



REPORTABLE

CASE NO: SA 78/2021

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MINISTER OF URBAN AND RURAL DEVELOPMENT	First Appellant
PRESIDENT OF THE REPUBLIC OF NAMIBIA	Second Appellant
SHAMBYU TRADITIONAL AUTHORITY	Third Appellant
COUNCIL OF TRADITIONAL AUTHORITIES	Fourth Appellant
THIRD APPELLANT'S CHIEF'S COUNCIL	Fifth Appellant

and

MARIA UKAMBA HAINDAKA	First
Respondent	
SOFIA MUNDJEMBWE KANYETU	Second Respondent

CORAM: SHIVUTE CJ, DAMASEB DCJ and FRANK AJA

Heard: 5 April 2023

Delivered: 16 June 2023

Summary: The appeal emanates from a chieftaincy succession dispute between two members of the royal family of the vaShambyu community in the Kavango

East Region. After the passing of the chief – traditionally known as the *Hompa* – of the community, a dispute arose as to who should succeed her. As the dispute could not be resolved under the community's customary law, it was escalated to the Minister of Urban and Rural Development in terms of the Traditional Authorities Act 25 of 2000 (the Act) for resolution. The Minister set up an investigation committee that made recommendations to her. The recommendations were accepted and the Minister issued five directives, incorporating the recommendations, on how the dispute should be resolved. One of such directives was that if the community could still not resolve the succession issue, then an election should be held to select the succeeding *Hompa*.

A new Minister came into office. In an attempt to break the deadlock, the new Minister directed that elections should take place. The candidates in the election were to be the two contenders to the throne.

One of the contenders instituted review proceedings in the High Court seeking the interdicting of the elections pending the outcome of the review proceedings she also instituted. The Minister ultimately conceded that the statutory provisions he relied upon as the basis for approval of the holding of an election did not apply to the facts of the dispute. The Minister's decision was accordingly set aside and the matter remitted to the Minister to take such decision as he might deem expedient for the resolution of the dispute.

Subsequent to the handing down of the High Court judgment, the Minister engaged the members of the royal family and explained to them his understanding of the judgment of the High Court. The Minister followed up the meeting with a letter in which he advised the traditional authority to make application for designation of the chief that is compliant with the relevant provisions of the Act as well as with the customary law of the community. The Minister explained in the letter that the applications for designation he had previously received were defective in that the parts which should have been completed by the Chief's Council of the traditional authority was completed by the candidates themselves. He gave a deadline within which the defects should be rectified.

The contenders seemingly accepted the Minister's decision and each separately approached the Chief's Council to complete her designation application and submit it to the Minister for approval. The Chief's Council resolved to support one candidate for designation and rejected the other's request for support, reasoning that it could not submit two applications for the designation of a chief in respect of one traditional community.

Despite this rejection, the candidate submitted her application to the Minister. The Minister decided to approve the application for the designation of the candidate whose application was submitted by the Chief's Council and rejected that which was not so submitted. The Chief's Council subsequently informed the Minister of the date of the coronation of the new *Hompa*.

The candidate whose application was rejected filed an application in the High Court for interim orders in terms of which the Shambyu Traditional Authority and its Chief's Council were to be interdicted from notifying the Minister of the date of the designation of the new chief and the Minister was to be restrained from designating the chief. This relief was sought pending the application for review of the Minister's decision directing the rectification of the alleged defects in the application for designation. The Minister's decision to approve the designation of a new chief was also sought to be reviewed and set aside.

The High Court held that the Act did not empower the Chief's Council to refuse to sign an applicant's application for designation. By refusing to sign the application, the Council usurped the Minister's powers. The Minister was simply presented with a *fait accompli* and acted on dictation by the Council.

As to the argument that the Minister acted contrary to the findings in the earlier review judgment in calling for the rectification of the applications, the court *a quo* held that as the Minister was given a wide discretion to take such decision as he may deem expedient, the decision directing the rectification of the defects in the application could not be faulted. The court nevertheless set aside the Minister's

decision approving the designation of a new chief and remitted the matter to the Minister to make a fresh decision as he may deem expedient. It also set aside the decision of the Chief's Council refusing to sign the other candidate's application and directed the Council to fill in her application form within a specified period.

The appeal lies against these orders. The second respondent, whose application for designation was approved by the Minister, supports the appeal and makes common cause with the submissions made on behalf of the appellants. The first respondent opposes the appeal and has also filed a cross-appeal against the High Court's order declining to set aside the Minister's decision directing the rectification of the applications for designation.

Held that on a proper approach to factual disputes in motion proceedings, the case put up by the appellants relating to the customary law of succession and the process followed in the second respondent's aborted designation was not refuted in the replying affidavit. Therefore, on the basis of the evidence presented by the appellants, it must be accepted that she met the requirements for designation under customary law and her designation as chief was done in accordance with the provisions of the Act.

