

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

CASE NO.: A 333/2012

In the matter between:

RAPHAEL HIJANGUNGO KAPIA

PLAINTIFF

and

**MINISTER OF REGIONAL AND LOCAL GOVERNMENT
HOUSING AND RURAL DEVELOPMENT
ZERAEUA TRADITIONAL AUTHORITY
MANASSE MEUNDJU ZERAEUA**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT**

Neutral citation: *Kapia v Minister of Regional and Local Government Housing and Rural Development (A 333/2012) [2013] NAHCMD 13 (24 January 2014)*

Coram: UEITELE, J

Heard: 5 December 2013

Delivered: 24 January 2014

Flynote: **Administrative law** - Administrative officials - Administrative action - What constitutes – Minister is an administrative official as contemplated in Article 18 of the Namibian Constitution- Decision of Minister to, in terms of the Traditional Authorities Act, 2000, approve the designation of a Chief amounts to administrative action.

Customary law - Traditional Authorities- when performing their functions in terms of the Traditional Authorities Act, 2000 are exercising public power, and in exercising those powers the traditional authority is an administrative body as contemplated in Article 18 of the Namibian Constitution.

Summary:

On 08 August 2012 the Minister approved the application by the Zeraeua Traditional Authority to approve the designation of Mr Manase Meundju Zeraeua as Chief of the Zeraeua Traditional Community. The applicant is aggrieved by that decision and requests this Court to review and set aside that decision.

Held that the decision taken by the Minister to approve the designation of of Mr Manase Meundju Zeraeua as Chief of the Zeraeua Traditional Authority is an administrative decision as contemplated in Article 18 of the Namibian Constitution.

Held further that Minister misread section 5(1) of the Act and thus stultified his discretion, he failed to perform his statutory duties.

Held further that the decision to approve the application for the designation of Manase Meundju Zeraeua as the chief of the Zeraeua Traditional Community did not comply with the requirements of the Act and can therefore not be allowed to stand and is reviewed and set aside.

Held further that the Minister is ordered to pay the costs of this application.

ORDER

- 1 The decision by the Minister to, in terms of section 5(2) of the Traditional Authorities Act, 2000, approve the application for the designation of Manase Meundju Zeraeua as the chief of the Zeraeua Traditional Community is hereby set aside.

- 2 The Minister is ordered to pay the costs of this application.

JUDGMENT

UEITELE J

A INTRODUCTION

[1] On 14 December 2012 the Applicant launched an application for the following relief as contained in his Notice of Motion. (I quote verbatim from the notice of Motion):

- '1 Reviewing, correcting and/or setting aside first respondent's decision set out in his letter of 8 August 2012 (annexure "RK1" to the founding affidavit).

- 2 Alternatively to prayer 1, declaring the decision taken by the first respondent as set out in prayer 1 hereof to be null and void.

- 3 Directing the first respondent to, in terms of section 6 read with section 12 of the Traditional Authorities Act, No. 25 of 2000 ("the Act") give effect to the first applicant's designation as Chief of the Zeraeua Traditional Community.

- 4 Directing first respondent and such other respondents as may oppose the relief herein to pay the costs of this application jointly and severally, the one paying the other (s) to be absolved.
- 5 Granting such further and/or alternative relief as this Honourable Court deems meet.’

[2] The first respondent is the Minister of Regional and Local Government, Housing and Rural Development, appointed in terms of Article 32(3)(1)(bb) of the Namibian Constitution (I will, in this judgement, for ease of reference refer to the first respondent as the Minister), and who is also responsible for the administration of the Traditional Authorities Act, 2000¹ (I will in this judgment refer to this Act as the ‘the Act’).

[3] The second respondent is the Zeraeua Traditional Authority, established in terms of section 2(1) of the Act, for the Zeraeua Traditional Community.

[4] The Third respondent is Manase Meundju Zeraeua, a major male person who was purportedly designated as the successor to the late Chief Christian Eerike Zeraeua as the Chief of the Zeraeua Traditional Community. I will, in this judgement, for ease of reference refer to the third respondent as Manase Meundju Zeraeua.

[5] No relief is sought against the second and third respondents; they are cited herein insofar as they may have an interest in these proceedings.

B BACKGROUND

[6] This application comes before this court with a background. I will briefly refer to the background facts which are common cause.

