REPORTABLE

CASE NO.: SA 28/2012

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ERASTUS TJIUNDIKUA KAHUURE	**1ST Appellant**
ALETHA KARIKONDUA NGUVAUVA	**2ND Appellant**

In re:

KEHARANJO II NGUVAUVA

and

MINISTER OF REGIONAL AND LOCAL GOVERNMENT AND HOUSING AND RURAL DEVELOPMENT	**1ST Respondent**
MBANDERU TRADITIONAL AUTHORITY	**2ND Respondent**
KILUS NGUVAUVA	**3RD Respondent**

Coram: SHIVUTE CJ, MARITZ JA and MAINGA JA

Heard on: **27 March 2013**

Delivered on: **18 June 2013**

APPEAL JUDGMENT

SHIVUTE CJ (MARITZ JA *et* MAINGA JA concurring):

Introduction

[1] This appeal arises from protracted legal proceedings essentially concerning a deeply regrettable and polarising dispute over the succession to the chieftaincy of the Ovambanderu Traditional Community. It is a matter that has a profoundly divisive effect on the community, resulting in the emergence of two opposing factions, each backing its preferred contender to the chieftaincy.

Background

[2] The events giving rise to the proceedings may be summarised as follows: The Ovambanderu community has a proud lineage of leadership succession extending into history for many generations. To regulate the process, the community developed customary rules and practices by which a successor is determined after the passing of a Chief. The most recent undisputed Chief in that line of succession was the late Chief Munjuku II Nguvauva, who passed away on 16 January 2008. On his passing, the unfortunate dispute arose as to who should succeed him. There were initially two contenders to the chieftaincy, namely half-brothers, Keharanjo II Nguvauva and Kilus Nguvauva, both sons of the late Chief Munjuku II Nguvauva. Keharanjo II Nguvauva was born of the marriage between the late Chief Munjuku II Nguvauva and Aletha

Karikondua Nguvauva (the second appellant), while Kilus Nguvauva (the third respondent) was born of a relationship which the late Chief had.

[3] I mention the fact that they were half-brothers because, as will soon become apparent whether a contender for succession was born in or outside a matrimonial relationship of a Chief appears to have been considered relevant to the order of succession. Shortly after his father's passing, Keharanjo II Nguvauva was designated as successor to the chieftaincy by a section of the community and an application was subsequently made to the first respondent, the Minister of Regional and Local Government and Housing and Rural Development (the Minister), to have him recognised as Chief of the Mbanderu Traditional Authority in terms of the relevant provisions of the Traditional Authorities Act, 25 of 2000 (the Act). His claim to succession as Chief was, however, disputed by another section of the community which supported the third respondent's succession to the position because he was the elder of the two and because the late Chief had allegedly proclaimed that to be his wish. The opposing factions submitted written petitions pursuant to s 12 of the Act to the Minister in which he was urged to investigate and resolve the dispute.

[4] The Minister appointed a Ministerial Investigating Committee (the committee) to investigate the matter. After public hearings, the committee concluded that, according to the customary rules of succession applicable to the Ovambanderu Traditional Community, a child born of a Chief's marriage is considered senior for purposes of succession to one born out of wedlock and that only a male child may be

the 'rightful successor to his father'. The committee found that Keharanjo II Nguvauva, who was born in wedlock, was the 'senior son' in the order of succession and recommended that he, rather than the third respondent, should be recognised as the Chief of the Ovambanderu Community.

[5] In the alternative and 'in the event that there is an objection about the senior son succeeding his father,' the committee recommended that the dispute be resolved by invoking s 5(10)(*b*) of the Act 'since Government was not there to exercise customary law on behalf of any traditional authority'. Paraphrased, the above section provides that, in the event of uncertainty or disagreement amongst the members of a traditional community regarding the applicable customary law, the members of the community may elect, subject to the approval of the Minister, a chief or head of the community by a majority vote.

[6] The Minister initially accepted the committee's recommendation that Keharanjo II Nguvauva should become the Chief of the Ovambanderu Traditional Community and he made this position absolutely clear in a letter addressed to the legal practitioners of Keharanjo II Nguvauva dated 9 December 2009. The Minister later changed his position and decided that an election instead be held to determine who, between Keharanjo II Nguvauva and the third respondent, should be recognised as Chief of the Ovambanderu Traditional Community. This decision was conveyed to the legal representatives of Keharanjo II Nguvauva by a letter dated 19 May 2010.