Held that the Chief's Council was under a legal obligation to ensure that the designation of a *Hompa* was done in accordance with customary law and the provisions of the Act. Having already designated the second respondent, the Chief's Council would have greatly erred had it also purported to designate the first respondent by signing her application and sending it to the Minister for approval. The court a quo thus erred in characterising the refusal by the Chief's Council to sign and process the first respondent's application as the Council's usurpation of the Minister's powers.

Held that it seemed likely that the requirements of the Act that a chief of the community is chosen for designation by the traditional community itself and Government is obliged to approve and recognise a statutorily compliant designation is a deliberate legislative policy shift, marking a departure from the

egregious pre-independence legal framework that allowed the government to appoint chiefs for communities in the country.

Held that it was clear from the appellants' pleadings that the Chief's Council of the Shambyu Traditional Authority was authorised under customary law to designate a chief from the royal family of the community. It was also not seriously disputed in reply that the second respondent's designation was done in accordance with the customary law of the community and the relevant provisions of the Act.

Held further that the Minister acted correctly in refusing to approve the first respondent's designation since her application did not meet the requirements of the Act. The court a quo should have dismissed the review application.

As regards the cross-appeal:

Held that the great deal of latitude given to the Minister meant that it was within his powers to decide on the most expedient manner of resolving the dispute in accordance with the law.

Held that there is an additional reason why the Minister's decision could not be reviewed and set aside. Although there were two personalities occupying the office of Minister at the time of the making of the relevant decisions, notionally it is the same functionary who made the decisions. The Minister was simply continuing from where his predecessor had left off.

Held that in any event, the undisputed evidence was that all the efforts made to implement the Minister's directives had been exhausted and there was nothing else to implement.

Held further that to repeat the section 12 of the Act process would create an intolerable prospect of making the community wait, possibly inordinately, for the institution of its head while the first respondent engages the Minister in an

unrelenting game of ping-pong. It was not in the best interest of the community for this to occur.

APPEAL JUDGMENT

SHIVUTE CJ (DAMASEB DCJ and FRANK AJA concurring):

Introduction

[1] The spectre of family feuds over chieftainship succession has reared its ugly head again in this appeal. This time around the succession dispute has sadly pitted members of the vaKwankora royal family of the vaShambyu traditional community in Kavango East Region against each other. The vaShambyu community has had a long-standing tradition that allows a female member of the royal clan to be coronated as the head – with the traditional title of *Hompa* – of the community following a matrilineal system of succession and inheritance. At the centre of the present succession row are two members of the vaKwankora royal family, each from the Mukwahepo and the Mwengere lineages of the clan from which a successor to the chieftaincy may be selected. Each member contends to be the rightful heir to the throne of *Hompa* of the community and therefore the right person to be designated as chief of the community in terms of the relevant provisions of the Traditional Authorities Act 25 of 2000 (the Act).

Background

[2] After the passing of the *Hompa* of the vaShambyu community, the late Angeline Matumbo Ribebe on 14 June 2015, a dispute arose as to who should succeed her. The Mukwahepo lineage initially nominated Ms Maria Kunyanda Joachim to succeed the late *Hompa* while the Mwengere lineage nominated Ms

Sophia Mundjembwe Kanyetu, the second respondent in this appeal, for the position. Sadly, Ms Joachim passed away before the succession dispute could be resolved. Following Ms Joachim's passing, the Mukwahepo lineage nominated Ms Maria Ukamba Haindaka, the first respondent in the appeal. As the succession dispute could not be resolved in accordance with the customary law of the community, it was escalated to the Minister of Urban and Rural Development (the Minister) – responsible for the administration of the Act – for resolution. The Minister, acting in terms of section 12 of the Act, appointed a committee to investigate the matter. Upon consideration of the investigation committee's report, the Minister presented the royal family of the vaShambyu traditional community with a five-point directive for the resolution of the dispute. The directives largely mirrored the investigating committee's recommendations.

[3] First, the vaKwankora royal family was afforded an opportunity to resolve the succession dispute without the involvement of the non-vaKwankora royal family members. Second, the Minister directed that if the royal family failed to resolve the dispute, it must seek assistance for mediation from the Kavango East and Kavango West Traditional Authorities Regional Forum. Third, the royal family was directed to resolve the dispute within a period of four months, calculated from the date of receipt of the Minister's letter. Fourth, should the royal family fail to resolve the dispute within the stipulated time frame, as a last resort, elections for a new *Hompa* should be conducted since both candidates were eligible for succession in terms of the customary law of the community. Lastly, the parties to the dispute were enjoined to stick to the plan and encouraged to approach the

Ministry for clarification if required. For convenience, these decisions will interchangeably be referred to in this judgment as 'the first decision' or 'directives'.

[4] Despite the efforts made to implement the first decision, the dispute could still not be resolved and so on 29 June 2018, the successor in title to the Minister who made the first decision, purportedly acting in terms of s 5(10) of the Act, granted approval for the election of a new chief of the community to be held on 18 August 2018. The contestants in the election were to be the first and second respondents. For the sake of fairness and transparency, the new Minister undertook to approach the Electoral Commission of Namibia to provide logistical support for the exercise.