(a) The Zeraeua Traditional Community is one of the many traditional communities existing in Namibia. The late Christian Eerike Zeraeua was installed as Chief of the Zeraeua Traditional Community during 1979. When the Traditional

¹ Act No. 25 of 2000.

Authorities Act, 1995² came into operation the late Christian Eerike Zeraeua was, in terms of that Act, recognised as Chief of the Zeraeua Traditional Community and his recognition gazetted in *Government Gazette* No 1828 of 31 March 1998.

- (b) On 08 January 2012 Chief Christian Eerike Zeraeua passed on. The funeral of the late Chief took place on 22 January 2012. On 26 January 2012 elders of the Ovakweyuva and Tjipepa royal family held a meeting at the late Chief's official residence (Okaumbaaha). At that meeting a decision was taken that the process of appointing the successor to the late Chief Christian Eerike Zeraeua must commence. Pursuant to that decision a steering committee (under the chairmanship of a certain Bean Ukondja Tjiseseta), which would drive the succession process, was, appointed. I will, in this judgment, refer to the steering committee elected on 26 January 2012 as the '26 January steering committee.'
- (c) From the evidence placed before me it emerges that on 09 February 2012 a joint meeting, between the Zeraeua Traditional Authority's Chief's Council and the Zeraeua Traditional Authority, was held. At that meeting a committee consisting of six persons (namely Edward Kazondandona, Fabianus Uaseuapuni, David Tjindjumba, Jeffrey Kavendjii, Elia Kake and David Tjiseseta) was elected and tasked with the responsibility of dealing with the succession issue and to liaise with the various royal families in terms of the customary laws and norms. I will, in this judgment, refer to the committee elected on 09 February 2012 as the '09 February committee.'
- (d) The 26 January steering committee called a meeting (scheduled to take place at Omatjete) for all the members of the Ovakweyuva and Tjipepa clan for 28 April 2012 for the purpose of electing a successor to the late Chief Christian Eerike Zeraeua. Another meeting (from the papers before me, it is not clear as to who called this meeting, but the contact persons for this meeting were identified as Manuel Zeraeua and a certain Unjamua Humu) was also called for the 28th April 2012 (This meeting was scheduled to take place Okaumbaaha).

² Act No.17 of 1995. This Act was repealed and replaced by Act 25 of 2000.

- (e) While the meeting called by the 26 January steering committee was in progress (i.e. on 28 April 2012) three members of the Zeraeua Traditional Authority's Chief's Council arrived at that meeting and presented a letter (addressed to Sam K Puriza and Unjamua Humu) to the meeting. In that letter which was signed by eleven members of the Zeraeua Traditional Authority's Chief's Council, a request was made for the different parties (i.e. the 26 January steering committee and the 09 February committee) to postpone their activities relating the election of the successor to the late Chief Christian Eerike Zeraeua. The people gathered at Omatjete meeting acceded to the request and postponed their meeting to 30 June 2012. The decision to postpone the meeting was communicated to the Zeraeua Traditional Authority's Chief's Council by letter dated 30 April 2012.
- (f) From the papers before me it appears that, the other meeting (the Okaumbaaha meeting presumably called by Mr Humu and Manuel Zeraeua) did not accede to the request by the Zeraeua Traditional Authority's Chief's Council to postpone their activities, they went ahead and nominated Manase Meundju Zeraeua (the third respondent) as the successor to the late Chief Christian Eerike Zeraeua.
- (g) The Zeraeua Traditional Authority's Chief's Council called a meeting for 19 May 2012 between the two parties (i.e. the faction led by the 26 January steering committee represented by Puriza and the faction led by the 09 February committee represented by Humu). The evidence (which is not contradicted) placed before me indicates that, at the meeting of 19 May 2012 the Chief's Council informed both factions that, it (the Chief's Council) wants the factions to meet and resolve the disagreement or dispute between them and that pending the resolution of the dispute it will not recognise the nomination of Manase Meundju Zeraeua as the successor to the late Chief Christian Eerike Zeraeua.
- (h) On 20 May 2012 Humu authored a letter (it is not clear to whom the letter is addressed) in which he alleges that Manase Meundju Zeraeua was introduced to the community on 19 May 2012 as the nominated successor to the late Chief Christian Eerike Zeraeua and that nobody opposed his nomination and he thus

requested the Traditional Authority to forward the recommendation of the nominated successor to the Minister.