[7] Evidently dissatisfied with the Minister's decision, Keharanjo II Nguvauva made application in the High Court, seeking amongst other relief, an order declaring that his 'appointment' as the Chief of the Ovambanderu Traditional Community was valid and an order reviewing, correcting and/or setting aside the Minister's subsequent decision that an election be held to determine a successor to the chieftaincy. This application will be referred to as the ‘review application’ in this judgment. Keharanjo II Nguvauva contended that he should be recognised as the Chief of the Mbanderu Traditional Authority. He cited the Minister and the Mbanderu Traditional Authority as first and second respondents and, since the third respondent also maintained that he was the one who should be so recognised instead, he was cited accordingly in those proceedings. The three respondents are also so cited in the appeal.

[8] The second and third respondents opposed the application and, simultaneously, brought a counter-application in which they also sought an order reviewing the decision of the Minister and an order recognising the third respondent as the Chief of the Mbanderu Traditional Authority. In addition, they sought a declarator that the purported rule of customary law or practice to the effect that, irrespective of age, a son born in wedlock is senior to one born out of wedlock for purposes of the order of succession is unconstitutional, invalid and unenforceable. The specific formulation of this prayer will be dealt with below.

[9] Whilst the litigation was pending in the High Court, Keharanjo II Nguvauva passed on. Following his passing, his mother, the second appellant, stepped into the fray. She maintained that, in terms of the Community's constitution or customary law, she was entitled to succeed her deceased son and to be duly designated and instituted as 'Queen' of the Ovambanderu Traditional Community. An application was also made to the Minister for her official recognition as Chief of the Mbanderu Traditional Authority pursuant to s 6 of the Act. In addition, she made application for leave to intervene in the counter-application pending before the High Court. She asserted standing on the basis that she was the 'Queen' of the Ovambanderu Community by virtue of her marriage to the late Chief Munjuku II Nguvauva and on account of her allegedly being 'duly recommended and approved as Paramount Chief in customary law', alternatively, as an ordinary member of the Ovambaderu Traditional Community.

[10] The first appellant, Mr Eratus Tjiundikua Kahuure, a Senior Traditional Councillor in the Mbanderu Traditional Authority joined cause with her in seeking leave to intervene in the counter application. The first appellant also indicated that, should leave to intervene be granted, he would seek an order that the second appellant be recognised as Chief of the Mbanderu Traditional Authority.

[11] The joint application to intervene was dismissed with costs by the High Court and it is against this order that the appeal is directed. I pause to note at the outset that the High Court appears to have misconstrued the appellants' application as the

one seeking leave to intervene in the review application rather than in the counter application. This apparent misdirection permeates much of the Court's reasoning in dismissing the appellants' application to intervene, as will be apparent from the discussion that follows.

The High Court Judgment

[12] The High Court held that the first appellant could not establish that he had interest in the review application greater than that of the other members of the Ovambanderu Community: the authority to exercise the powers of the Traditional Community was delegated not to individual members but to the Mbanderu Traditional Authority. It reasoned that, although this power may expressly be sub-delegated to individual members in appropriate cases, the first appellant did not allege nor was there any proof that any of the powers conferred on the Mbanderu Traditional Authority had been delegated to him. In any event, the Mbanderu Traditional Authority was a party to the review application; had launched a counter-application to the review application and an answering affidavit had been filed on its behalf. Had the Traditional Authority declined to oppose the review application at the invitation of the first appellant, then in those circumstances, he would have been entitled to seek leave to intervene to protect the interests of the community that he might have felt were threatened by the review application.

[13] As regards the second appellant, the High Court found that she, like the first appellant, had not shown any interest 'peculiar and exclusive' to her so as to clothe

her with the legal standing to intervene. As to the submission by counsel in the High Court that, as a 'duly designated and coronated Paramount Chief of the Ovambanderu Traditional Community', the second appellant would be 'severely prejudiced' by the judgment in the review application and the counter-application in that her position and social status in the community would be adversely affected by the judgment in the counter application, the learned Judge reasoned that she had not established that she was a descendant of royal blood of the Nguvauva clan and therefore eligible for designation as chief or head of the Ovambanderu Traditional Community as required by that community's constitution (much about which later in this judgment). Moreover, so the Court found, it had not been established that the other procedural requirements set out in the Ovambanderu constitution relating to the designation of a chief or head for the community had been complied with. It accordingly dismissed the application with costs.

[14] In this Court, Mr Maleka, SC assisted by Mr Hinda argued the appeal on behalf of the appellants while Mr Frank, SC assisted by Ms Bassingthwaighte argued on behalf of the second and third respondents. There was no appearance on behalf of the Minister.

Preliminary Issue: Is the order of the High Court appealable without leave?

