

REPUBLIC OF NAMIBIA



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

Case No.: A 206/2015

In the matter between:

JAN TSUMIB	1ST APPLICANT
MANNETJIE GABISEB	2ND APPLICANT
BANDU KOMOB	3RD APPLICANT
DAWID WILLEM	4TH APPLICANT
ANNA AIS	5TH APPLICANT
ELIAS !AOKOEOB GUXAB	6TH APPLICANT
ALEXANDER ARAEB	7TH APPLICANT
NIKODEMUS HABUE HAWASEB	8TH APPLICANT

and

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	1ST RESPONDENT
NAMIBIA WILDLIFE RESORTS LTD	2ND RESPONDENT
HAI OM TRADITIONAL AUTHORITY	3RD RESPONDENT
NAMIBIA DEVELOPMENT CORPORATION	4TH RESPONDENT
!GAOBAUB HAI OM ASSOCIATION	5TH RESPONDENT
NAMIBIA POWER CORPORATION (PTY) LTD	6TH RESPONDENT
WEXFORD INVESTMENTS (PTY) LTD	7TH RESPONDENT
JOACHIM LENSSEN	8TH RESPONDENT
NAMIBIA HD MINING AND INVESTMENT (PTY) LED	9TH RESPONDENT

ANDREAS TUTA RUNONE	10TH RESPONDENT
NAMIBIA WATER CORPORATION LIMITED	11TH RESPONDENT
EHIROVIPUKA CONSERVANCY	12TH RESPONDENT
SHEYA SHUUSONA CONSERVANCY	13TH RESPONDENT
KING NEHALE CONSERVANCY	14TH RESPONDENT
OSHIKOTO COMMUNAL LAND BOARD (CHAIRMAN)	15TH RESPONDENT
OHANGWENA COMMUNAL LAND BOARD (CHAIRMAN)	16TH RESPONDENT
ONDONGA TRADITIONAL AUTHORITY	17TH RESPONDENT
OUKWANYAMA TRADITIONAL AUTHORITY	18TH RESPONDENT
THE COUNCIL OF TRADITIONAL LEADERS	19TH RESPONDENT
ATTORNEY GENERAL	20TH RESPONDENT

Neutral Citation: *Tsumib v Government of the Republic of Namibia* (A 206/2015)
[2019] NAHCMD 312 (28 August 2019)

Coram: **ANGULA DJP, NDAUENDAPO J et MASUKU J**

Heard: **26 – 29 November 2018**

Delivered: **28 August 2019**

Flynote: Application and motions – Application for leave to represent a minority group, the Hai||om people as rights-bearing entity – Representative action – Applicants and members of the Hai||om traditional community minority being members of that recognized traditional community in terms Traditional Authorities Act, 2000 – Power and duties of the Traditional Authority to represent members of its community – Applicants usurping the power and functions of the Traditional Authority – If relief is granted would create a parallel representation in contravention of the provisions of the Traditional Authorities Act – Applicants must exhaust internal remedies – Application dismissed.

Summary: The applicants, being members of a minority group, the Hai||om people, applied for leave to represent, the Hai||om people in an action they intended to institute against the Government in which they would claim ownership or exclusive beneficial occupation of what they claimed to be their ancestral land; a claim to the natural resource;

a claim to develop the said land; a claim to the non-exclusive occupation of the said land; an alternative claim to that they be allocated a land in the same extent as their ancestral land as compensation – The applicants claimed that even though the Constitution of Namibia guarantees the Hai||om people right to fair trial and further provides for a right for any person who claim that his or her fundamental right has been infringed to approach the court with a view to enforce or protect such right – The applicants claimed that there was no procedural mechanism for them to assert those rights before court.

The applicants further argued that the Traditional Authority was conflicted and was thus not in a position to litigate against the Government for the reason that it was under a statutory obligation to assist and co-operate with the Government in the execution of Government policies. The applicants accordingly urged the court to exercise its inherent power to develop the common law and to regulate its own processes by authorising the applicants to represent the Hai||om people and to institute the intended claims in their representative capacity.

The respondents who opposed the application argued that the correct entity to represent the Hai||om Traditional Authority, established in terms of the Traditional Authorities Act, 2000 and not the applicants; that there was no constitutional or legislative basis for the applicants instituting the intended representative actions.

The respondents further contended that in terms of the provisions of the Act it is the Traditional Authority in whose name the properties owned by that community should be registered. Furthermore, the Traditional Authority has been vested with a statutory obligation by the Act to uphold, promote, protect, preserve the culture, language and traditional value of the Hai||om people and further to preserve cultural sites of the Hai||om people.

The respondents further denied that the Act, limited the Traditional Authority from litigating against the Government. In any event, the respondents argued, if the Act constituted a stumbling block which prevented them from asserting effectively and giving effect to the

constitutional rights of the Hai||om people they have an obligation to challenge the offending provisions of the Act.

Held that, the competent body to launch the action sought by the applicants is the Hai||om Traditional Authority.