[5] Evidently aggrieved by the Minister's decision, Ms Haindaka lodged an urgent application seeking to interdict elections pending the outcome of the review proceedings she at the same time had instituted. The Minister subsequently conceded that the statutory provisions he relied upon as the basis for approval of the holding of an election did not apply to the facts of the dispute. The parties thus agreed that the decision should be reviewed and set aside on this basis.

[6] The High Court held, amongst others, that although the parties were agreed on the setting aside of the Minister's decision to approve the holding of elections, the first decision still stood and in the absence of a court order setting it aside, the Minister must decide the matter in terms of s 12 of the Act. The Minister's decision was accordingly reviewed and set aside and the matter remitted to him with a wider margin of discretion 'to take such decision as he might deem expedient for

the resolution of the dispute'.¹ To distinguish it from the review application to be discussed in the paragraphs below, this review application will be referred to as the election review application.

[7] Subsequent to the handing down of the High Court judgment, the Minister invited the contesting parties to a meeting in Windhoek to inform them of the way forward. Upon being informed that the candidates did not have funds to travel to Windhoek, the Minister travelled to Rundu where he met them on 9 October 2019. According to the minutes of that meeting, the Minister explained that he had called the meeting in light of the decision of the High Court in the election review application and to afford the parties to the succession dispute the right to make representations to him before he could take a decision he deemed expedient for the resolution of the dispute as ordered by the High Court.

[8] The Minister set out his understanding of the judgment in the election review matter. He explained that after a nomination had been made in terms of the customary law and submitted by the Chief's Council, it had to be approved by the Minister in terms of s 5 of the Act. The Minister explained further that the Chief's Council of the vaShambyu community existed and cannot disappear with the demise of a chief. He gave an analogy of a Presidency and Cabinet, explaining that the fact that there may not be a President did not mean that Cabinet had ceased to exist. He concluded his opening remarks by stating that he had studied the election review judgment and wanted to hear from the parties to the dispute as he intended to expedite taking a decision on the matter seeing that the community

¹ The High Court judgment is reported as *Haindaka v Minister of Urban and Rural Development* 2019 (4) NR 951 (HC).

had been without a *Hompa* for a long time. The Minister then gave an opportunity to spokespersons each from the Mwengere and the Mukwahepo lineages to make presentations on the process of designating a *Hompa* in terms of customary law, which they duly did.

[9] The Minister subsequently addressed a letter, dated 31 October 2019, to the Governor of the Kavango East Regional Council in which he stated that having perused the applications for designation submitted by Ms Kanyetu and Ms Haindaka, he was of the view that neither of the applications was compliant with the Act 'insofar as the part that is supposed to be completed by the Chief's Council has been completed by candidates for the chieftainship themselves.' He regarded that to be a defect requiring rectification by the candidates for their applications to comply with the law. The Minister set out the provisions of s 5(1) of the Act. He referred to a finding in the election review judgment that the Chief's Council of the Shambyu Traditional Authority existed. He also referred to s 5(2) of the Act and concluded that he could not consider an application to designate a chief that did not comply with s 5. Accordingly, the Minister gave the vaShambyu traditional community an opportunity to 'rectify the defects' in the applications for designation of a chief by 10 November 2019.

[10] The contenders seemingly accepted² the Minister's directive to seek the designation approval through the Chief's Council and each separately approached that body to complete her designation application and submit it to the Minister for

² Although Ms Haindaka later contended that she participated in the process only because she did not obtain prior legal advice and that had she been aware of her rights at the time, she would not have 'engaged' the Minister.

approval. The Chief's Council decided to support Ms Kanyetu's designation and rejected Ms Haindaka's subsequent request for support, reasoning that it could not submit two applications for the designation of a chief in respect of one traditional community.

[11] Despite this rejection, Ms Haindaka submitted her application to the Minister which was not completed on behalf of the Chief's Council nor was the content thereof verified by the regional Governor as required by regulation 2 of the Regulations made under the Act.³ Ms Kanyetu's application, on the other hand, appeared to have been duly completed, signed and verified. The Minister decided to approve Ms Kanyetu's application and rejected Ms Haindaka's. Each candidate was informed of the Minister's decision pertaining to her. On 18 November 2019, the Chief's Council informed the Minister that Ms Kanyetu would be coronated as *Hompa* of the community on 22 November 2019.

[12] Also on 18 November 2019, Ms Haindaka filed an application in the High Court for interim orders in terms of which the Shambyu Traditional Authority and its Chief's Council were to be interdicted from notifying the Minister of the date of Ms Kanyetu's designation as chief of the community, and the Minister was to be restrained from designating her as such. This relief was sought pending the application for review of the Minister's decision directing Ms Haindaka to 'rectify' the alleged defects in her application for designation. The Minister's decision to approve Ms Kanyetu's designation as chief was also sought to be reviewed and set aside. On 21 November 2019, Ms Haindaka was granted interim relief by the

³ Regulations made under the Traditional Authorities Act, 2000, Government Notice 94 of 2001 (Government Gazette No. 2532).

