111] The applicants raised the issue of the constitutionality of the Minister's decision belatedly in the wake of the judgment in the *Witbooi*<sup>34</sup> matter, which placed the cat amongst the proverbial pigeons, causing the applicants to amend the relief sought.

[112] At the time that this matter was argued the appeal was still pending before the Supreme Court. The Supreme Court, in the interim, dealt with the appeal in *Witbooi v Witbooi*,<sup>35</sup> and when considering the issue of constitutionality, Makarau AJA remarked as follows on this point:

[90] Firstly, correctly understood, the essence of the dispute between the parties was the applicable customary practice of the community. This is an aspect of the content of the customary law of the community. The content of the customary law was thus not agreed upon. Before that correct content of the customary law of the community was established by evidence adduced and assessed on a balance of probabilities, it was in my view premature to decide whether or not the customary law of the clan is unconstitutional. The issue was not ripe for adjudication. It was too early to pronounce on the constitutionality or otherwise of a law yet to be

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<sup>32</sup> *Kaputuaza and Another v Executive Committee of the Administration for the Hereros and Others* 1984 (4) SA 395 (SWA) at 301 E-I.

<sup>33</sup> *Tjingaete v Lakava NO and Others* 2015 (2) NR at 439 para 27.

<sup>34</sup> *Supra* at footnote 9.

<sup>35</sup> *Witbooi v Witbooi* (SA 31/2022) [2023] NASC (30 November 2023).

established. In the circumstances, it is my considered view that the court *a quo* ought to have shied away from making any findings on the matter, even tentative ones.

[91] Secondly, having been brought as a review, the matter turned to be resolved on the application of the principles of administrative law. There was no indication on the record that recourse to the principles of administrative law would have failed to resolve the suit that was before the court *a quo*.

[92] In practice, where a matter is capable of resolution by applying the principles of the common law or the provisions of a statute, the need to interpret the Constitution is obviated and becomes unnecessary as the application of the subsidiary law can and should provide an adequate remedy. It is only in instances where the interpretation of the Constitution is necessary to effect a remedy that a decision must turn directly, and in the first instance, on the provisions of the Constitution. This has given rise to the doctrine of constitutional subsidiarity discussed in detail by Cameron J in *My Vote Counts NPC v Speaker of the National Assembly & others*<sup>36</sup>. Put in the abstract, and to borrow from the language of Cameron J, subsidiarity in litigation denotes 'a hierarchical ordering of principles or of remedies, and signifies that the central or higher norm, should be invoked only where the more local or concrete norm, or detailed principle or remedy does not avail.' Put differently and simply, subsidiarity in litigation denotes a ranking of enforcement of laws, where the constitution as the supreme law is only invoked because there are no adequate remedies in either the common law or relevant statute. Thus, where it is possible to decide a criminal or civil case without reaching a constitutional issue that should be done.

[93] On the basis of the twin doctrines of subsidiarity and ripeness, it is my considered view that the remarks *a quo* on the constitutionality of the decision of the Minister were unnecessary. The remarks were pre-mature and the matter that was before the court *a quo* could have been competently determined and therefore should have been determined applying the common law principles of administrative law.

[94] Using the same twin principles, I refrain from determining the issue.'

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<sup>36</sup> *My Vote Counts NPC v Speaker of the National Assembly & others* [2015] ZACC 31.

[113] Not much more needs to be said on the constitutionality issue except that, in my view, it is not necessary to decide this issue on the prevailing customary law. As in the *Witbooi*<sup>37</sup> matter, the constitutionality issue was raised prematurely before me. As it stands, I must agree with the respondents that there appears to be no discrimination against women. There is no evidence before this court that women will be disqualified from becoming a chief. The disqualification operates against men and women from the matrilineal line equally. I do not wish to repeat the argument by Ms Bassingthwaighte in this regard, but she raised a valid question on the constitutionality of succession, which only follows from the matrilineal line. The question is then, is this not an instance where what is sauce for the goose is sauce for the gander?

[114] I am of the view that the challenge with respect to the constitutionality of the Minister's decision does not have any merit. The Minister made it clear that he made his decision after carefully considering the prevailing customary law of the Zeraeua Traditional Community and receiving legal advice in this regard.

*Minister's failure to order an election in terms of s 5(10)*

[115] The respondents are of the view that the relief sought in terms of s 5(10) is improper. The applicants are of the view that as a result of the irreconcilable dispute between the parties, the Minister should have determined that an election be held to determine the chieftainship. They further contended that in terms of s 12(3) of the Act, the Minister has wide discretion in terms of s 12(3) and should have taken such decision as he may have deemed expedient to resolve the issue upon receipt of the investigation report.

[116] Section 5(10)(b) provides for election in the event that there is uncertainty on the applicable customary law in a traditional community. This is an option that the Traditional Community can exercise, but there is no evidence before this court that the Traditional Community has indeed exercised this option.

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<sup>37</sup> Supra footnote 33.

[117] The Minister acted in terms of s 12 of the Act by ordering an investigation, and when it became clear that the dispute regarding the succession remained unresolved, a reconciliation committee was brought to life. The disputing parties are and have been worlds apart in this matter and remain irreconcilable. Even if the Minister could call for an election, it would not have made any difference in this matter as it would not have resolved the dispute.

[118] There is no evidence that the Traditional Community called for an election. It would appear that the rift created between the disputing factions ran too deep to even agree on this issue.

[119] I am not convinced that the discretion to call for an election lies with the Minister. In any event, there is no obligation on the Minister to do so in terms of s 5(10).

*Should the matter be referred back to the Minister to consider and make a decision on whether or not an election should be held?*

[120] This point presupposes that the decision taken by the Minister acted in an arbitrary, irrational and contrary to Article 18 of the Constitution.

[121] Having considered the facts of the matter, I am satisfied that the Minister's decision is none of the above. The Minister exhausted the remedies available to him. He had multiple engagements with the disputing factions, and he fully engaged them on their view on the customary law. The Minister's predecessors constituted an investigation team and a reconciliation committee. Mediation, supported by a court order, was also attempted. The Minister clearly engaged the institutional memory at his disposal to inform himself and consider the new information placed before him.<sup>38</sup>

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<sup>38</sup> *Ovambanderu Traditional Authority v Minister of Urban and Rural Development* (HC-MD-CIV-MOT-REV-2019/00239) [2023] NAHCMD 525 (25 August 2023) at para 82.

[122] The decision by the Minister clearly stated that he considered the facts as well as the legal opinion, and he made a decision that was in line with the relevant customary law and the provisions of the Act. The complaint by the applicants about audi finds no application in this matter in my view.

[123] In any event referring this matter to the Minister, which I do not intend to do, would create an intolerable situation by dragging the uncertainty for this Traditional Community out even further than the current 12 years that it has been dragging on.

[124] It would appear that the most expedient way of resolving the dispute was for the Minister to ask the traditional authority to designate a chief in accordance with the law.

### Conclusion

[125] In view of the discussion above, together with the conclusions reached, it seems to me that the applicants' application has no merit and stands to be dismissed.

### Order

[126] My order is as follows:

1. The application is dismissed.

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'[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. (my emphasis)

2. The first and second applicants are liable for the cost of the first, second, third and fifth respondents, jointly and severally, the one paying the other to be absolved.
3. Cost in respect of the second and third respondents to include costs consequent upon the employment of one instructing and one instructed counsel.

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JS Prinsloo

Judge

Appearances:

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Windhoek

First and fifth respondents:

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Second and third respondent:

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