Held further that, provisions of the Act cited by the applicants as constituting an impediment to the Traditional Authority being a viable body to assert the rights of the Hai||om people, are capable of being interpreted in a manner that is sensible and rights-giving.

Held further that, the effect of the order sought by the applicants would lead to the establishment of a parallel representative and decision-making structures for the Hai||om people which is prohibited by the Act and constitutes a criminal offence.

Held further that, if the court should incline to granting the relief sought, that would usurp the authority of the Hai||om Traditional Authority that has jurisdiction over the Hai||om people.

Held further that, the applicants have not exhausted internal remedies provided for by the Act in asserting their rights, nor have they, challenged the constitutionality of the provisions of the Act that they perceive to be an obstacle in their way of asserting their rights. Accordingly the application was dismissed.

ORDER

1. The application for leave by the applicants to represent the Hai||om people, alternatively the Hai||om as members of a minority group, ('the Hai||om') and the individuals who constitute the Hai||om, to institute and prosecute an action on their behalf in asserting and enforcing the rights described in the draft the particulars of claim attached to the application, including any interlocutory proceedings or

proceedings incidental to the action, or any appeal proceedings, and to negotiate and conclude a full or partial settlement of the action or of any other such proceedings, is refused.

2. There is no order as to costs.
3. The matter is removed from the roll and is regarded as finalised.

RULING

THE COURT:

Introduction:

[1] Not infrequently, the law throws up a vagary of new, unprecedented and at times vexed questions of law for determination, requiring the court in the process, to harness its wit and judicial sagacity. Whilst this may, in many cases prove a difficult and treacherous terrain to navigate at the time, it is in those very difficult and at times unyielding conditions that tentative steps in extending the reach of the law, become possible.

[2] Presently serving before court in the current proceedings is such a matter. Stripped to the bare bones, the primary question that the court is called upon to answer, is whether the present matter constitutes a proper and condign case in which to allow the applicants to institute what is normally referred to in legal parlance, as a 'representative action'.

Relief sought:

[3] The applicants, in their notice of motion, seek an order from this court authorizing them to 'represent the Hai||om people minority group as a collective, right-bearing entity'

to institute six distinct claims on behalf of the Hai||om people. In this regard, the applicants stress that they seek leave to represent a distinct legal entity, consisting of the Hai||om people or the minority group.

[4] The applicants are at pains to point out that they do not seek the court to recognise or create a right to bring class actions into Namibian law. Put differently, the applicants do not seek leave to represent the Hai||om people in a class action. It is the applicants' further contention that although Namibian law recognises the international law right of the Hai||om people or the Hai||om minority, there is currently no procedural mechanism for them to assert those rights before court.

[5] We pause to observe that the applicants are correct in their assertion that there is currently no mechanism for them to enforce their rights in a representative action. The applicants accordingly urge the court, in the exercise of its inherent reservoir of power to develop the common law and further in exercise of its power to regulate its own processes and proceedings before it, in terms of Article 78(4) of the Constitution, to authorise the bringing by the applicants of a representative action as aforesaid.

[6] Lastly, the applicants also seek in advance a protective costs order, which simply means that in the event the applicants are unsuccessful with their proposed claims, they should not be mulcted in costs, in line with the general rule that applies to costs, namely, the costs ordinarily follow the event. The applicants contend that the issues they raise, are of general importance and of great moment in this country, hence the prayer for a protective costs order.

Representation of the parties:

[7] The parties were ably represented by counsel during the hearing of the application. Mr. Corbett SC, was the leader of the applicants' legal team. He was ably assisted by Mr. Hathorn SC, Ms Bassingthwaighe and Mr. Bishop. The GRN legal team was ably led by Mr. Trengove SC, duly assisted by Mr. Akweenda, Ms Bleazard, Mr. Maasdorp and Mr.

Nekwaya. The 3rd respondent, was duly represented by Mr. Shikongo, ably assisted by Ms Miller.

[8] The court wishes to express its appreciation to counsel for the assistance they rendered to the court, particularly the industry, commitment and diligence they all displayed in fulfilling their priestly role as officers of the court. This is said in acute appreciation of the fact that this was a rather novel matter that required the court to tread with boldness and apprehension at the same time. The steady hand of all counsel, was accordingly critical in striking the right balance.

The parties:

[9] The applicants are members of a traditional community known as the Hai||om people. Save the 5th applicant, the rest of the applicants are male adults belonging to the said traditional community. They reside in the Northern areas of this Republic that are not necessary to identify for purposes of the present application. The 1st applicant, Mr. Jan Tsumib, who deposed to the founding affidavit, alleges that he is widely acknowledged as the leader of the Hai||om people.

[10] The main respondents are the Government of the Republic of Namibia, (GRN), cited as the 1st respondent and the Hai||om Traditional Authority, which is cited as the 3rd respondent. The other respondents, are various companies duly incorporated in accordance with company laws of this Republic, some Conservancies which operate in various places within the locale of the Republic of Namibia and some Traditional Authorities.