High Court. The review application in turn was heard on 10 February 2021 and reasons given on 9 September 2021.

Review application

[13] The review application is the subject matter of this appeal. In that application, Ms Haindaka contended, in summary, that the Minister's decision to call for fresh applications or the rectification of the applications for designation as chief of the community was unfair and unreasonable. This was contended to be so, on the basis that the decision was contrary to the order of the High Court in the election review application. It was further asserted that it was not open to the Minister to call for new applications without first having had the first decision set aside.

[14] The High Court agreed with Ms Haindaka's contentions and submissions and held that whatever defects present in Ms Haindaka's application form could have easily been rectified by the Chief's Council. The particulars that should be set out in the application form were readily available to the Shambyu Traditional Authority. The court held further that the Act did not empower the Chief's Council to refuse to sign an applicant's application for designation. By refusing to sign Ms Haindaka's application, the Council impermissibly usurped the Minister's powers: Instead of the Minister, it is the Chief's Council that decided Ms Haindaka's application. The Minister was simply presented with a *fait accompli* and acted on dictation by the Council.

[15] As to the argument that the Minister acted contrary to the findings in the election review judgment in calling for the rectification of the applications, the court a quo held that given the wider discretion given to the Minister 'to take such decision as he may deem expedient for the resolution of the dispute', the decision directing Ms Haindaka to rectify the defects in her application could not be faulted. While leaving that decision intact, the court set aside the Minister's decision approving Ms Kanyetu's designation as chief and remitted the matter to the Minister to make a fresh decision as he may deem expedient. It also set aside the decision of the Chief's Council refusing to sign Ms Haindaka's application and directed the Council to fill in her application form within 15 days from the date of the order.

[16] The appellants have now appealed against these orders. Ms Kanyetu supports the appeal and makes common cause with the submissions made on behalf of the appellants. Although the appellants' appeal is broadly stated to be against 'the whole judgment and all the orders' of the High Court, it cannot be correct that they have also appealed against the order declining the prayer to set aside the decision calling for the rectification of Ms Haindaka's application for designation. This is so because that order is not only in the appellants' favour, but it is the subject matter of a cross-appeal by Ms Haindaka. Ms Kanyetu opposes the cross-appeal.

[17] The main thrust of Ms Haindaka's case in the cross-appeal is that the decision appealed against was inconsistent with the finding in the election review application that her application was already properly before the Minister. The court

a quo's above findings and Ms Haindaka's cross-appeal will be considered later in the judgment. It has become opportune at this point in time to consider the legal framework regulating the designation of a chief of a traditional community.

Designation legal framework

[18] It is clear from a reading of the Act in context that the designation of a chief of a traditional community is both a matter of customary and statutory law. As such it is necessary to consider first the statutory scheme for the designation of a chief before considering whether Ms Kanyetu's aborted designation was done in compliance with the statutory requirements and the customary law on chieftaincy succession of the vaShambyu traditional community. In considering the statutory context, reference will be made only to the pertinent provisions of the Act.

Statutory scheme

[19] The overall purpose of the Act as set out in its preamble is to provide for the establishment of traditional authorities; the designation, election, appointment and recognition of traditional leaders; to define the powers, duties and functions of traditional authorities and traditional leaders; and to provide for matters incidental thereto. Section 3 sets out the powers, duties and functions of traditional authorities and their members. Subsection (1) thereof provides in part that the functions of a traditional authority are to promote peace and welfare amongst the members of its community, supervise and ensure the observance of the customary law of the community by its members, and in particular to ascertain the customary law applicable in that traditional community after consultation with the members of

the community, and assist in its codification; and administer and execute the customary law of that traditional community.

[20] 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:

- '(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.'
(Emphasis added)

[21] Section 5, being one of the sections to which s 4 is 'subject' is headed 'Prior notification of chief or head of traditional community' and it provides:

- '(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. . . (The particulars to be furnished in the prescribed form are not apposite to the present discussion and have been omitted).

(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.'

[22] Paraphrased, subsec (3) provides that if the Minister is of the opinion that the person sought to be designated as chief represents a group of persons who are members of a traditional community in respect of which a chief has already been designated and recognised; or such group does not constitute an independent traditional community inhabiting a common communal area detached from another traditional community; or the group in question is too small to warrant a traditional authority established for them, and that there are no reasonable grounds for recognising such group of persons as a separate traditional community, then the Minister must advise the President accordingly.

[23] Subsection (7) of s 5 states that:

'(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.'

[24] Section 6 is headed 'Recognition of chief or head of traditional community' and provides that:

- '(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.'

[25] As can be seen from 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, who *shall* be instituted as the chief or head of the community. Where a community does not have a royal family, any member of that community may be instituted as the head of the traditional community in accordance with the customary law of the community concerned.

