REPUBLIC OF NAMIBIA **REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between: Case no: A 15/2012

GEORGE P.S. HIKUMWAH	**1ST APPLICANT**
SIPORA WEYULU DAN	**2ND APPLICANT**
VATILIFA F. HANGULA	**3RD APPLICANT**

And

MWADINOMHO MARTHA YA KRISTIAN NELUMBU	**1ST RESPONDENT**
OUKWANYAMA TRADITIONAL AUTHORITY	**2ND RESPONDENT**
MINISTER OF REGIONAL, LOCAL GOVERNMENT, HOUSING AND RURAL DEVELOPMENT	**3RD RESPONDENT**
GHIDINIHAMBA URIAS NDILULA	**4TH RESPONDENT**
ELIAS WAANDJA	**5TH RESPONDENT**
SAMUEL MATEUS	**6TH RESPONDENT**
JOSEF KAMATI	**7TH RESPONDENT**
LINDA NAUYOMA	**8TH RESPONDENT**

Neutral citation: *Hikumwah v Nelumbu* (A 15/2012) [2015] NAHCMD 111 (13 May 2015)

Coram: GEIER J
Heard: **02 July 2014**
Delivered: **13 May 2015**

Flynote: Review — Delay in instituting review proceedings — Whether delay was unreasonable — Applicants launching review proceedings five months and 25 days after their dismissal from their positions as traditional councilor and senior traditional councilors of the Oukwanyama Traditional Authority — The respondents raising the defence of unreasonable delay in their answering papers - applicants explaining delay in reply — After having regard to the overall facts and circumstances of the case - court coming to the conclusion that the applicants delay, in this instance, was not unreasonable and that the question of condonation did thus not arise

Practice - Application and motions – Application for review – respondents contending that applicants should substantively have applied for condonation for the delay in instituting the review proceedings – court considering point to be without merit for the reasons set out in the judgment – as the question of condonation did not arise objection not finally decided –

Administrative law - Administrative action – First respondent, the tradtitional leader of the Oukwanyama Traditional Authority dismissing the applicants, a traditional and two senior traditional councilors from their positions – Question arising whether such dismissals constituted an administrative act or the exercise of the traditional leaders executive powers - Distinction between administrative and executive acts for purposes of review - Issue to be decided on case by case basis – After considering the role of Traditional Authorities and traditional leaders in the context of local government – and with reference to the scheme and scope created by the Traditional Authorities Act 25 of 2000 in terms of which Traditional Authorities are established and operate - as well as upon the consideration of further factors such the source of the traditional leaders power, the nature of the power/function exercised, the impact of the decision on the public/community, whether there was a need for the decision to be exercised in the public interest and the fact that the powers were disciplinary powers, court concluding that the complained of decisions were administrative in nature, rendering them liable to review in terms of Article 18 of the Namibian Constitution.

Customary law – The removal from office of Traditional Councillors – in terms of Section 10(2) of the Traditional Authorities Act 2000 - regulated by the customary law of the traditional community in respect of which such councillor is appointed or elected - "customary law" by definition means the customary law, norms, rules of procedure, traditions and usages of a traditional community in so far as they do not conflict with the Namibian Constitution or with any other written law applicable in Namibia – Section 14 of the Act expressly limits the powers of traditional authorities, and by implication their customary law powers, in that it also provides that any custom, tradition, practice, or usage which is discriminatory or which detracts from or violates the rights of any person as guaranteed by the Namibian Constitution or any other statutory law, … , shall cease to apply - Through these provisions a traditional leader, by virtue of his or her membership of a traditional authority, becomes obliged to administer and execute the customary laws of that community in accordance with the Constitution and any other applicable written law. By that same token it appears that customary laws, which are discriminatory or which detract from or violate the rights of any person as guaranteed by the Namibian Constitution or any other statutory law, can no longer be administered or executed by a traditional authority, as they have ceased to apply.