[11] The other respondents appear to have been cited due to the legal interests that they may have in the land or areas which the applicants claim constitute their ancestral land. According to the applicants, the rights of the said respondents include statutory rights granted and vesting in the said respondents, such as conservancy rights, mineral rights, rights of servitude and testamentary rights of usufruct, i.e. the right to use and enjoy land during the holder's lifetime.

[12] A number of Traditional Authorities have also been cited as respondents. This is due to the fact that part of the land the applicants claim as their ancestral land, stretches over and includes areas over which the said Traditional Authorities exercise authority and jurisdiction over their members in terms of Traditional Authorities Act.¹ It is accordingly unnecessary, for present purposes, to describe each and every one of the respondents considering that there is no particular relief sought against them in the present application.

[13] It is perhaps important to mention, at this nascent stage of the ruling that properly considered, it is safe to say that there are two respondents who have opposed the application described above, and who have, in their line of opposition, filed papers and instructed counsel to represent them. These are the GRN and the Hai||om Traditional Authority. These respondents will be referred to in this ruling as the GRN and the 3rd respondent, respectively, or collectively, as the respondents.

Purpose of the application:

[14] According to Mr. Tsumib, as deposed to in his founding affidavit, the purpose of this application is to seek leave from this court for the applicants to 'represent the Hai||om people minority group as a collective, right-bearing entity to institute six distinct claims on behalf of the Hai||om people'. We summarise and list the intended claims below:

- (a) Claim 1 – ownership or exclusive beneficial occupation and use of land in the Etosha National Park, consisting of some 23, 150 square kilometres; eleven farms situated in Mangetti West area, together with the 'subject land' or in its stead a land of equal extension and quality or compensation at the market value of the subject land, which in the applicants' estimation, is N\$3 914000. This is referred to as the ownership and exclusive use of land claim;
- (b) Claim 2 – a claim to the natural resources in, and the revenue generated, by the Etosha National Park, including compensation for past loss of access

¹ Act No. 25 of 2000.

to exploitation of natural resources on the said land. This is referred to as the natural resources claim;

- (c) Claim 3 – a claim for the right to develop the land in the Etosha National Park, and payment as compensation for past exclusion from the development of the said land. This is the development claim;
- (d) Claim 4 – a claim to the (non-exclusive) beneficial occupation and use of the Etosha National Park and Mangetti West farms, alternatively, in respect of the said land, a land of equal extension and quality or financial compensation in the amount of N\$3 914 000. This can be referred to as the non-exclusive claim;
- (e) Claim 5 – a claim to exclusive, alternatively, primary access to part of the Etosha National Park, to enable members of the Hai||om people to engage in Hai||om cultural and religious practices and to practise their traditional lifestyle and a claim to participation in the management of the said lands, the preservation and promotion of the traditional Hai||om knowledge and practices of the land. This is referred to as the cultural rights claim; and
- (f) Claim 6 – a claim to be allocated land measuring 23 000 square kilometres and a report or undertaking of further steps to be taken to compensate for the racial discrimination, dispossession and eviction of the Hai||om people from their ancestral lands, marginalisation and on-going discrimination of the Hai||om people. This is referred to as the discrimination claim.

[15] According to Mr. Tsumib, the Hai||om people, are the largest grouping of the San people in Namibia, estimated to be about 6,200 adults. It is the 1st applicant's further deposition that the said land is to be claimed in three different capacities, namely, for the Hai||om people as a whole; in their individual capacities and lastly, in a representative capacity, on behalf of the individual members of the said community.

[16] The impediment, according to Mr. Tsumib, that has necessitated this application for leave as intimated earlier, is that the Constitution of Namibia, in Art 12(1)(a), guarantees the Hai||om people 'a fair and public hearing by an independent, impartial and competent Court or Tribunal, established by law', and further provides in Art 25(2), for persons who claim that their fundamental rights have been infringed and they are aggrieved thereby, to approach a competent court with a view to enforcing or protecting such rights. It is contended in this regard that the present regime contained in the rules of this court, does not make provision for a representative or class action to be instituted on behalf of an aggrieved group of persons to exercise their constitutional rights referred to in this paragraph.

[17] The applicants further assert that in addition to the rights mentioned above that are constitutionally guaranteed, they also seek to assert their rights to property, culture, religion, dignity and equality. Because of the present lacuna in the rules, if we may refer to it as such, the applicants claim that the only relief at their disposal in the circumstances, to enable them to enforce their rights mentioned above, is to approach this court and seek guidance regarding the proper procedure they should follow in seeking to assert their rights aforesaid, particularly in the representative capacity that they seek to employ.

[18] The applicants further depose that this court has inherent power to regulate its own procedure hence the approach for the court to (a) certify that the applicants will adequately represent the Hai||om people and the individual members thereof in the action to determine their rights over the said land and (b) to issue directions concerning the appropriate procedures to be followed in prosecuting the applicants' and the Hai||om peoples' claims referred to earlier.