- (i) On 21 May 2012 Mr Puriza on behalf of the 26 January steering committee invited the 09 February committee led by Mr Humu to a meeting for the purposes of resolving the dispute. Mr Humu did not respond to the invitation.
- (j) On 22 May 2012 Mr Uaseuapuni, purportedly acting on behalf of the Chief's Council and the Traditional Authority addressed a letter to the Minister, in which letter, he informed the Minister that there were two factions in the Zeraeua Traditional Community the one faction representing the paternal family was led by Mr Unjamua Humu and the other faction representing the maternal family is led by Mr Samuel Puriza.
- (k) On 24 May 2012 Mr Humu wrote a submission to the Zeraeua Traditional Authority's Chief's Council. In that submission he requested the Chief's Council to apply to the Minister for the recognition of Manase Meundju Zeraeua as successor to the late Chief Christian Eerike Zeraeua.
- (l) On 23 June 2012 the Zeraeua Traditional Authority's Chief's Council called another meeting and at that meeting endorsed the nomination of Manase Meundju Zeraeua as the successor to the late Chief Christian Eerike Zeraeua. The endorsement of Manase Meundju Zeraeua as the successor to the late Chief was announced over the Otjiherero Radio Service of the Namibia Broadcasting Corporation (the NBC).
- (m) On 25 June 2012 Mr Puriza on behalf of the 26 January steering committee addressed a letter to the Minister in which letter he apprised the Minister of all the developments regarding the selection of the successor to the late Chief Christian Eerike Zeraeua. In the letter to the Minister, Mr Puriza further alleged that the bodies which took the decision to nominate Manase Meundju Zeraeua as the successor to the late Chief Christian Eerike Zeraeua acted illegally and contrary to the customary laws of the Zeraeua Traditional Community.

- (n) On 29 June 2012 Mr Uaseuapuani, acting on behalf of the Zeraeua Traditional Authority addressed a letter to the Minister. To that letter he attached the application for the approval to designate Manase Meundju Zeraeua as the Chief of the Zeraeua Traditional Community.
- (o) On 30 June 2012 the Ovakweyuva and Tjipepa royal family met and at that meeting the royal family resolved to nominate Mr Raphael Hijungungo Kapia (the applicant) as the successor to the late Chief Christian Eerike Zeraeua. This decision was communicated to the Minister on 02 July 2012.
- (p) On 02 August 2012 Mr Puriza acting on behalf of the Zeraeua Royal family submitted an application for the approval to designate Raphael Hijungungo Kapia as the Chief of the Zeraeua Traditional Community to the Minister. The Minister did not reply to this letter.
- (q) On 08 August 2012 the office of the Minister addressed a letter to Mr Uaseuapuani in which the Minister informed him that *'your application for approval to designate Mr Manase Meundju Zeraeua as Chief of the Zeraeua Royal House Traditional Authority to succeed his late father Chief Christian E. Zeraeua, has been approved.'*
- (r) On 21 August 2012 Mr Puriza acting on behalf of the Zeraeua Royal Family addressed a letter to the Minister in which letter Mr Puriza alleges that the designation of Manase Meundju Zeraeua as Chief of the Zeraeua Traditional Authority was improperly done. He further requested the Minister to exercise his powers in accordance with section 12(2) of the Act. The Minister did not reply to this letter.
- (s) On 06 September 2012 Mr Uaseuapuani addressed a letter to the Minister. In that letter he, as contemplated in s 5(7) of the Act, invited the Minister for the latter to witness the designation of Chief Manase Meundju Zeraeua. On 07 September 2012 the Minister appointed Mr Cleophas Mutjavikua (the Governor

of the Erongo Region) to represent him at the ceremony for the designation of Chief Manase Meundju Zeraeua.

[7] The applicant is aggrieved by the Minister's decision to approve the designation of Mr Manase Meundju Zeraeua as Chief of the Zeraeua Traditional Community and it is that decision which the applicant is asking this Court to review and set aside.

C THE BASIS ON WHICH THE APPLICANT SEEKS TO REVIEW THE MINISTER'S DECISION.