Customary law – The removal from office of Traditional Councillors – in terms of Section 10(2) of the Traditional Authorities Act 2000 – by the head of a Traditional Authority - subject to the demands imposed by Article 18 of the Constitution - Article 18 requires administrative bodies and administrative officials to act fairly and reasonably and to comply with the requirements imposed on them by the common law and any relevant legislation - Article 18 of the Constitution of the Republic of Namibia, which requires administrative bodies and administrative officials to act fairly and reasonably, goes beyond the principles of natural justice, ie the *audi alteram partem* rule, and should be seen against the background of a long history of abuse of governmental power in Namibia by the apartheid South Africa. The temper of art 18 is to repudiate anything that might be unfair and unreasonable from any administrative body or official.

Customary law – The removal from office of Traditional Councillors – in terms of Section 10(2) of the Traditional Authorities Act 2000 – by the head of a Traditional

Authority – Court holding that the procedure followed in this instance by the first respondent did not measure up the required standards of procedural fairness and reasonableness as the rules of natural justice in regard to a fair disciplinary process were not satisfied when the applicants were not informed that they would be subjected to disciplinary proceedings and were not informed of the charges that would be preferred against them which could lead to their dismissal, allowing them to prepare adequately or at all for the presentation of their cases to enable them to meaningfully participate in the disciplinary proceedings.

Customary law – The removal from office of Traditional Councillors – in terms of Section 10(2) of the Traditional Authorities Act 2000 – by the head of a Traditional Authority - when the applicants were then subjected to the disciplinary proceedings before an 'interim special committee' without warning and without any charges having been formulated against them, thereby not affording them adequate time or the opportunity for the preparation and presentation of their defences at the set hearing, such proceedings amounted to 'disciplinary proceedings by ambush', a situation which clearly offended not only against the principles of natural justice but also against the more stringent demands for fair administrative action imposed on the respondents by Article 18 of the Constitution.- first respondents decisions to dismiss the applicants accordingly reviewed and set aside.

Communal Land Reform Act 5 of 2000 – first applicant removed by first respondent, the head of the Oukwanyama Traditional Authority, from his position as a member of the Ohangwena Communal Land Borad - removal from office of member of Communal Land Board however regulated by Section 6(3) of the Communal Land Reform Act and can only be effected by the Minister, on specified grounds, and after giving the affected board member a reasonable opportunity to be heard - chiefs or heads of traditional authorities are not assigned any powers in this regard by the Act. First respondent's dismissal of first applicant from the board *ultra vires* and accordingly unlawful -

Summary: The facts appear from the judgment.

ORDER

1. The decisions taken by the 1st Respondent on 15 August 2011 dismissing the first, second and third applicants from their positions as 'Junior Traditional Councillor' and 'Senior Traditional Councillors' respectively, are hereby reviewed and set aside.

2. The 1st Respondent is directed to forthwith reinstate the applicants to the positions they held in the structure of the 2nd Respondent namely at the time of their dismissal on 15 August 2011.

3. The 1st and or the 2nd Respondents are directed to pay the applicants all allowances that would have been paid to them had the 1st Respondent not taken the decision set out in paragraph 1 hereof.

4. All such payments are to be made, to the applicants, on or before the close of business of 30 June 2015.

5. The 1st and/or 2nd Respondents are to pay the first, second and third applicants costs of this application, jointly and severally, the one paying the other to be absolved.

JUDGMENT

GEIER J:

[1] The first applicant, a junior traditional councillor of the Oukwanyama Traditional Authority, and the second and third applicants, both senior traditional councilors of that authority, where dismissed from their positions by the first respondent, the queen of the Oukwanyama traditional community.

[2] The dismissal seems to have been precipitated by the first applicant's discovery of certain irregularities in that the communal trust fund of the Oukwanyama traditional community, in their view, was not administered in accordance with the Traditional Authorities Act. This discovery was made some time during 2010. The complaint was that certain moneys, sourced from the community, were apparently not paid into the designated communal trust fund, but into a separate bank account, and that certain loans, out of the monies held in the Oukwanyama Community trust fund, were granted to certain beneficiaries without a resolution of the board of trustees and without following a proper procedure.