[19] The applicants further allege that they can fairly and adequately represent the interests of the Hai||om people. This is so mentioned for the reason that the applicants are of a diverse composition of the Hai||om people, representing the majority of the communities that make up the Hai||om people. The applicants' further claim that they are fit and proper persons who are committed to diligently representing their people. The applicants further depose that they harbour no conflict of interest that would harm the

interests of the other members of the Hai||om people. The applicants further contend that they have the time means, inclination and ability necessary to prosecute the proposed claims.

[20] Last, but by no means least, the applicants allege that in view of the large numbers of the Hai||om people, it is, in the circumstances impracticable to join the individual members as parties in the proposed actions. It is their further contention that the overwhelming majority members of the Hai||om people were dispersed and marginalized and are as such, not sufficiently possessed of educational, economic and social opportunities. In the circumstances, it is submitted, the representative action is the only viable medium that would be appropriate to secure their rights and interests.

[21] The 1st applicant spared no time or effort in delving into the intimate details of the history of the Hai||om people and their relationship with the land forming subject of the intended actions. This also includes the circumstances that Mr. Tsumib claims resulted in the Hai||om people being disposed of the land in question. Because of the limited nature of the relief sought for present purposes, it is unwise and also unnecessary to repeat the treatise in this regard, which would unduly burden this ruling, considering the limited nature, purpose and scope of the present enquiry.

Bases for opposition:

[22] The GRN, in its affidavit, deposed to by the Prime Minister, opposes the granting of the relief sought. The GRN adopts the stance that the right to acquire and hold immovable property vests in the Tradition Authority set up in terms of s 18(1) of the Traditional Authorities Act², ('the Act'). In this regard, so contends the GRN, properly construed, this right is exclusively vested by law in the Traditional Authority and because the Hai||om people have a traditional authority recognised by law, it is that body that is entrusted with dealing with this issue. The import, of s18 of the Act, the GRN further contends, precludes the applicants or any other persons for that matter, from asserting the rights on behalf of the Hai||om people and as such, the application must be dismissed.

² Act No. 25 of 2000.

[23] The GRN further contends that there is no constitutional or legislative basis for the applicants instituting the representative action contemplated. This, is so averred because Namibian courts and the common law of this Republic, does not recognise representative standing that is sought to be asserted by the applicants. The GRN further states that even if the court saw the need to develop the common law in this regard, this case does not admit of being a proper case in which to do so.

[24] The GRN further contends that all said and done, the applicants have failed to meet and fully address the procedural requirements for representative standing, namely, that the representative action is the most appropriate means of determining the claims; that the applicants are suitable persons to be permitted to represent the Hai||om people; that it is possible to determine objectively who the applicants represent and who the beneficiaries of the intended representative action will be; that there is an appropriate procedure for allocating any monetary award to those identified as members of the Hai||om people and that the funders of the litigation and the legal representatives are not conflicted.

[25] The GRN contends further that a representative action is not the most appropriate means of determining the claims for the reason that if successful, the beneficiaries will only be those who will have opted to join the action by registering with the applicants and who are accepted as belonging to the Hai||om people by the applicants and others. The GRN further argues that the effect of the representative action is to usurp the authority of the Hai||om Traditional Authority, which has, by law, been given jurisdiction and authority to represent the Hai||om people, including the acquisition and holding of property on their behalf.

[26] It is the GRN's further contention that the contemplated representative action would serve to circumvent the election and dispute resolution mechanisms embedded in the Act, which govern who is authorised by the community and recognised by Government to represent the Hai||om traditional community. Last, but by no means least, the GRN argues that the best manner in which to prosecute the intended claims, would be for the

Hai||om traditional community, acting in its name, or the Traditional Authority, a recognise entity by law, to prosecute the claims in a single action that would benefit the entire community.

[27] It is important to mention that the 6th respondent, Nampower Corporation (Pty) Ltd, filed an affidavit, prepared by Kwala & Co., which when read in context, appears not to essentially oppose the preparatory application presently serving before court. The 6th respondent couched its affidavit in a guarded manner, without prejudice to its rights, especially on the merits of the dispute. All said and done, it did not deal with the issues raised by the applicants in the founding affidavit pound for pound and also did not appear to argue its opposition at the hearing of the application.

[28] Turning to the 3rd respondent, namely the Hai||om Traditional Authority, who also opposed the application, it must be stated in this regard that the Office of the Government Attorney initially represented this respondent but later withdrew as a legal practitioner of record on behalf of the 3rd respondent. On 27 January 2016, Shikongo Law Chambers came on record on behalf of the 3rd respondent and an opposing affidavit deposed to by Chief David Khamuxab was filed.

[29] Read in the context of the preliminary issue with which the court is presently engaged, it is fair to say that the 3rd respondent also opposes the granting of the application for leave to the applicants to represent members of the Hai||om community. This, as one reads the opposing affidavit, is also based on the provisions of the Act. In particular, the 3rd respondent states that every Namibian has a right to approach the court and that it is incorrect for the applicants to approach the court in the manner they have and seek the relief in question.