[15] Mr Frank raised a preliminary point that the order of the High Court is interlocutory in its nature and therefore not appealable without leave of that Court or without the leave of this Court. Relying on s 18(3) of the High Court Act 16 of 1990

and case law, Mr Frank referred us to the now trite principle that an appeal to this Court as of right lies only in respect of final orders or judgments. In respect of costs or interlocutory matters, leave of the High Court is required and, if refused, the Supreme Court should be approached by way of a petition and that, unless the petition for leave to appeal is granted by the Supreme Court, the appeal cannot be entertained. Counsel contends that the order of the High Court refusing the application to intervene was interlocutory in substance and that leave was necessary. Since the appellants did not seek leave of the High Court, the appeal was not properly before this Court and, as such, it should be struck off the roll with costs.

[16] Mr Maleka on the other hand, argues on this aspect that the facts in the cases relied on by Mr Frank were distinguishable from the set of facts in the appeal to the extent that in the cases cited in support of his propositions, the parties were the same in both the main and interlocutory proceedings. In the present matter, the appellants were not parties to either the review application or the counter-application. Relying on para 8 of the judgment of the South African Supreme Court of Appeal in *Highveld Steel & Vanadium Corporation Ltd v Oosthuizen* 2009 (4) SA 1, Mr Maleka contends that the order of the High Court declining leave to intervene was final in effect; it was binding on the second and third respondents; it could not be altered by the Judge concerned, and it effectively disposed of the rights and/or obligations of the parties. As such, he submitted, the dismissal of the application to intervene was a final order which was appealable as of right.

[17] Mr Frank contends that the *Highveld Steel* case relied on by Mr Maleka was decided in the context of leave having been granted by the Court appealed from and can thus not be cited in support of the proposition advanced on behalf of the appellants. There is no doubt that Mr Frank is correct in his submission that the *Highveld Steel* case falls to be distinguished on that basis. However, as to the overall question whether or not the judgment or order of the High Court is appealable my own view is that normally interlocutory orders operate as between or amongst parties who are also parties to the main proceedings. The appellants in the present matter were not parties to the main proceedings in the High Court. Instead, as mentioned above, they sought leave to intervene. By refusing them leave to intervene, the order or judgment of the High Court as against them is final in effect. They cannot assert any right or interest in the review application or the counterapplication.

[18] I do not agree with the contention by Mr Frank, if I understand it correctly, that because there were other conceivable procedural avenues available to the appellants that they did not pursue after the application to intervene had been refused, the judgment or order of the High Court cannot be said to be final in effect. Aside from the fact that the alternative procedures would only have given rise to a multiplicity of actions between the same litigants and raise the undesirable possibility of conflicting judgments or orders given by the same court differently composed on substantially the same subject matter at different times, the fact that the appellants did not take possible alternative procedural steps to assert their rights or protect their interests does not detract from the position that the decision of the High Court to exclude them

from the main proceedings is a judgment or order as envisaged by the South African Supreme Court of Appeal in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I-J. The principles derived from that case to distinguish between interlocutory and final orders have been applied by our courts in numerous cases: the order is not interlocutory, namely that if it is final in effect and not susceptible of alteration by the court that has made it; is definitive of the rights of the parties and has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. As regards the appellants, the judgment and order of the High Court is therefore appealable as of right. Although, as this Court pointed out in *Shetu Trading CC v Chair, Tender Board of Namibia and Others* 2012 (1) NR 162 (SC) at para 22, the principles in *Zweni* are not rigid principles to be applied invariably but are intended as 'useful guidelines', it is my considered view that, as between the appellants and respondents, the order of the High Court was final and thus appealable. The appeal is accordingly properly before us.

The Merits of the appeal

[19] The central issue in this appeal, namely whether the High Court was correct in its findings that none of the appellants had established a *prima facie* case to a direct and substantial interest in the counter-application so as to be entitled to leave to intervene will be dealt with later in this judgment. Before that is done, it is necessary first to preface the consideration of that issue with the discussion of the legal basis for the designation of a person as chief or head of a traditional community or traditional authority.

Designation of a chief or head of a traditional community

[20] The designation of a chief or head of a traditional community is not exclusively a customary law issue. The process is also regulated by the Act. The word 'Chief' is defined in s 1 of the Act as meaning 'the supreme traditional leader of a traditional community designated in accordance with section 4(1)(*a*) and recognised as such under section 6 of the Act'. The following definition of 'head' is given in the same section: '"head" in relation to a traditional community, means the supreme traditional leader of that traditional community designated in accordance with section 4(1)(*a*) or (*b*), as the case may be, and recognised as such under section 6.' 'Designation' is defined as follows: '"designation" in relation to the institution of a chief or head of a traditional community, includes the election or hereditary succession to the office of a chief or head of a traditional community, and any other method of instituting a chief or head of a traditional community recognised under customary law.' Section 4(1) of the Act provides that:

> '(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.'