[26] The process for designation is that if a community intends to designate a chief or head in terms of the Act, the Chief's Council must apply on the prescribed form to the Minister for approval for such designation. Where there is no Chief's Council, the application may be made by the Traditional Council of that community. Where there is neither a Chief's Council nor a Traditional Council, the application may be made by members of that community who are authorised by the customary law of the community. The particulars set out in s 5(1)(b) must be stated in the prescribed form. The Minister must approve, in writing, the proposed designation, but only if the application for designation complies with subsec (1) of s 5 and 'subject to' subsec (3) of the same section.

[27] Upon receipt of the written approval of the proposed designation by the Minister, the Chief's Council or the Traditional Council as the case may be must notify the Minister in writing and in advance of the date, time and place of the designation of the Chief. Once duly notified, the Minister or a representative is required to attend the designation so as to witness such designation and satisfy themselves that the designation was done in accordance with the customary law applicable in that community.

[28] Another important step in the designation process is the recognition of the designated chief or head. In this regard and as set out in s 6, if the Minister is satisfied that a chief or head has been designated in accordance with the requirements of the Act, the Minister must notify in writing the President of such designation. The written notification must specify the name, office, traditional title (if any), the date of designation and the name of the traditional community in respect of which the chief or head has been designated. On receipt of the statutorily compliant notice of designation from the Minister, the President must recognise the designation by proclamation in the *Gazette*, setting out in the notice the particulars of the chief or head concerned.

[29] As noted earlier, s 4(2) provides that the qualifications for designation and succession to the office of chief or head of a traditional community is regulated by the customary law of the traditional community in respect of which such chief or head of the traditional community is designated. It is therefore crucial to determine what the vaShambyu customary law of succession to the office of chief of the community is. It is to this aspect that the next phase of the judgment turns.

Customary law of succession

[30] To establish the vaShambyu community's customary law of succession to the office of chief, Ms Haindaka relied on a supporting affidavit filed in the election review application. The deposition was made by Ms Cesilia Mwengere Haingura,

aged 87 at the time, who identified herself as a member of the vaKwankora royal family from the Mukwahepo lineage.

[31] According to Ms Haingura, there were two methods of succession of a deceased *Hompa*. The first is where the *Hompa* had made a 'declaration' and the other is where no declaration was made. In the first method, the declaration is made by the *Hompa* orally and openly to all members of the royal family. The declaration-making process is that the sitting *Hompa* first summons all the royal family members on the matrilineal side to the palace and informs them of her choice of successor. The selected person is invited in front of the gathering and the *Hompa* holds the person's hand and invites the royal family members present to honour and respect the decision. The next step in the process is that the *Hompa* summons all the traditional councillors or sages – traditionally known as the *Matimbi* – together with royal family members to inform them of the chosen successor. The *Matimbi* are then instructed to start the initiation process of training the future *Hompa* in leadership skills and in general administration of community affairs.

[32] In the instance where the sitting *Hompa* had not made a declaration, the selection process is initiated by the eldest royal family member who summons the royal family members on the matrilineal side to a meeting to choose a successor. The discussions are held behind closed doors. Once consensus has been reached and the most suitable candidate identified, the *Matimbi* are summoned and informed of the choice. Preparations for coronation may then commence.

[33] Ms Haingura's version of the customary law of succession of a chief was contradicted in some respects by Mr Edward Mutero Sikerete, the secretary to the Chief's Council. Mr Sikerete deposed to the answering affidavit on behalf of the Shambyu Traditional Authority, Ms Kanyetu and the Chief's Council. He used strong language to dismiss some aspects of Ms Haingura's account, describing her version that a *Hompa* is solely chosen by the royal family as 'completely false, misleading and finding no application in the customs of the vaShambyu community'.

[34] While the two deponents agree on the first method of selection – whereby the deceased *Hompa* had chosen a successor during her lifetime – their point of departure appears to be on the question whether traditional authority structures other than the royal family also play a role in the selection process where no successor was chosen by the reigning *Hompa*. Mr Sikerete's version on this score is that where the *Hompa* had not made her wish of a successor known, the traditional council of the community and not the royal family, decides who to succeed the deceased *Hompa* from within the ranks of the royal family.

[35] According to Mr Sikerete, a *Hompa* does not rule over a royal family. On the contrary, a *Hompa* represents and rules over a community. He argued that it is for that reason that a *Hompa* would always first consult his or her Chief's Council about a successor. Only trusted members of the royal family are informed of the choice of a successor. This is done to protect the chosen candidate and avoid disputes over succession.

[36] In the instance of the succession of the late *Hompa* Angelina Matumbo Ribebe, Mr Sikerete asserted that the late *Hompa* followed the process of expressing a wish and chose Ms Kanyetu as her successor. According to Mr Sikerete, the late *Hompa*'s 'verbal Will' of choice of successor was accepted by the Shambyu Traditional Authority, the Chief's Council and the vaShambyu community with the exception of some royal family members from the Mukwahepo lineage who disputed that a choice had been made. Mr Sikerete stated that Ms Kanyetu met the customary law requirements for designation as chief and enjoys the support of the Shambyu Traditional Authority as well as that of the Chief's Council and the community in general. It was on that basis that she was designated as the chief of the community in accordance with the customary law and the relevant provisions of the Act.