[3] The applicants thought it best to first approach the first respondent and inform her of their suspicions. For this they had a meeting with her on 5 February 2011 during which they explained that there were reasonable grounds for believing that the communal trust fund was not administered in accordance with the law. She was requested to intervene or take the necessary steps.

[4] The first respondent then authorized the applicants to have a meeting with one Theophelus Nelulu, the chairperson of the board of trustees of the fund, and the person that had opened the separate bank account. The said Nelulu refused to attend that meeting. However, he and some of his advisors held a separate meeting to discuss the issue on 15 March 2011. It so became evident to the applicants that there would be no platform on which their concerns would be addressed.

[5] As the applicants considered it their duty to account to the community they were serving, they convened a community meeting at Omafo village for this purpose.

[6] This resulted in their immediate suspension. The first respondent suspended them in the following terms:

'OUKWANYAMA TRADITIONAL AUTHORITY (OTA)

….

HEADMAN GEORGE HIKUMWA 13 JUNE 2011
ONGHA
OMHEDI DISTRICT

RE: NOTICE OF SUSPENSION

With this notice you are hereby informed as follows:

1. As investigations have commenced in determining your accusations in you accusing the chairperson of the Oukwanyama Authority, Headman George Nelulu, I am suspending you, in my capacity as Queen, of the village for an unspecified period.
2. You are suspended from all activities of the Ongha village leadership as all authorities given to you are upheld, within the Oukwanyama Traditional Authorities as well as your representation on the landboard in the Ohangwena Region.
3. Arrangements are in progress to cater for the administration of the Ongha village during your suspension.
4. You are hereby requested to surrender all books as well as all assets that are used by the Authorities between 10H00-14H00- on Friday the 17th June 2011
5. Your suspension starts with immediate effect as you are notified.

Yours

SIGNED
Mwadinomho Martha Ya Kristian Nelumbu
Her Majesty Queen of Oukwanyama'

[7] This suspension was followed up by a general notice issued some two days later:

'OUKWANYAMA TRADITIONAL AUTHORITY (OTA)

… 15 June 2011

RE: INTERIM ADMINISTRATION OF ONGHA VILLAGE

The residents of the village as well as all listeners who are gathered here are informed that the Headman of the Ongha village Mr. George Hikumwa has been relieved from his duties for an inspecified period due to investigations in the affairs of the Oukwanyama Traditional Authorities or the following reasons:

(a) Issues being alledged.
(b) Isues that he is alleging against the chairperson of the Oukwanyama Traditional Authorities, Mr. George Hikumwa.

The administration of the Ongha village will be under the control of Mr. Josef Kamati during the period of suspension of Mr. George Hikumwa.
Kindly be of assistance to him in the execution of his duties.

Yours

SIGNED
Martha Mwadinhomo yaKristian Nelumbu
Queen of Oukwanyama'

[8] During August 2011 a committee, to investigate the charges against applicants, was appointed by the first respondent.

[9] Applicants sketch the proceedings to which they were subjected in the following way:

' … I and my fellow applicants were summoned to appear before this committee and when we appeared before it, we were subjected to harassment and rebuke and we were accused of sowing divisions in the community. The committee accused us that we did not respect the Queen and that we were not supposed to call and attend a community meeting. On the 15 day of August 2011, this committee presented to us what was termed a summary of the final outcome of the committee of investigation. Each of the applicants received this document purporting to set out the charges against us and the decisions taken. I attach hereto copies of the Oshikwanyama and English versions of these documents …'.