[30] The 3rd respondent further states that if the applicants wished to approach this court in the manner they seek, they should have sought an order declaring certain provisions of the Act unconstitutional, or remove the Chief and his Council in the manner prescribed by the Act and the Hai||om customary law. The 3rd respondent further denies that the claims sought to be lodged are claims of the Hai||om people as a whole, but those

of a sprinkling of members who went around and used social issues, which the GRN is addressing, as a basis for the intended claims. Lastly, the 3rd respondent contends that it has jurisdiction over all the Hai||om people, irrespective of their geographical location. It thus questions the propriety of the applicants to arrogate to themselves the right to represent the Hai||om people.

Is this a proper case in which to grant leave for the institution of a representative action?

[31] In addressing this question, we shall primarily have regard to the provisions of the Act and in that regard, assess whether they do not, as presently couched, provide a sufficient mechanism that would be available to the applicants and other interested members of the community to institute the intended claims.

[32] The mainstay of the respondents' argument is to be found in the Act. In this regard, the court was referred to various provisions, which in the view of the respondents, have a decisively ominous bearing on the application.

[33] A reading of the Act suggests that the aims and objectives of the Act, are to establish traditional authorities, regulate the affairs of traditional authorities and to, *inter alia*, 'define the powers, duties and functions of traditional authorities and leaders'. The Act provides for the establishment of traditional authorities in the following language in s 2(1):

- '2. (1) Subject to this Act, every traditional community may establish for such community a traditional authority consisting of -
- (a) the chief or head of that traditional community³, designated and recognise in accordance with this Act.

³ "Traditional community" means an indigenous homogeneous, endogenous social grouping of persons comprising of families deriving from exogamous clans which share a common ancestry, language, cultural heritage, customs and traditions, who recognises a common traditional authority and inhabits a common communal area, and may include the members of that traditional community residing outside the common communal area.

- (2) A traditional authority **shall** in the exercise of its powers and the execution of its duties and functions have jurisdiction over the members⁴ of the traditional community in respect of which it has been established.’ (Emphasis added).

[34] The Hai||om Traditional Authority has been established in terms of s 2 of the Act. The current designated leader in terms of s 4(1)(a) and recognise as such under s 6 of the Act, is Chief David Khamuxab. He deposed to an affidavit, as stated before, in which he states that the individual applicants are not recognise leaders of any area under his authority and they have commenced the case with the assistance and facilitation of the Legal Assistance Centre (LAC), without involving the Traditional Authority and/or himself.

[35] He further states that the decision to initiate the case against Government was not taken by the Traditional Authority or by himself as the Chief. He states further that as the Chief of the Hai||om traditional community, he has been engaged in talks with the GRN, to address the devastating effects of colonisation and the apartheid policy which have resulted in the marginalisation of ‘my people’. He asserts that what the applicants seek to do, is to establish a parallel structure for the Hai||om people and submits that this is in conflict with the provisions of the Act and is accordingly prohibited.

[36] Section 3 of the Act provides for the powers, duties and functions of traditional authorities and members thereof. It reads as follows:

- ‘3. (1) Subject to section 16, the functions of a traditional authority, in relation to the traditional community which it leads, shall be to promote peace and welfare amongst the members of that community, supervise and ensure the observance of the customary law of that community by its members, and in particular to –

⁴ “Member”, in relation to – a traditional community, means a person either or both of whose parents belong to that traditional community, and includes any other person who by marriage to or adoption by a member of that traditional community or by any other circumstance has assimilated the culture and traditions of that traditional community and has been accepted by the traditional community as a member thereof.

- (a) ascertain the customary law applicable in that traditional community after consultation with the members of that community, and assist in its codification;
- (b) administer and execute the customary law of that traditional community;
- (c) uphold, promote, protect and preserve the culture, language, tradition and traditional values of that traditional community;
- (d) preserve and maintain the cultural sites, works of art and literary works of that traditional community;
- (e) perform traditional ceremonies and functions held within that traditional community;
- (f) advise the Council of Traditional Leaders in the performance of its functions as provided under Article 102(5) of the Namibian Constitution, the Council of Traditional Leaders Act, 1997 (Act No. 13 of 1997), or under any other law;
- (g) promote affirmative action amongst the members of that traditional community as contemplated in Article 23 of the Namibian Constitution, in particular by promoting gender equality with regard to position of leadership; and
- (h) perform any other function as may be conferred upon it by law or custom.'

[37] Our understanding of the provisions of s 3 is that, it is the Traditional Authority (Hai||om) that 'shall' – uphold, promote, protect and preserve the culture, language, tradition and traditional values of the Hai||om people and also preserve and maintain the cultural sites of the Hai||om people.