[37] According to Mr Sikerete, Ms Haindaka's application for designation as chief spearheaded by the Mukwahepo lineage of the royal family, was not supported by the Shambyu Traditional Authority, the Chief's Council and the community in general. She was not a party to the original succession dispute between Ms Kanyetu and the late Ms Maria Kunyanda Joachim.

[38] Regarding the directives issued by the Minister, Mr Sikerete stated that attempts were made to implement the directives to no avail. Therefore, so he contended, the entire process envisaged in the first decision was exhausted. Mr Sikerete dealt with each directive and set out the steps taken to address the issue raised therein. As to the directive that the vaKwankora royal family should resolve their differences without the involvement of non-vaKwankora royal family

members, the deponent explained that various meetings were arranged by the two royal family lineages but no consensus could be found. Mr Sikerete was adamant that there was no prospect of the two sides amicably resolving their differences.

[39] With regards to the directive for the royal family to seek assistance from the Traditional Authorities Regional Forum (the Forum), the Forum tried to mediate. However, members of the Mukwahepo royal family lineage declined to attend the mediation meetings. This allegation is borne out by a letter forming part of the pleadings signed on behalf of the Mukwahepo royal family side wherein it declined to attend a meeting, accusing one member of the Forum of bias and questioning the alleged exclusion of one other member of the Forum from mediation efforts.

[40] As regards the directive that the succession dispute should be resolved within a period of four months, Mr Sikerete stated that this could not be done and correspondence sent to the erstwhile Minister informing her of the status of the implementation of her decision went unanswered.

[41] As to the last aspect of the Minister's directives that an election should be conducted to choose a leader when everything else failed, Mr Sikerete rightly pointed out that this was no longer an option since this decision was set aside by the High Court in the election review application initiated by Ms Haindaka. He concluded on this aspect of his deposition that there was nothing else left for implementation from the Minister's directives and all the avenues for an amicable resolution of the dispute had been exhausted.

[42] Mr Sikerete's version of customary law of succession of a chief is supported by an expert on vaShambyu community customary law, Mr Kaputungu Harupe Paulus Haididira. Aged 98 at the time, Mr Haididira, a former teacher and the Headman for Mashare village since the early 1970s, stated that he became an expert by observing how customary law was practised in the community. He also worked closely with the *Hompas* and the community over the years.

[43] According to Mr Haididira, the first method of chieftaincy succession is when the reigning *Hompa* had expressed a wish for a successor. In the vaShambyu custom this wish is called *Ndjawo*. In the case of the *Ndjawo* method of succession, the chief selects a highly respected person within the royal family as the successor. The *Hompa's* wish is communicated to trusted members of the royal family and to traditional councillors only. In the instance where the *Hompa* had not chosen a successor, the traditional council decides from amongst members of the royal family, who to succeed.

[44] The averments made by Messrs Sikerete and Haididira were not pertinently disputed by Ms Haindaka in reply. She replied only to a few of the averments, but even in instances in which she did so, her replies constituted mere denials. Her reaction to Mr Sikerete's entire 41 paragraphs-long affidavit was captured in one terse sentence that reads:

'Ad the third, fourth and sixth respondents' answering affidavit: I deny the entire contents thereof insofar as they are at variance with the contents of my founding affidavit.'

[45] In respect of the supporting affidavit of the expert on customary law, the denial was not only bare but it was also infused with a dose of unfortunate vitriol directed at the deponent Mr Haididira. Ms Haindaka's reply thereto was formulated as follows:

'I deny the veracity of the contents of the supporting affidavit deposed to on a matter regarding the third respondent's succession. That person can neither speak nor understand English. Accordingly, he could not have understood the content of that affidavit.'

[46] It is clear that there were factual disputes as to the customary law of chieftaincy succession in the vaShambyu community and whether Ms Kanyetu was nominated for designation in accordance with the community's customary law. 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.⁴ That approach was followed by our courts in numerous cases, including *Rally for Democracy and Progress*⁵ 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.⁶ It was further stated there that the facts set in a respondent's papers are to be accepted unless a court considers them to be far-fetched or untenable.⁷

[47] In resorting to the making of bare denials in reply on important matters such as the position of customary law on chieftaincy succession, Ms Haindaka missed

⁴ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

⁵ *Rally for Democracy and Progress v Electoral Commission for Namibia & others* 2013 (3) NR 664 (SC).

⁶ Para 99.

⁷ *Ibid.*

the opportunity granted to her to refute the allegations made by the appellants in their answering papers. A replying affidavit 'serves to refute the case put up by the respondent in his answering affidavit'.⁸ A mere denial in general terms of a party's material averments cannot serve to defeat a party's case in motion proceedings.⁹ In any event, the appellants' version is not 'so improbable and unrealistic that it can be considered to be fanciful and untenable'¹⁰ so as to be rejected on the papers alone by adopting what has been referred to as a robust, common-sense approach. Before I decide the issues that call for determination in the appeal, it is necessary to first briefly discuss this statutory body called the Chief's Council and the role that it plays in the process of designating a chief.