[10] The referred to 'summary of the final outcome' then respectively reflects the first respondent's decisions vis a vis the applicants in the following terms:

AD THE FIRST APPLICANT:

'QUEENS' DECISION

BELOW HERE FOLLOWS MY DECISION regarding the disputes which was laid on the table in terms of Act no 25 of 2000 Section 10 (2). In terms of this section I decided as follows:

George Hikumwa

I relief you from your responsibilities as member of the Land Board with immediate effect, and;

I order the Headman of Mhedi, Johannes Moshana, to relief George Hikumwa from his responsibilities as Headman for the Ongha village, with immediate effect. The decision is in accordance with the above stated.

SIGNED
Martha Mwadinomho yaKristian Nelumbu
Her Majesty Queen of Oukwanyama'

AD THE SECOND APPLICANT:

'QUEENS' DECISION

BELOW HERE FOLLOWS MY DECISION regarding the disputes which was laid on the table in terms of Act no 25 of 2000 Section 10 (2). In terms of this section I decided as follows:

SIPORA WEYULU-DAN

I relief you from your responsibilities as senior traditional councilor for the Haingu district, entering into force as from now. The decision is in accordance of the above stated.

SIGNED
Martha Mwadinomho yaKristian Nelumbu
Her Majesty Queen of Oukwanyama'

AD THE THIRD APPLICANT:

'QUEENS'DECISION

BELOW HERE FOLLOWS MY DECISION regarding the disputes which was laid on the table in terms of Act no 25 of 2000 Section 10 (2). In terms of this section I decided as follows:

Hangula Vatilifa

I relief you from your responsibilities as senior traditional councilor for the Kelemba district, entering into force as from now. The decision is in terms of the above stated.

SIGNED

Martha Mwadinomho yaKristian Nelumbu
Queen of Oukwanyama'

[11] On the same date the first respondent, through a 'notice of termination' also purportedly terminated the first applicant from his position as member of the Ohangwena Communal Land Board. The second and third applicants were given additional 'notices of termination of services' also on 15 August 2011.

[12] The applicants are now seeking to assail their terminations by way of review.

[13] This review application was brought on 9 February 2012.

[14] The first and second respondents have opposed the review and have also raised the defence of unreasonable delay, through an *in limine* objection.

[15] Subsequently certain affected parties, ie, those persons who had immediately benefitted from the dismissals of the applicants, by being appointed to the applicants' positions, were also joined to these proceedings, as the fourth to eight respondents. All of them are united in their opposition to the applicants' application. They also rely on the defence of unreasonable delay.

THE ISSUE OF UNREASONABLE DELAY

[16] The original submissions on the objection were formulated by Mr Chibwana, in heads of argument filed on behalf of the respondents, as follows, and I quote.

'The courts have passed judgment on various matters where the question of what time period constitutes an unreasonable delay was in issue. The following is a list of cases and time frames that the courts have deemed unreasonable:

1) *Ogbokor vs The Immigration Selection Board* (2012) NAHCMD 33 – a delay of 8 months was found to be an unreasonable delay.
2) *Purity Manganese (Pty) Ltd vs Minister of Mines and Energy* 2009 NR (1) 277 (H.C) a delay of 3 months was found to be unreasonable.
3) *Ebson Keva vs Chief of the Defence Force and 3 Others* – unreported judgment case number A 29/2007 a delay of 5 months was found to be unreasonable.

4) *Kleynhans vs Chairperson for the Municipality of Walvis Bay and Others* 2011 (2) N.R 437 (H.C) a delay of 4 months was found to be unreasonable.
5) *Namibia Grape Growers and Exporters vs Minister of Mines and Energy* 2002 NR 328 (H.C) a delay of 7 months was found to be unreasonable.
6) *Disposable Medical Products (Pty) Ltd vs The Tender Board of Namibia and Others* 1997 NR 129 (H.C) a delay of 6 months was found to be unreasonable.

It is common cause that on 13 June 2011 the second and third Applicants were served with letters removing them from their positions as senior traditional councilor and traditional councilor. It is also common cause that this review application was launched on 9 February 2012. Thus the delay in launching the present application was 8 months in the case of the second and third Applicants and 6 months in the case of First Applicant.

One submits that the delay in launching the present review application was unreasonable.