Section 5 deals with the procedure for the notification of the designation of a chief or head of a traditional authority while s 6 contains substantive and procedural aspects of the recognition of a chief or head of the traditional community.

[21] The Ovambanderu Traditional Community has adopted a constitution that appears to have codified certain aspects of its customary law, particularly in relation to the succession of a chief or head of the community. The constitution, titled 'Ovambanderu Constitution', has been relied upon by the parties on both sides and it is quite evident that its validity was not an issue in the Court below nor is it an issue in this Court. It has thus become necessary to refer to pertinent provisions of the Ovambanderu constitution. Evidently informed by Article 19 of the Namibian Constitution which provides that every person is entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the Constitution and to the rights of others or the national interest, the Preamble to the Ovambanderu constitution records that the community has established an Authority with the aim to promote unity, culture and 'traditional development'. Chapter 9 of the Ovambanderu constitution provides for the designation, powers and functions of the

Chief of the Community (styled in the constitution as the Paramount Chief or *Ombara Otjiuru*). However, nothing turns on the nomenclature, because due recognition is given in the Ovambanderu constitution that the statutory designation of the Paramount Chief is 'Chief'. Clause 9.1(b) of the Ovambanderu constitution sets out the legal basis for the designation of the Chief essentially reciting the provisions of s 3(1) of the now repealed Traditional Authority Act, 1995 which had provided that the members of a traditional community may designate one person from amongst themselves, in accordance with the customary law of that community, who shall be instituted as chief of that community. The equivalent provision to section 3(1) of the repealed law can be found in s 4 of the Act, although the latter is much wider in its scope and ambit.

[22] Reference having been made to the provisions of the repealed Act, clause 9.1(b) of the Ovambanderu constitution continues to provide that:

> 'In pursuance of the foregoing statutory provisions regarding the designation of a traditional leader, the Paramount Chief (Chief) of the Ovambanderu shall be designated as follows: the Supreme Leader of the Ovambanderu is customarily drawn from among descendants of the royal blood from Nguvauva clan in the Ovambanderu community. Since the inception of the Ovambanderu as a separate community, the Paramount Chief has been designated from the royal house of Nguvauva. The Supreme Leader shall continue to be designated from among descendants of royal blood from Nguvauva clan in the Ovambanderu community and succession shall be hereditary. In this process both the Supreme Council and General Assembly will endorse the recommendations of the Committee of eminent persons from the Nguvauva clan . . . This Committee of eminent persons from the Nguvauva clan will also be responsible for the designation of the Paramount Chief.'

[23] It would appear from the above provisions of the Ovambanderu constitution that for a person to qualify for designation as Chief of the Ovambanderu Traditional Community the following requirements must all be met: he or she must be a descendant of the Nguvauva clan; the succession is hereditary; there must be a recommendation by a committee of eminent persons from the Nguvauva clan; such recommendation must be endorsed by the Supreme Council, and the same must be endorsed by the General Assembly as well. Against the backdrop of these statutory and constitutional prerequisites, it is proposed then to briefly deal with general principles relating to an application to intervene and what an applicant in such application must establish to obtain relief before considering whether or not the appellants had established a *prima facie* case that each had a direct and substantial interest in the subject matter of the application they sought leave to join.

Requirements for an application to intervene

[24] The views of the High Court and unanimous submissions by counsel that *Ex Parte Sudurhavid (Pty) Ltd: In Re Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd* 1992 NR 316 (HC) sufficiently sets out the law applicable in applications to intervene are undoubtedly correct. I also agree with counsel for the appellants that nothing of significance in subsequent case law in Southern Africa has modified or altered the exposition of the principles set out in the *Sudurhavid* judgment. The principles were endorsed by Hannah J in *Sudurhavid* at 321A-C (quoting from the dictum of White J in *Minister of Local Government and Land Tenure v Sizwe*

Development: in re Sizwe Development v Flagstaff Municipality 1991 (1) SA 677 (Tk)) where it was stated as follows:

> 'The applicant must satisfy the Court that:
>
> > (i) he has a direct and substantial interest in the subject-matter of the litigation, which could be prejudiced by the judgment of the Court . . .; and
> >
> > (ii) the application is made seriously and is not frivolous, and that the allegations made by the applicant constitute a *prima facie* case or defence - it is not necessary for the applicant to satisfy the Court that he will succeed in his case or defence . . .'