[38] It was submitted on behalf of the GRN that 'the use of the word 'shall' connotes (peremptory) that it is only the traditional authority, under the leadership of the Chief that

will be the only representative and collective decision-making structure for the traditional authority. By vesting jurisdiction in the traditional authority, the Act indicates that the traditional authority is exclusively vested with the authority to exercise the powers and functions that are assigned to the traditional authority under the Act. No other body or group of people may exercise those powers and functions – they are only vested in one Traditional Authority representing that traditional community’. We fully agree with this submission as in our view, the use of the word ‘shall’, demonstrates the intention of the legislature that only a recognise traditional authority shall represent members of a traditional community.

[39] We are of the view that the correctness of foregoing interpretation is fortified by the fact that s 3(4) of the Act, prohibits and renders the performance of the functions and duties of the traditional authority by any other person or body, a criminal offence. It then follows, in our considered view, that the competent body to launch the action sought by the applicants is the Hai||om Traditional Authority.

[40] The applicants, further, argue that the Hai||om Traditional Authority is conflicted and cannot bring the action contemplated because in terms of ss 3(2)(b) and 16 of the Act, its duties are to assist, and co-operate with the Government in the execution of its policies. It must give support to the policies of Government and must refrain from doing any act which undermines the authority of Government.

[41] The applicants contend further in their heads of argument that: ‘As litigation for the relief the applicants seek would only be necessary when it was contrary to government policy, and would undermine government’s authority, the Traditional Authority Act cannot be read to grant the Hai||om Traditional Authority power to bring this litigation’. By insisting that only the Traditional Authority can pursue the action, the government seeks to make it impossible for the Hai||om people to claim rights unless the claim is approved by the government. Even if it were possible to interpret the Traditional Authority Act to afford the Hai||om Traditional Authority the power to bring the action, it would not be an appropriate representation. The Traditional Authority would still be bound by section 3(2)(b) and 16

to respect government policy and to assist and co-operate with the Government in the execution of its policy. Sections 3(2)(b) and 16 provides:

- (2) A member of a traditional authority shall in addition to the functions referred to in subsection (1) have the following duties, namely -
- (b) to assist and co-operate with the Government, regional councils and local authority council in the execution of their policies and keep the members of the traditional community informed of developmental projects in their area.
16. A traditional authority shall in the exercise of its powers and the performance of its duties and functions under customary law or as specified in this Act give support to the policies of the Government, regional councils and local authority councils and refrain from any act which undermines the authority of those institutions.'

[42] We do not agree with the applicants' submission on the grounds that no reasons are advanced by the applicants why the Traditional Authority cannot be a proper body to represent the rights and interests of the members of the Hai||om community, other than them claiming 'it would not be an appropriate representation'. It is well to note that the aims and objectives of the Act are to cater for the rights and interests of the traditional communities, including the Hai||om people.

[43] In any event, if there is force to the argument by the applicants, which we do not endorse presently, that the Traditional Authority is, in terms of the Act, required to assist and co-operate with the Government in its policy and in a manner that compromises the rights and interests of the Hai||om people, this would be a proper case for the applicants to approach the court for appropriate relief.

[44] Furthermore, the provisions of the Act cited by the applicants as an impediment to the Traditional Authority being a viable vehicle to assert the rights of the Hai||om people, are capable of being interpreted in a manner that is sensible and rights-giving, namely, that the Traditional Authority must assist in the implementation of Government policies and development projects in their communities as an extension of local government,

namely to facilitate localised service delivery and development in the interest of the members of the traditional community.

[45] The applicants submit that the Traditional Authority would have a permanent conflict of interest that would make it impossible for it to properly represent the Hai||om people. The applicants rely in this argument on the judgment of Geier J in *Hikumwah and Others v Nelumbu and Others*⁵, which held that Traditional Authorities are ‘supportive organs of Local Government’, as contemplated under article 102(4) of the Constitution. The applicants’ therefore argue that Traditional Authorities cannot litigate against the Government.

[46] We do not agree with the applicants foregoing contentions for the following reasons: There are instances where organs of the Government have litigated against each other or against Government (see: *Ondangwa Traditional Authority v Oukwanyama Traditional Authority*⁶; *Road Fund Administration v Government of the Republic of Namibia*⁷). Furthermore, that interpretation, contended for by the applicants, if it were to be adopted, would compromise the ability of a Traditional Authority to perform the very powers, duties and functions that have been entrusted to it by Parliament.

[47] The GRN argues, correctly in our view, that the Act expressly deals with the limitation of powers of Traditional Authorities under s 14 of the Act. Had the Parliament intended to limit the powers of the Traditional Authority in such a drastic manner as prohibiting it from ever litigating against the Government, it would have said so expressly in s 14. But s 14 contains no such limitation. In our view, as we pointed out earlier, the interpretation contended by the applicants would seriously undermine the capacity of Traditional communities such as the Hai||om people and its members to assert and protect their constitutional and international law rights.

[48] In point of fact, the GRN acknowledges in its heads of argument that there is nothing to stop traditional authorities in appropriate cases, from suing the GRN in

⁵ 2015 (4) NR 955 (HC), para 91.

⁶ 2015 NAHCMD 170.