CONDONATION

The Applicants by way of the replying affidavit appear to seek condonation for the delay in launching the present application. At best they place an attempt to explain the delay. One submits that the Applicants should in terms of the Rules have brought a formal application for condonation. This view is supported by the fact that more than eight months have elapsed from the date when the answering affidavit was filed up to date. One refers to the answering affidavit because that is the affidavit which raised the issue of an unreasonable delay.

One submits that there is at present no condonation application before this Honourable Court and further submits that the Applicants have had sufficient time to apply formally to this honourable court for condonation.

In *Ogbokor* supra Geier J quoting from *Keya* supra states as follows:

“What is needed is proof of prejudice which could have been averted if notice were had of an impending review. The more substantial such prejudice, the more it strengthens the conclusion that the delay in bringing a review application was unreasonable.”

The court was reviewing the factors to be considered in granting condonation. One submits that in the present circumstance, the Applicants did not issue any notice of a pending review. It is common cause that there have been appointments to replace

Applicants as well as a restructuring resulting in three additional traditional councilors being appointed where previously one of the applicants served as the sole traditional councilor. One need not take the question of prejudice any further in view of the above common cause position.

One submits that the application should be dismissed on this basis alone.'

[17] Mr Khama, counsel for the applicants, countered, by making the following written submissions, which I quote:

'The respondents avers that, it has taken the first applicant a period of 8 months and 6 months for the second and third applicants to lodge the review application [1]. On this basis, they aver that, there was an unreasonable delay to institute the review proceedings [2]. They further aver that the alleged delay causes prejudice to them [3].

The applicants had denied that there was an unreasonable delay in lodging the review application [4]. It will be submitted that, there is no factual basis that has been advanced by the first and second respondents to support a finding of unreasonable delay. In law, there is no prescribed time frame within which a review application should be lodged [5], consequently, the respondent's sole reliance on the alleged period does not establish a basis for unreasonable delay. It will further be submitted that, for a respondent to be successful on a point concerning unreasonable delay, it is firstly required that, that respondent must allege relevant circumstances that the court should consider to determine whether those circumstances warrant a finding of unreasonable delay and secondly that, such a delay is not condonable by the court. A mere calculation of a period is neither the basis nor the test for determining unreasonable delay [6],[7],[8],[9],[10].

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[1] Para 3 of the 1st-2nd respondents answering affidavit
[2] Para 3.2 of the 1st-2nd respondents answering affidavit
[3] Para 3.2 and 4.7 of the 1st -2nd respondents answering affidavit
[4] Para 5 of the applicants replying affidavit to the 1st -2nd respondents answering affidavit.
[5] *Samicor Diamond Mining (PTY LTD) v Minister of Mines and Energy and Others* A:236/2011 ,a decision of the High Court of Namibia delivered on 19 February 2013
[6] *KRÜGER v TRANSNAMIB LTD (AIR NAMIBIA) AND OTHERS 1996 NR 168 (SC) at PAGE 170-172.*

[7] *DISPOSABLE MEDICAL PRODUCTS (PTY) LTD v TENDER BOARD OF NAMIBIA AND OTHERS* 1997 NR 129 (HC) :HEADNOTE

[8] *KLEYNHANS v CHAIRPERSON OF THE COUNCIL FOR THE MUNICIPALITY OF WALVIS BAY AND OTHERS* 2011 (2) NR 437 (HC) AT PARA 44

[9] *CHESTERFIELD HOUSE (PTY) LTD v ADMINISTRATOR OF THE TRANSVAAL AND OTHERS* 1951 (4) SA 421 (T) C AT PAGES 425 -426

[10] *Ogbokor v The Immigration Selection Board* (A223/2011)(2012)NAHCMD 33 ,a decision of this

The respondents aver that, the alleged delay is prejudicial to them as substantive replacements have been made. It will be submitted that, this argument is with respect unfounded. It will further be submitted that, it is not the alleged delay that prompted the replacement. The first respondent appointed the 4th -8th respondents immediately after taking the decisions she took against the applicants. The first respondent did not wait for any time periods to pass before she appointed them; instead, she appointed them immediately after she made the decisions to be reviewed. It is therefore not correct to suggest that, had the applicants timeously lodged the application that would have avoided the appointments [11].