[25] It is a trite principle that an applicant must establish a *prima facie* case in the founding affidavit in which such a case is sought to be made out. The founding affidavit must set out factual averments, which if established at the hearing would entitle the applicant to some relief. In this regard, *Herbstein and Van Winsen*[1] at 438 opine that:

> 'As in the case of a summons, it must appear from the application that the applicant has an interest or special reason entitling the bringing of the application - that he has *locus standi* in the matter . . .'

Herbstein and Van Winsen also point out at 566 that 'a pleading that states conclusions and opinions instead of material facts, or that draws a conclusion without

[1] *Herbstein and Van Winsen*; The Civil Practice of the High Courts and the Supreme Court of South Africa, 5th ed. (by Cilliers, Loots and Nel) Juta 2009

alleging the material facts which, if proved, would warrant that conclusion, is defective'.

[26] It has now become necessary to examine more closely the allegations made by the appellants in the founding papers about their interest in the subject matter of the counter-application to ascertain whether the Court *a quo* was correct in its conclusion that the appellants had not established a *prima facie* case to be granted leave to intervene.

The second appellant

[27] It is convenient to deal with the allegations made in relation to the second appellant first. Because the first and second appellants made joint cause on the matter, the founding affidavit in the application to intervene was deposed to by the first appellant with the second appellant simply deposing to a confirmatory affidavit. The pertinent averments made by the first appellant in relation to the second appellant are that the second appellant had joined the application to intervene in her capacity 'as the customary law designated Paramount Chief of the Ovambanderu Traditional Community, alternatively as an *omumbanderu* adult female acting in terms of Chapter 6(a)(*iii*) of the Ovambanderu constitution; that on 30 April 2011 eminent persons of the Nguvauva clan met at Otjombinde Constituency and recommended the second appellant to the Supreme Council of Ovambanderu Traditional Authority to be the successor to Keharanjo II Nguvauva, and that on the same day the

Supreme Council met and accepted the recommendation that the second appellant be designated as the Paramount Chief of the Ovambanderu Traditional Authority.

[28] The first appellant continued by noting that an application for approval of her designation had been submitted to the Minister and the Minister replied, amongst other things, by calling for an election to settle the leadership dispute. The only allegation relating to the interest that the second appellant has had in the proceedings that she sought to intervene in was put by the deponent as follows:

> 'The second [appellant] has a direct and substantial interest in this matter. Firstly, she is the Queen of the Ovambanderu Community by virtue of her marriage to Munjuku Nguvauva the erstwhile undisputed Paramount Chief of the Mbanderu Traditional Authority. Secondly, as I set out above she was duly recommended and approved as paramount Chief in customary law.'

[29] It will be recalled that some of the Ovambanderu constitutional requirements for eligibility for designation as chief or head are that such individual must be a descendant of the Nguvauva clan and that the position of the head of the Community is hereditary. The allegation that the second appellant is a descendant of royal blood from the Nguvauva clan is singularly absent from the founding affidavit. Indeed, counsel for the appellants readily conceded that the second appellant had not established a *prima facie* case on the affidavits before the Court that she was a descendant of the Nguvauva clan.

[30] The question that immediately arises in this connection is this: given the clear terms of the Ovambanderu constitution, on what basis then can it be contended that the second appellant became a candidate for succession to the chieftaincy of the Ovambanderu Traditional Authority in terms of the constitution if it has not been established on the admissible evidence presented to the Court that she is a descendant of the Nguvauva clan? In an attempt to answer this question, counsel for the appellants contends that since the definition of the phrase 'designate' in the Act (as mentioned before) includes not only the election or hereditary succession but also 'any other method of instituting a chief or head of a traditional community recognised under customary law', the appellants have made undisputed allegations that a process of succession had taken place and that that process complied with the relevant provisions of the Ovambanderu constitution.

[31] Counsel argues that an application to intervene involves both legal and factual issues. Whether or not the process that led to the designation of the second appellant was in fact in line with the provisions of the Ovambanderu constitution is a matter that will be debated and decided in due course in the counter-application proceedings. The appellants, however, were entitled to ventilate that version by joining the counter-application.

[32] Counsel for the second and third respondents, on the other hand, argues that the allegations relating to the designation process are mere conclusions arrived at without first having established primary facts by admissible evidence. Counsel

submits that the appellants had to set out facts in their affidavits from which an inference could be drawn that, whatever processes the appellants contend had been gone through, complied with the Ovambanderu constitution. In the absence of facts on the basis of which an inference can be drawn that the second appellant qualifies in terms of the Ovambanderu constitution to be designated as chief or head of the community, so counsel further contends, a *prima facie* case has not been made out.