[8] The basis on which the applicant asks this court to review the Minister's decision is set out in paragraph 6 of his founding affidavit. The grounds of review can be summarised as follows:

- (a) The process that was followed to approve the designation of Mr Manase 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 Manase Meundju Zeraeua as Chief of the Zeraeua Traditional Community.
- (c) The applicant was not given an opportunity, alternatively a proper opportunity to place his views before the Minister and to present his side of the case either before, at or after the Minister made his decision.

[9] The Minister opposed the relief sought by the applicant. The second and third respondent also initially indicated that they are opposing the relief sought by the applicant, but on 03 December 2013, the second and third respondents withdrew their opposition to the application and at the hearing of the application the second and third respondents indicated that they will abide by this court's decision.

[10] In his opposition to the relief sought by the applicant the Minister raised three points *in limine*. The first point *in limine* being that the decision contained in the letter of 08 August 2012 is not an administrative decision but a ministerial duty which is not reviewable, the second point *in limine* being that the applicant has prematurely commenced this application without exhausting the internal remedies provided for in s12 of the Act, if indeed there is a dispute as to whether the third respondent is the rightful successor and the third point *in limine* being that the Court has no jurisdiction to designate the applicant or any other person as a chief or head of a traditional community as claimed the applicant. At the hearing of the application Mr Hinda who appeared for the Minister, correctly in my opinion, abandoned the first two points raised *in limine*.

[11] Mr Hinda confined the Minister's opposition to the relief sought by the applicant to the fact that the decision sought to be reviewed is not clearly ascertainable.

D THE ISSUE FOR DECISION

[12] On 17 September 2013 the legal practitioners representing the parties held a case management conference as is required by the case management rules. At that conference the parties amongst others identified the following issue as the issue which this court has to resolve namely, whether the Minister acted fairly and in accordance with Article 18 of the Namibian Constitution when he approved the designation of of Mr Manase Meundju Zeraeua as Chief of the Zeraeua Traditional Community.

[13] I am of the view that the answer to that question is determinative of the dispute between the parties and that is the question that I will answer in this judgment.

E. DID THE MINISTER ACT IN ACCORDANCE WITH ARTICLE 18 OF THE NAMIBIAN CONSTITUTION WHEN HE APPROVED THE DESIGNATION OF OF MANASE MEUNDJU ZERAEUA AS CHIEF OF THE ZERAEUA TRADITIONAL COMMUNITY?

[14] The starting point in answering that question is the Namibian Constitution itself. Article 18 of the Constitution enjoins administrative bodies and administrative officials to act *fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation.* (Italicized for emphasis).

[15] In *Africa Personnel Services (Pty) Ltd v the Government of the Republic of Namibia and Others*³ this Court observed that the institutional and individual targets that must comply with the administrative justice requirements under Article 18 of the Namibian Constitution are only ‘administrative bodies’ and ‘administrative officials’. (Italicized and underlined for emphasis).

[16] In *Disciplinary Committee for Legal Practitioners v Makando and Another, Makando v Disciplinary Committee for Legal Practitioners and Others*⁴ Parker, J observed that:

‘administrative bodies and administrative officials are State institutions who form the Bureaucratic Executive, which, together with the Political Executive, constitute the Executive organ of State in our system of constitutional governance based on the trias politica of the doctrine of separation of powers; and administrative officials are, as a matter of course, the personnel who man those institutions that fall within the Bureaucratic Executive.’

[17] I thus have no doubt in my mind that the Minister is an administrative official. As to whether his decisions or actions are ‘administrative’ depends, as Ngcobo, J⁵ said, on a number of factors which include ‘(a) the relationship of coercion or power that the actor has in its capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercised in the public interest’. In *Grey’s Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*⁶ Nugent, JA said:

³ Case No. A13/2008 (HC).

⁴ Case No. A 216/2008, A 370/2008 [2011] NAHC 311 (delivered on 18 October 2011).

⁵ *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC); 2008(3) BCLR 251 (CC).

⁶ 2005 (6) SA 313 (SCA) 2005 (10) BCLR 931 at paragraph 24.

'Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. Features of administrative action (conduct of 'an administrative nature') that have emerged from the construction that has been placed on s 33 of the Constitution are that it does not extend to the exercise of legislative powers by deliberative elected legislative bodies, nor to the ordinary exercise of judicial powers, nor to the formulation of policy or the initiation of legislation by the executive, nor to the exercise of original powers conferred upon the President as head of State. Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.'

[18] Although stated in a different Constitution setting, I accept and endorse the pronouncements by Ngcobo J and Nugent JA. The decision taken by the Minister to approve the designation of Mr Manase Meundju Zeraeua as Chief of the Zeraeua Traditional Community was taken in pursuance of the provisions of the Act, and was exercised by him carrying out the daily functions of the State, which have direct and immediate consequences for individuals or groups of individuals. I therefore, furthermore, have no doubt that the decision taken by the Minister to approve the designation of of Mr Manase Meundju Zeraeua as Chief of the Zeraeua Traditional Community is an administrative decision as contemplated in Article 18 of the Namibian Constitution.

[19] As regards traditional authorities I made the following comment in the matter of *Chaune v Ditshabue and Others*⁷ which comment I find relevant to this matter:

'There is nothing private or personal about the exercise of the powers conferred on traditional authorities. The powers are given to the traditional authorities in the interests of the proper conduct of the affairs of traditional communities⁸. In my view therefore the exercise of power by traditional authorities pursuant to the Traditional Authorities Act,

⁷ Case No. A 5/2011 [2013] NAHCMD 111 (delivered on 22 April 2013).

⁸ See section 3(1) of the Traditional Authorities Act, 2000 (Act 25 of 2000).

2000 is plainly the exercise of a public power, and in exercising those powers the traditional authority is an administrative body as contemplated in Article 18 of the Namibian Constitution.’

[20] The requirements which traditional authorities and the Minister must comply with in the process of designating and approving the designation of a person as a chief of a traditional community are set out in the Act. The relevant provisions are set out in sections 4, 5, 6, 8 and 12 of that Act. Section 8(2) the Act, in material terms provides as follows:

‘8 Removal and succession of chief or head of traditional community

(1) ...

(2) If, by reason of removal from office as contemplated in subsection (1) *or death*, a chief or head of a traditional community ceases to perform the functions of his or her office, *the members of that traditional community, who are authorized thereto by customary law*, may designate in accordance with this Act a member of that traditional community to replace such chief or head.’ (Italicized and underlined for emphasis).

[21] In the present matter it is common cause that Christian Eerike Zeraeua has, by reason of death, ceased to perform the functions of his office as Chief of the Zeraeua Traditional Community. It follows that in terms of s 8(2) of the Act, members of the Zeraeua Traditional Community, who are authorized thereto by customary law must, in accordance with the Act, designate a member of that traditional community to replace the late Chief Christian Eerike Zeraeua. The procedures which the members of the Zeraeua Traditional Community must follow to designate the successor to the late Chief Christian Eerike Zeraeua are set out in s 5 of the Act.

[22] The first step that must be taken to designate a member of a traditional community as chief of that community is that, members of that traditional community who are authorised thereto by the customary law of that community, may designate in accordance with that law one person from the royal family of that traditional community,

who will be instituted as the chief of that traditional community⁹. The qualifications for designation and the tenure of, removal from and succession to the office of chief a traditional community will be regulated by the customary law of the traditional community in respect of which such chief is designated.¹⁰

[23] After the members of a traditional community who are authorised thereto by the customary law of that community have designated a person from the royal family of that traditional community as the person who is to be instituted as chief of that traditional community, the Chief's Council of the Traditional Authority in respect of that traditional community must, in the prescribed form, apply to the Minister for approval to make such designation¹¹. The application form must state the following information:

- (a) the name of the traditional community in question;
- (b) the communal area inhabited by that community;
- (c) the estimated number of members comprising such community;
- (d) the reasons for the proposed designation;
- (e) the name, office and traditional title, if any, of the candidate to be designated as chief or head of the traditional community;
- (f) the customary law applicable in that community in respect of such designation; and
- (g) such other information as may be prescribed or the Minister may require.

[24] On receipt of an application as contemplated in s 5(1) of the Act and if the application complies with subsection (1), the Minister must, in writing, approve the proposed designation set out in such application. I find it appropriate to pause here and evaluate whether the process that led to the Minister approving the designation of Mr Manase Meundju Zeraeua as Chief of the Zeraeua Traditional Community complied with the requirements set out in the Act. (Italicized and underlined for emphasis.).