Chief's Council

[48] An analysis of the provisions of the Act shows that a Chief's Council plays an overarching role not only in the overall administration of a traditional authority, but also in the designation of a chief. A Chief's Council is established by s 9 of the Act for every traditional community which has a chief.¹¹ Likewise, a Traditional Council is established under the same section for a traditional community the head of which is not called chief.¹² Members of the Chief's Council are appointed by the chief of the traditional community concerned.¹³ The chief is the chairperson of the Chief's Council and has the power to appoint such other office-bearers of the Council as he or she may deem necessary.¹⁴ The Chief's Council is responsible for

⁸ Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed Juta 1997 at 356H.

⁹ Cf. *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154G.

¹⁰ *Truth Verification Testing Centre CC v PSE Truth Detection CC* 1998 (2) SA 689 (W) at 699F-G.

¹¹ Section 9(1)(a).

¹² Section 9(1)(b).

¹³ Section 9(2)(b).

¹⁴ Section 9(3).

the day-to-day administration of the affairs of the traditional authority of the community in respect of which it has been established.¹⁵ It is the Chief's Council or its equivalent that must make application for designation on the prescribed form to the Minister.

[49] The Minister's role in the designation process is confined to considering the application for designation and if found to be compliant with the requirements of the Act, to approve such designation. The Minister is also required to attend or to be represented at the designation ceremony. Finally, the Minister's other important function is to facilitate the recognition of the designated chief or head by the President but only once satisfied that the designation in question complies with the provisions of the Act.

[50] As mentioned before, the Chief's Council is required by s 4(1)(a) to designate *one* person – and not two persons – from the royal family of the community 'who *shall* be instituted as the chief or head, as the case may be, of that traditional community'.

Determination

[51] Returning to the factual matrix in the appeal, it is clear that on a proper approach to factual disputes in motion proceedings, the case put up by the appellants relating to the customary law of succession and the process followed in Ms Kanyetu's aborted designation was not refuted in the replying affidavit. Therefore, on the basis of the evidence presented by the appellants, it must be accepted that Ms Kanyetu met the requirements for designation under customary

¹⁵ Section 9(4).

law and her designation as chief was done in accordance with the provisions of the Act.

[52] The Chief's Council was under a legal obligation to ensure that the designation of a *Hompa* was done in accordance with customary law and the provisions of the Act. A reading of a letter dated 4 November 2019 addressed to the Minister and forwarding Ms Kanyetu's application for designation, shows that in endorsing Ms Kanyetu the Chief's Council considered 'the legal requirements under s 5 of the [Act] and the requirements under our customary law' and resolved to 'correct the defects in the previous application' by submitting only one application. This position was also captured in the minutes of the meeting of the Chief's Council where the resolution to complete and submit Ms Kanyetu's application for designation was adopted.

[53] Having already designated Ms Kanyetu, the Chief's Council would have greatly erred had it also purported to designate Ms Haindaka by signing her application and sending it to the Minister for approval. The court a quo thus fell into error in characterising the refusal by the Chief's Council to sign and process Ms Haindaka's application as the Council's usurpation of the Minister's powers.

[54] We have been informed from the Bar that Ms Haindaka rightly does not support this particular finding by the court a quo. The conflation of the power, in effect to nominate or designate and the power to approve a statutorily compliant application for designation regrettably also led the court a quo to make an

erroneous finding that by signing only one application, the Chief's Council presented the Minister with a *fait accompli* to approve the person chosen by it.

[55] I repeat for emphasis that it is the Chief's Council that must nominate for designation a chief in accordance with the customary law of the community and the Act. In doing so, it must designate one person from the royal family of the community. In this case, it would have been unlawful for the Chief's Council of the Shambyu Traditional Authority to purport to designate two persons for the same traditional authority. It thus correctly exercised the function assigned to it by signing and submitting only one application for approval.

[56] It seems likely that the requirements of the Act that a chief of the community is chosen for designation by the traditional community itself and Government is obliged to approve and recognise a statutorily compliant designation is a deliberate legislative policy shift, marking a departure from the egregious pre-independence legal framework that allowed the government to appoint chiefs for communities in the country. Back then, the Administrator was given wider powers to 'recognise or appoint any person as a chief or headman in charge of a tribe, or of a location or a native reserve. . . .'¹⁶

[57] The Administrator was also given draconian powers to 'remove any chief or headman found guilty of any political offence, or for incompetency or for other just cause from his position as such chief or headman and may order his removal with his family and property to some other part of the mandated Territory; and may

¹⁶ Section 1(a) of the Native Administration Proclamation 1928 (Proclamation 15 of 1928).

place him under such supervision or restraint as to him may appear expedient'.¹⁷ The court a quo's finding that the Minister was 'forced to appoint' a person chosen by the Chief's Council appears to have overlooked this historical context and has the unintended consequence of restoring the status *quo ante* in the legal regime pertaining to the designation of chiefs in the country.