[33] I agree with counsel for the appellants that the adjudication of an application to intervene requires the determination of both legal and factual issues. To that extent, material facts on the basis of which an inference may be drawn that a *prima facie* case has been made out must be established in the founding and supporting affidavits. For the second appellant to be successful with her application to intervene, it was necessary first to establish that she met all the requirements relating to the designation as chief or head of the Mbanderu Traditional Authority as stipulated in the Ovambanderu constitution and that all the procedural and substantive processes set out in that constitution have been complied with. As mentioned above, the Ovambanderu constitution clearly stipulates that for a person to be eligible for designation as chief or head of the community, such person must, amongst other things, be a descendant of the royal blood of the Nguvauva clan. The second appellant has self-admittedly not established on the affidavits presented that she meets this criterion. To merely say that the provisions of the Ovambanderu constitution have been complied with without setting out the factual basis upon which this conclusion has been reached is essentially to draw a conclusion without alleging

the material facts which, if proved, would warrant that conclusion. As the learned authors of *Herbstein and Van Winsen* point out, this manner of pleading is defective.[2]

[34] It may well be that whether or not the Ovambanderu constitution has been complied with is one of the issues to be argued and decided in the counter application proceedings as counsel for the appellants contended. However, it seems to me that for the second appellant to succeed in establishing standing in the proceedings that she sought leave to join, she had to establish the factual basis upon which an allegation has been made that she had been designated as chief or head of the Ovambanderu Traditional Community in terms of that community's constitution. This has not been established. I should add that, even if the Court would have accepted that the second appellant, although not a descendant of the late Chief Munjuku II Nguvauva, is nevertheless a descendant of the Nguvauva clan if one were to have regard to her ascendants and that of the late Chief, there is no allegation or evidence that she has a stronger claim to succession than the third respondent, who is an immediate and direct descendant of the late Chief. The High Court was therefore correct in its finding that the second appellant had not established a *prima facie* case for leave to intervene on the basis that she was a duly designated chief or head of the Ovambanderu Traditional Community.

[35] As already stated, the second appellant had also sought to join the counter-application proceedings on the alternative basis that she was an *omumbanderu* adult

[2] See para 24 of this judgment above.

female acting in terms of Chapter 6(a)(*iii*) of the Ovambanderu constitution. By this is understood to mean that she sought leave to intervene in the proceedings as an ordinary member of the Ovambanderu Traditional Community to assert those duties set out in Chapter 6(a)(*iii*) of the Ovambanderu Constitution.

[36] As I understand the judgment of the High Court on this aspect, having characterised the application as one for leave to intervene in the review application, that Court did not specifically consider or decide the alternative basis on which the second appellant had sought leave to join the proceedings. Instead, the Court only dealt with the principal ground for leave to intervene and held, as stated already, that the second appellant's alleged direct and substantial interest in the review application was predicated on the allegation that she had been duly designated and had gone through a coronation ceremony as Paramount Chief of the Ovambanderu Traditional Community and, that there was no 'iota of evidence' that she was from amongst the descendants of the royal blood from the Nguvauva clan. It concluded that there was thus no evidence that she qualified for designation as chief.

[37] It is a settled principle of our law of joinder and intervention that a person does not have to leave the protection of his or her interest to either of the parties to the litigation in the expectation that those will adequately protect his or her rights. In *Sudurhavid*, for example, Hannah J referred with approval to a passage in *Bitcon v City Council of Johannesburg and Arenow Behrman & Co* 1931 WLD 273 (quoting

from the Privy Council decision in *Orphan Board (President etc) v Van Reenen* 12 ER 252 (1829 1 Knapp 83 PC) that:

> 'The principle of the law of intervention is, that if any third person considers that his interest will be affected by a cause which is pending, he is not bound to leave the care of his interest to either of the litigants, but has a right to intervene, or be made a party to the cause, and take on himself the defence of his own rights, provided he does not disturb the order of the proceedings . . . '

[38] This principle is even more relevant and of application in the circumstances of this appeal where the second respondent, being the authority with statutory powers generally to uphold the customs and practices of the community[3] had sought to challenge the alleged customary rule of succession earlier referred to by way of a constitutional attack and has generally aligned itself with the position of one of the contenders who sought to have that rule declared unconstitutional and void. Provided therefore that the second appellant could establish that as an ordinary member of the Ovambanderu Traditional Community, she had the necessary standing to intervene in the counter-application, she could have been allowed to join the proceedings. It is to this aspect that I propose to turn next.