⁷ (A 165)[2011] NAHCMD (12 July 2019).

enforcement of the interests and rights of the members of their communities. This accordingly puts paid the applicants' argument.

[49] We accordingly agree with the respondents that what the applicants seek to do in bringing this application is to try and circumvent the Act for the representation and collective decision-making of traditional communities. The effect of the order they seek would be to establish a parallel representative and decision-making structure for the Hai||om people. That is prohibited by the Act and constitutes a criminal offence

[50] As is now apparent from what has been discussed above, if the Act is perceived, rightly or wrongly by the applicants as a stumbling block in the way of the applicants asserting their rights, or to the extent that the applicants' complaint is that the Act infringes or does not adequately give effect to the constitutional rights of Hai||om people, then it is obligatory on them to challenge the constitutionality of the offending provisions of the Act.

[51] In *My Vote Counts NPC v Speaker of the National Assembly and Others*⁸, the Constitutional Court of South Africa made the following lapidary remarks:

'Where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the constitution.'

[52] We are of the considered opinion that the above excerpt fits hands in glove with the position in this case. The Act, in our *prima facie* view, provides a vehicle through which the applicants can effectively assert their rights. Should we be mistaken in this regard, the onus is then on the applicants to challenge what they consider to be the constitutionally offensive provisions of the Act. They are, with respect, not entitled to treat the Act and its provisions as *pro non scripto*.

[53] The 1st respondent argues further that if the court should incline to granting the relief sought, that would usurp the authority of the Hai||om Traditional Authority that has

⁸ *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) para 161.

jurisdiction over the Hai||om people. In that way, the applicants will circumvent the election and dispute resolution mechanisms provided under the Act; and further assume the authority to determine who is or is not a legitimate member of the Hai||om people. We agree with this submission. We find support for this view having regard to the provisions of section 4 of the Act which provides thus:

- ‘4. Where a traditional authority referred to in section 2(1) has been established for a traditional community, and a group of members of that traditional community establishes in conflict with the provisions of this Act another authority purporting to be a traditional authority for such group, and any member of such last-mentioned authority exercises or performs any of the functions contemplated in paragraphs (b) and (h) of subsection(1) and paragraphs (a) and (b) of subsection (3) of this section -
- (a) any such act shall be null and void; and
- (b) such member shall be guilty of an offence, and upon conviction be liable to a fine of N\$4 000 or to imprisonment for a period of twelve months or to both such fine and imprisonment.’

[54] It is our considered view that what the applicants seek to do is contrary to s 4 of the Act and is thus null and void, constitutes an offence and is punishable by a fine or imprisonment. By granting the relief sought, the court would be actively assisting the applicants to violate the law, which is an anathema.

[55] The applicants deny that the powers in s 18 are vested exclusively in the recognise Traditional Authority. They accordingly argue that it is open to them to acquire and hold assets and manage a community, trust fund, on behalf of the Hai||om people. They further argue that the language of s 18 of the Traditional Authority Act (may) is permissive and empowering, not mandatory and exclusive.

[56] The GRN argues that the use of ‘may’ in s 18(i) does indeed indicate that it is a permissive and empowering provision: it vests power in the Traditional Authority that it

may, or may not, exercise. However, s 18(i) is an exclusive empowering provision ie. it vests these permissive powers only in the Traditional Authority, acting with the consent of the community.

[57] As regards the proposed claim for ownership of the said land, s 18 of the Act makes provision for the property of a traditional community to vest in, and to be registered in the of the Traditional Authority and its funds to held in a Trust Fund. Section 18 provides as follows:

- '18. (1) A traditional authority may with the consent of the members of its traditional community acquire, purchase, lease, sell, or otherwise hold or dispose of movable and immovable property in trust for that traditional community, and shall have such rights in respect of the acquisition and disposal of such property as may reasonably be necessary or expedient for the carrying out of its functions under this Act.
- (2) Any immovable property acquired as contemplated in subsection (1) shall be registered in the name of the traditional authority concerned in accordance with the provisions of the Deeds Registries Act, 1937 (Act No. 47 of 1937) or the Registration of Deeds in Rehoboth Act, 1976 (Act No. 93 of 1976).
- (3) A traditional authority may with the consent of the members of its traditional community establish a Community Trust Fund, to be held in trust for the members of that traditional community, and towards which such members may contribute for the purposes of -
- (a) financing projects in that community which promote and uplift the culture, preserve cultural sites, works of art and literary works of that community;
 - (b) meeting the administrative costs of running of office of the traditional authority;
 - (c) Meeting the costs of performing any of the functions and duties of a traditional authority under this Act; and

- (d) meeting the costs of performing any of the functions and duties of a traditional authority under this Act; and

- (d) meeting any other costs that the traditional community may agree upon.'

[58] It is accordingly clear from the provisions of s 18(1) of the Act, that the Hail|lom Traditional Authority has the power, with the consent of the community, to acquire, lease movable and immovable property. Furthermore, it may establish a Trust Fund to hold money to finance its projects. Properly considering the scheme of the Act, it would appear that it would be iniquitous for the applicants and the people they claim to represent, to seek to acquire property, which they seek to do, outside of the realms of the Act and particularly excluding or by-passing the Traditional Authority in the process.