⁹ See section 4(1) of the Traditional Authorities Act, 2000.

¹⁰ See section 4(2) of the Traditional Authorities Act, 2000.

¹¹ See section 5(1) of the Traditional Authorities Act, 2000.

[25] Although Mr Hinda confined the Minister's opposition to the relief sought by the applicant to the basis that it is not clear as to which decision the applicant is asking this court to review, I find it appropriate to briefly deal with the stance taken by the Minister.

[26] The Minister argues that his role in the process of designating a successor to a chief who has ceased to perform his duties as chief by reason of death, is:

'...only to approve the application in terms of the peremptory provisions of section 5(2), which he must do without any discretion. Section 5(2) of the Act, provides that "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.'
(Underlined for emphasis).

He proceeds and argues that section 5(3) does not apply in this case as the issue was merely a succession and left him with no option except to approve the designation. He furthermore argued that the subsection does not require him to consult the applicant or any other member of the traditional community.

[27] The Minister has, in my opinion, misconstrued section 5 of the Act. It is incorrect of him to state that, he is in a "straight jacket" and has no discretion to approve or disapprove an application to a proposed designation. I say the Minister's interpretation of s 5 is incorrect for the following reasons. The section requires the Minister to, upon receipt of an application under section 5(1), approve an application which complies with s 5(1) of the Act. What the section requires of the Minister is for him to, on receipt of an application under s 5 (1), satisfy himself that the application complies with the Act and only thereafter can he approve or disapprove the application. It therefore follows that the Minister must not approve an application which does not comply with the Act. (Italicized and underlined for emphasis).

[28] Having found that the Minister has misread s 5(1) of the Act, the question is, what are the consequences of his misreading of the Act? The answers to this question

can be found in a judgment by Stratford, JA in the case of *Union Government v Union Steel Corporation (South Africa) Ltd*¹², where the learned judge said:

‘If a discretion is conferred by a statute upon an individual and he fails to appreciate the nature of that discretion through misreading of the Act which confers it, he cannot and does not properly exercise that discretion. In such a case a court of law will correct him and order him to direct his mind to the true question that has been left to his discretion.’

[29] In the present matter the Minister misread the Act and thus stultified his discretion, he failed to perform his statutory duties. Section 4 of the Act; in clear terms provide that “members of a traditional community who are authorised thereto by customary law of that community, may designate in accordance with that law one person from the royal family of that traditional community, who shall be instituted as the chief of the traditional community.

[30] In a letter dated 22 May 2012 Mr Fabianus Uaseuapuni, amongst others informed the Minister that the Chief’s Council and the Traditional Authority of the Zeraeua Traditional Community, on 19 May 2012, congregated with the family of late “Ombara C Zeraeua” and that the family was divided into factions. The letter proceeds to state (and I quote verbatim):

‘...on 19 May 2012 we congregated with the family of the late Ombara C Zeraeua the family was however divided in two factions. One faction the paternal faction under the leadership of Mr Unjamua Humu. He said that according to the Herero traditional norms he has the authority to preside and to make decision about the succession of the late Ombara Eerike Zeraeua.

Therefore in his capacity he has appointed the son of the late chief Zeraeua as the successor of the late Ombara Eerike Zeraeua. This son’s name is Manase Meundju Zeraeua. He also asked the entire congregation if there is anyone who claims the authority over him but there was no objection on the authority of Mr Unjamua Humu at all.

¹² 1928 AD 220 at pages 234 – 235.

The maternal faction that was led by Mr Samuel Puriza did not challenge the authority of Mr Unjamua Humu as the family members. However the maternal family members refused to sign the attendance list and as a result they marched out of the meeting...'