[39] It will be useful to start the analysis of the case that the second appellant sought to establish with the consideration of the provisions of the Ovambanderu Constitution on which she relied. Clause (a)(iii) of Chapter 6 reads as follows:

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[3] See s 3 for the powers, duties and functions of traditional authorities.

'(a) Duties of members

The duties of a member shall be the following:

(i) ...

(ii) ...

(iii) To observe the discipline of Ovambanderu, to participate in the traditional life of Ovambanderu, to carry out in practice the policy and decisions of Ovambanderu and to fight against everything inside and outside which is detrimental to the interest of Ovambanderu people.'

[40] The prayers in the second and third respondents' counter-application that are relevant to the present discussion are the following:

'(a) That the dispute regarding the designation of Chief be referred back to the first respondent;

(b) Declaring that the customary law relating to the appointment/designation of a Chief is as reflected in Chapter 9 of the Constitution of Ovambanderu read with the detailed explanation set out in the affidavit of Gerson Katjirua;

(c) Declaring that the third respondent has been duly designated as Chief of the Ovambanderu Community;

(d) That the first respondent be ordered to approve the designation of the third respondent as the Chief of the Ovambanderu Community in terms of section 5 of the Traditional Act, 25 of 2000;

(e) Declaring the purported rule of customary law or customary (*sic*) relied upon by the applicant and the Ministerial Investigating Committee which discriminates against persons born out of wedlock to be in conflict with the

> Constitution of Namibia and that the recommendation based upon such rule or custom is invalid and unenforceable.'

[41] It is not stated in the founding affidavit which one of the principles listed in clause (a)(iii) of Chapter 6 of the Ovambanderu constitution the second appellant had sought to advance in the counter-application proceedings in her capacity as an ordinary member of the Ovambanderu Traditional Community. It appears that the only basis of the allegation that the second appellant had a direct and substantial interest in the counter application was the same allegation as the one quoted earlier in support of the principal basis on which she sought leave to intervene, namely her claimed designation as Chief of the Ovambanderu Traditional Community according to customary law.

[42] In the first place there is no allegation or evidence that as ‘Queen’ (by virtue of her being the widow of the late Chief Munjuku II Nguvauva), the second appellant has had any constitutional powers or duties and obligations over and above those conferred on ordinary members of the Ovambanderu Traditional Community. Secondly, as mentioned above, the designation of a chief or head in terms of the Ovambanderu customary law (as distilled from that community's constitutional provisions) is done in accordance with criteria set in Chapter 9.1(b) of the Ovambanderu constitution discussed above. To summarise that discussion, it has been found that, on the affidavits before Court, the second appellant has not established a *prima facie* case that she is from amongst descendants of the royal blood from the Nguvauva clan. It follows, therefore, that the allegations made on

behalf of the second appellant why she should be granted leave to intervene in the counter-application in her capacity as an ordinary member of the Ovambanderu Traditional Community - insofar as those allegations were not different from the averments made in respect of the interest she may have had in her capacity as Paramount Chief allegedly so designated in customary law - likewise do not constitute a *prima facie* case for intervention on the alternative basis.

[43] The High Court as alluded to in para 13 above, found that the second appellant had also not established that the recommendation for her designation as chief made by the Committee of Eminent Persons has been endorsed by the Supreme Council as required by Chapter 8(a) of the Ovambanderu constitution, because the Supreme Council was not properly constituted. This issue has not been argued before us and I accordingly refrain from expressing any views on it.

The first appellant

[44] I turn next to consider the position regarding the first appellant. The first appellant had essentially made two allegations why he should be granted leave to intervene. The first was that as a Senior Traditional Councillor he had a direct and substantial interest in the counter-application brought by the second and third respondents, because he was required to protect and uphold the Ovambanderu customary law in that capacity. Secondly, he contended that the review application was opposed by an unauthorised structure of the second respondent, namely the Supreme Council. The Chief's Council and, not the Supreme Council was the body

authorised to make administrative decisions on behalf of the second respondent. Moreover, since the Supreme Council did not have a chief or head, it could not take a valid decision to oppose the review application or at all.

[45] Counsel for the appellants argued that as a senior councillor, the first appellant had a direct and substantial interest to protect the Ovambanderu constitution, particularly the alleged customary rule or practice that a child born in wedlock is senior to one born out of wedlock and as such is the rightful successor to the chieftaincy in the event of a vacancy arising. The first appellant had an interest to protect the alleged customary rule because the statutory authority that was supposed to protect the rule or practice had taken a different view on the matter. Counsel for the second and third respondents contended that the ground now being advanced by counsel for the appellants is new and different from the grounds contended for by the first appellant in the founding affidavit.