[58] It is clear from the appellants' pleadings that the Chief's Council of the Shambyu Traditional Authority was authorised under customary law to designate a chief from the royal family of the community. It was also not seriously disputed in reply that the designation of Ms Kanyetu was done in accordance with the customary law of the community and the Act. The Minister acted correctly in refusing to approve Ms Haindaka's designation since her application did not meet the requirements of the Act. As such, the court a quo should have dismissed the review application.

Cross-appeal

[59] It will be recalled that Ms Haindaka's cross-appeal is directed against the court a quo's refusal to set aside the Minister's decision directing Ms Haindaka to rectify the 'defects' in her application for designation. The so-called defects were essentially the considerations that her application was not made by the Chief's Council nor was it verified by the Governor. The court a quo reasoned that the impugned decision could not be set aside because the Minister was given a wider discretion to resolve the dispute as he deemed it expedient.

¹⁷ Section 1(b).

[60] I agree with the court a quo that the great deal of latitude given to the Minister meant that it was within his powers to decide on the most expedient manner of resolving the dispute in accordance with the law. There is however an additional reason why the Minister's decision could not be reviewed and set aside. Although there were two personalities occupying the office of the Minister at the time the relevant decisions were made, notionally it was the same functionary who made the decisions. The Minister was simply continuing from where his predecessor had left off. It would appear that the Minister understood this legal position well, hence his decision to approve the holding of elections to choose a chief, the only outstanding or next step in his predecessor's directives.

[61] In any event, the undisputed evidence is that all the efforts made to implement the directives issued in the first decision had been exhausted. The two factions of the royal family could not resolve the dispute amicably amongst themselves; the offer for mediation by the Forum was rebuffed by one faction; the dispute could not be resolved in four months as ordered and the directive for the holding of an election was held by the High Court to be inoperable. As Mr Sikerete stated, 'there was nothing else to implement'.

[62] It is not surprising that although Ms Haindaka insisted on something to be done, she was conspicuous in her silence to articulate what else could conceivably be done. She was contented with the statement that the Minister should not have engaged a process that disqualified her from consideration as a candidate for designation. In the end though, her legal practitioner suggested in oral argument that the Minister could reinvoke the provisions of s 12 of the Act.

[63] Section 12 is headed 'Settlement of disputes' and it is reproduced here in full. It reads as follows:

- (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.'

[64] Appointing an investigation committee in terms of s 12 is precisely what the Minister did when the community could not resolve the dispute in accordance with its customary law. The investigation committee made recommendations to the

Minister, which recommendations were accepted and were sent to the community as ministerial directives. It would appear that Ms Haindaka now contends for the rehash of the process. As a dispute submitted to the Minister pursuant to s 12 is done on written petition, presumably the Minister must ask the vaShambyu traditional community to petition him to invoke the provisions of the section. Assuming that the community accedes to the Minister's request, then the process must start all over again. In my respectful view, to repeat the s 12 process would create an intolerable prospect of making the community wait, possibly inordinately, for the institution of its head while Ms Haindaka engages the Minister in an unrelenting game of ping-pong. It is not in the best interest of the community for this to occur, especially when it has not had a recognised chief for a long time.

Conclusion

[65] 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, in contradistinction to the applications for designation that were submitted by the candidates themselves. Before he asked for the rectification of what he characterised as defects in the applications, the Minister granted the contenders an opportunity to be heard when he met them in Rundu. He followed up on that meeting with the directive for the submission of an application compliant with both the customary law and the Act. The Chief's Council considered the requirements of the Act and the position of customary law on the matter and resolved to submit only one application in line with the law. Having satisfied himself that Ms Kanyetu's application for designation met the requirements of both the Act and customary law, the Minister approved it. Both the Chief's Council and

the Minister acted entirely correctly, fairly and reasonably in following that approach. Therefore, there can be no basis for impugning their decisions. The High Court ought to have so found. The appeal must therefore be allowed and the cross-appeal dismissed.

Costs

[66] There is no reason to depart from the general rule that costs should follow the result. Ms Haindaka appears to be pursuing a private interest against the appellants and Ms Kanyetu. She must therefore pay the appellants' costs both in this Court and the court below.

Order

[67] The following order is accordingly made:

- (a) The appeal is upheld with costs, such costs to include the costs of one instructing legal practitioner and one instructed legal practitioner.
- (b) The cross-appeal is dismissed.
- (c) The order of the High Court is set aside and the following order is substituted therefor:

'The application is dismissed with costs, such costs to include the costs of one instructing and one instructed legal practitioner.'

SHIVUTE CJ

DAMASEB DCJ

FRANK AJA

APPEARANCES

APPELLANTS: S Akweenda (with him J Ncube)
Instructed by Government Attorney

FIRST RESPONDENT: T Muhongo (with him A Shimakeleni)
Instructed by Appolos Shimakeleni Lawyers

SECOND RESPONDENT: E Nangolo
Of Sisa Namandje & Co Inc