[31] The application form which was forwarded to the Minister, under paragraph 3, requires the applicant to give a summary of the customary law applicable in respect of the designation of a chief. Mr Uaseuapuni (who completed the application and who also authored the letter of 22 May 2012) states that: '*According to our customary law or practices, the successor should be the younger of the deceased or the first bon (sic) of the late chief.*'"

[32] Firstly in the letter of 22 May 2012, the Minister was informed that a faction of the royal family led by Samuel Puriza refused to sign the attendance list and marched out of the meeting. Secondly there are glaring contradictions in the letter of 22 May 2012 and the application form. In the letter of 22 May 2012 Mr Uaseuapuni alleges that according to the Herero traditional norms Mr Humu has the 'authority to preside and make decision about the succession of the late Ombara Eerike and Zeraeua' and that Mr Humu 'has appointed the son of the late Chief as successor of the late Ombara E Zeraeua, but in the application for the approval to designate a chief, Mr Uaseuapuni alleges that 'according to our customary law or practices the successor should be the younger of the deceased or the first born of the late chief'.

[33] Another aspect which bothers me is the conduct of some of the members of the Chief's Council. Four members of the Chief's Council, (that is Messrs Kazondandona, Uaseuapuni, Kavendjii and Kake) were also members of the 09 February Committee, which was tasked by the faction representing the paternal royal family to coordinate the aspects relating to the election of the successor of the late Chief. These four members were also signatories to a letter which requested the factions representing the paternal and maternal members of the royal family to put on hold all the activities relating to the succession of the late Chief. Yet the same members of the Chief's Council approved and recommend the designation of Manase Meundju Zeraeua, as successor of the late Chief without them disclosing to the Minister whether the disagreement or dispute,

relating to the designation of the successor to the late Chief, between the members of the paternal and maternal royal family was resolved. I find the action of the members of the Chief's Council to be irregular and contrary to the common law principle *nemo iudex in propia causa*.

[34] I have no doubt that the letter of 22 May 2012 does not meet the requirements of section 5(1) of the Act, I say so for the following reasons: In the letter of 22 May 2012 Mr Uaseuapuni refers to the Herero traditional norms. Sections 4 and 5 require the successor to be appointed according to the customary law of the traditional community in question. The chief who had to be designated is for the Zeraeua Traditional Community and not for the Herero Traditional Community. The application for the designation of the chief, does equally not comply with the requirements of sections 4 and 5. The application does not identify the traditional community in respect of whom the customary law allegedly applies. The application is furthermore incomplete, it states that 'according to our customary law or practice it is the younger of the deceased or the first bon (sic) of the late chief'. It does not qualify the "younger" or the first born. So the question arise as to the younger what? or the first born what?

[35] I am satisfied that the misreading of the Act by the Minister is such that it led the Minister to misconceive the nature of his power and the error furthermore prevented him from properly exercising the power conferred on him by section 5(2) of the Act.

[36] Having reached the conclusion that the Minister misconceived the nature of his powers and failed to properly exercise his discretion, I now turn to the thrust of Mr Hinda's argument. Mr Hinda argued that, Annexure "RK1" to the applicant's supporting affidavit:

'...has a number of decisions and the decision sought to be reviewed must be clearly ascertainable and set out in the papers because once made an order, the Rule of Law enjoins the first respondent to obey the court order. In the absence of clarity, the order is likely to be a *brutum fulmen* incapable of enforcement. It is trite that a court of law does not give an order that may or has the effect of a *brutum fulmen*.'

[37] While I agree with Mr Hinda that the relief sought in paragraph 1 of the Notice of Motion is not elegantly drafted, I still can make out what relief it is that the applicant seeks. The applicant wants this court to review and set aside the Minister's decision, approving the application to designate Manase Meundju Zeraeua as the Chief of the Zeraeua Traditional Community.

[38] In view of my finding that the Minister misread the Act, and that that misreading of the Act, prevented him from properly exercising the power conferred on him by section 5(2) of the Act, the decision to approve the application for the designation of Manase Meundju Zeraeua as the chief of the Zeraeua Traditional Community cannot be allowed to stand and is reviewed and set aside.

[39] In the result I making the following order:

- 1 The decision by the Minister to, in terms of section 5(2) of the Traditional Authorities Act, 2000, approve the application for the designation of Manase Meundju Zeraeua as the chief of the Zeraeua Traditional Community is hereby set aside.
- 2 The Minister is ordered to pay the costs of this application.

SFI Ueitele
Judge

APPEARANCES:

APPLICANT:

K.N.G KANGUEEHI

Of Hengari, Kanguuehi & Kavendjii Inc

FIRST RESPONDENT:

G S HINDA

Instructed by Government Attorney