[59] As can be observed from the provisions of the s 18, any immovable property acquired shall be registered in the name of the Traditional Authority. That means, in peremptory terms that property owned by the traditional authority shall be registered in its name. The Traditional Authority may, with the consent of the members of its traditional community, establish a Community Trust Fund, to hold funds in trust for the members of that traditional community. It is into that Fund that any compensation that may be ordered or agreed in respect of the intended claims, should the said claims succeed, would have to be deposited.

[60] This interpretation, contended for by the first respondent, is consistent with our understanding as it is supported by the following textual indicators, amongst other, namely: (a) the title of s 18 'Assets and trust fund of traditional community' – suggests that the mechanism described in s 18 for the acquisition, holding and disposal of collective assets of a traditional community is the only permitted mechanism and one that pertains to all the collective assets of the community; (b) the use of mandatory language ('shall') in s 18(i) indicates that once the Traditional Authority, acting with the consent of the community, decides to a acquire, hold or dispose of community property, the Traditional Authority alone 'shall' have such rights in respect of the acquisition and disposal of such property as may reasonably be necessary or expedient for the carrying out of its functions under this Act; and (c) section 18(2) requires the community's title in immovable property

to be registered in the name of the Traditional Authority. The provision also uses mandatory language ('shall') and states: 'Any immovable property acquired as contemplated in subsection (1) shall be registered in the name of the Traditional Authority concerned in accordance with the provision of the Deeds Registries Act, 1937 (Act 47 of 1937) or the Registration of Deeds in Rehoboth Act, 1976 (Act 93 of 1976) (p 106 – 7).

[61] Having regard to the entire scheme of the Act, we are of the considered view that the applicants have not exhausted internal remedies provided for by the Act in asserting their rights, nor have they, as stated earlier, challenged the constitutionality of the provisions of the Act that they perceive to be an obstacle in their way of asserting their rights. Only once those internal remedies provided by the Act have been exhausted can the applicants properly consider approaching the court as they did. In these circumstances it is not legally permissible for the applicants to approach the court for leave to circumvent the provisions of the Act, by seeking to initiate a representative action, as they do herein.

[62] For the reasons advanced above, we come to the conclusion that the relief sought by the applicants is not, in the present circumstances, permissible and for that reason, it is in our considered opinion proper that the application should be dismissed.

Costs:

[63] The applicants, as stated earlier in the ruling, seek a protective costs order in respect of the proposed actions. In view of the conclusion we have reached with regard to this application that issue appears to have become moot.

[64] The relief sought by the applicants regarding costs is as follows:

'Directing

7.1 that the first respondent and any other party or parties who defend the proposed action pays the costs of this application;

- 7.2 alternatively that there will be no adverse costs order against the applicants in the event the applicants are unsuccessful in the application;
- 7.3 in the further alternative, that there shall be no order as to costs irrespective of the outcome of this application.'

[65] The GRN's attitude to the issue of costs is that in the event of the application being dismissed, it will not press for an adverse costs order against the applicants. It is trite that the decision to award costs rests solely within the discretion of the court and this is so regardless of the outcome of the case. In that connection, the discretion, like in all cases, must be exercised judicially and judiciously, without caprice or whim and in full appreciation of the relevant facts attendant to the matter at hand.

[66] In view of the foregoing, we come to the considered view that it would be just and fair to make no order as to costs in the peculiar circumstances of this case, as we hereby do.

Order:

[67] For the foregoing reasons and considerations, we are of the view that the following order is condign in the circumstances:

1. The application for leave by the applicants to represent the Hai||om people, alternatively the Hai||om as members of a minority group, ('the Hai||om') and the individuals who constitute the Hai||om, to institute and prosecute an action on their behalf in asserting and enforcing the rights described in draft the particulars of claim attached to the application, including any interlocutory proceedings or proceedings incidental to the action, or any appeal proceedings, and to negotiate and conclude a full or partial settlement of the action or of any other such proceedings, is refused.
2. There is no order as to costs.

3. The matter is removed from the roll and is regarded as finalised.

H Angula
Deputy-Judge President

N Ndauendapo
Judge

T Masuku
Judge

APPEARANCES:

APPLICANTS: A CORBETT SC (with him P HATHORN SC,
N BASSINGTHWAIGHTE and M BISHOP)
Instructed by Legal Assistance Centre, Windhoek

1ST and 2ND

RESPONDENTS: W TRENGOVE SC (with him S AKWEENDA,
J BLEAZARD, R MAASDORP and E NEKWAYA)
Instructed by Government Attorney, Windhoek

3RD RESPONDENT: E SHIKONGO (with him S MILLER)
Of Shikongo Law Chambers, Windhoek

6TH RESPONDENT: No appearance
Of Kwala & Co. Inc., Windhoek