[46] The debate on the first appellant's interest in the subject matter of the second and third respondent's counter application was cut short by the concession made by counsel for the appellants in answer to the question posed by a member of the Court. The question was whether, given the passing of Keharanjo II Nguvauva, the first appellant had any direct and substantial interest in the relief prayed for in the counter application other than the prayer relating to the constitutional challenge to the alleged rule of customary law. Counsel for the appellants conceded that the first appellant's

interest was confined to the prayer challenging the constitutionality of the alleged customary rule or practice detailed as prayer (e) in para 39 above.

[47] Counsel for the appellants having made the above fatal - as far as the case of the first appellant is concerned - but unavoidable concession, it did not come as a surprise that in the course of his argument counsel for the second and third respondents expressly abandoned prayer (e) of the counter-application. With the abandonment of prayer (e), the first appellant's case for intervention effectively collapsed. In the light of this development, it has become unnecessary to decide on appeal whether the first appellant had established a *prima facie* case or interest in the counter-application for him to be entitled to leave to intervene – other than for the purposes of costs, which will be dealt with when the issue of costs is considered below.

Conclusion

[48] The principal issue in contention in the High Court was that of succession to the chieftaincy of the Mbanderu Traditional Authority. Since the second appellant wishes to defend her purported designation as Chief of Ovambanderu Traditional Community in customary law, she was required to establish a *prima facie* case that she was eligible to be designated as the chief or head of that community in accordance with the stipulations of the Ovambanderu constitution. This she has failed to do. To the extent that she sought to join the proceedings on the alternative basis as an ordinary member of the Ovambanderu Traditional Community, she did not

make averments other than those made in relation to the allegation that she had been designated as chief of the community in customary law and the alternative ground should fail for the same reasons. She has, therefore, not established a *prima facie* case for standing to intervene in the counter-application. As regards the first appellant, the abandonment of the relief relating to the constitutionality of the rule of customary law then impugned in the counter-application of the second and third respondents has left the first appellant without any interest in the remaining prayers in the counter-application. He will accordingly not have any role to play in what remains of the counter-application. The appeal must accordingly be dismissed in respect of both appellants.

Costs

[49] The issue of costs remains to be considered. Normally a party is entitled to costs if the other party abandons a point or relief on appeal especially as in the present circumstances where the abandonment was done in the course of arguments and the effect thereof is to render the appeal nugatory. Had prayer (e) not been abandoned, the first appellant may well have had the requisite standing to intervene and should have been allowed to join the proceedings in relation to that prayer. This he could have done given his position as a Senior Traditional Councillor in the Mbanderu Traditional Authority; the stance taken by the second respondent as regards the impugned rule of custom or practice and because, as counsel for the appellants correctly argued, standing as regards constitutional issues extends well

beyond the primary interest of the parties to litigation. Had this been the only consideration, I would have granted an order of costs in favour of the first appellant.

[50] However, on the facts of this appeal it is plain that the principal purpose for the first appellant's application to intervene was to protect and secure the purported designation of the second appellant as Chief of the Ovambanderu Traditional Community. To that end, he made common cause with the second appellant. This much is evident from the fact that at the time the application to intervene was made, the relief relating to the constitutional point that the first appellant avowedly sought to defend had become of lesser importance with the passing of Keharanjo II Nguvauva.

[51] As no *prima facie* cause for succession has been established in support of the application to intervene by either of the appellants, the second appellant's appeal must fail and, so too, the common basis on which the first appellant sought to join in the proceedings. Had the first appellant not made cause with the second appellant, I would have made an order of costs in his favour and had the appeal of the second appellant been the only one before the Court, I would have dismissed it with costs. In circumstances where the two appellants have made common cause in the intervention application and subsequent appeal and were throughout the proceedings jointly represented by the same counsel but, for reasons earlier stated, the one is entitled to a favourable order of costs against the respondents and the other to an adverse order, it seems to me that it will be both fair and just to make no order as to costs and to amend the order of the Court *a quo* accordingly.

Order

[52] For all these reasons, the following order is made:

(a) Subject to the order in paragraph (c), the appeal is dismissed.

(b) No order as to costs in the appeal is made.

(c) The costs order of the High Court made pursuant to the dismissal of the application is substituted for the following order: 'No order of costs is made.'

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SHIVUTE CJ

_____
MARITZ JA

_____
MAINGA JA

APPEARANCES

APPELLANTS:	Mr V Maleka
	Assisted by Mr G S Hinda
	Instructed by Dr Weder, Kauta and Hoveka
SECOND AND THIRD RESPONDENTS:	Mr T J Frank
	Assisted by Ms N Bassingthwaighte
	Instructed by AngulaColeman Legal Practitioners