If regard is had to annexure "GH8" [12] and "GH 10" [13], the evidence shows that, the first respondent took her decision against the first applicant on the 13th of June 2012 and on the 15th of June 2012 she announced her new appointment to the community. This evidence unequivocally refutes the respondent's unfounded averment that had the applicants timeously lodged the review application she would not have made the appointment.

It will further be submitted that there is no factual basis for the alleged prejudice. The respondents do not set out an iota of evidence of the alleged prejudice either actual or potential prejudice if any. They just make unsubstantiated submissions that are not based on any factual basis. It will be submitted that there is no prejudice that has been shown by the respondents.

The respondents further aver that, the claim of the applicants for a payment of all allowances that they would have been entitled to causes prejudice to them. It will be submitted that again, this averment is without any factual substance at all. The claim of the applicants is a competent relief under article 18 of the Namibian Constitution and this Court is empowered and competent to grant it. It is evidently clear on the papers that, the respondents do not set out any factual basis that indicates how the claim of the applicants causes prejudice to them. This point is fully addressed herein below on the relief sought by the applicants.

In view of the above submissions, It will be submitted that, the respondents have dismally failed to establish a basis for the alleged unreasonable delay and, on this basis, the point *in limine* be dismissed with costs.

Court delivered on 17 October 2012 at para 44.
[11] Para 4 OF 1ST -2ND respondents answering affidavit.
[12] Record page 39
[13] Record page 41

THE LEGAL TEST FOR UNREASONABLE DELAY

It will be submitted that, the legal test to determine unreasonable delay is the one set out in the case of *Radebe v Government of the Republic of South Africa* at page 798G-799E.The test was set out as follows[14]:

> **"The Court has first to determine whether a reasonable time has elapsed prior to the institution of the proceedings, or, to put it differently, whether there had been an unreasonable delay on the part of the applicant. In deciding whether a reasonable time has elapsed, a Court does not exercise a discretion. The enquiry is a factual one, that is, whether the period which has elapsed was, <u>in the light of all the relevant circumstances, reasonable or unreasonable."</u>**

This test has been adopted and applied in many cases both in Namibia and in South Africa [15],[16],[17],[18],[19].,[20],[21]

It will be submitted that, if the legal test developed and followed in the above mentioned cases is applied to this case, it becomes evident that, the respondents have dismally failed to pass that test and on this basis alone, there is consequently no legal basis to uphold the point *in limine* raised by the respondents.

It will further be submitted that, even if the respondent's argument on the alleged period of time was to be considered, the alleged period does not on its own establish a basis upon which a finding of unreasonable delay can be made [22].

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[14] *RADEBE v GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS* 1995 (3) SA 787 (N).

[15] *KRÜGER v TRANSNAMIB LTD (AIR NAMIBIA) AND OTHERS* 1996 NR 168 (SC) at pages 170-172.

[16] *DISPOSABLE MEDICAL PRODUCTS (PTY) LTD v TENDER BOARD OF NAMIBIA AND OTHERS* 1997 NR 129 (HC):HEADNOTE

[17] *KLEYNHANS v CHAIRPERSON OF THE COUNCIL FOR THE MUNICIPALITY OF WALVIS BAY AND OTHERS* 2011 (2) NR 437 (HC) HEADNOTE

[18] *SCOTT AND OTHERS v HANEKOM AND OTHERS* 1980 (3) SA 1182 (C) AT PAGES 1192-1193

[19] *CHESTERFIELD HOUSE (PTY) LTD v ADMINISTRATOR OF THE TRANSVAAL AND OTHERS* 1951 (4) SA 421 (T) C AT PAGES 425 -426

[20] *PURITY MANGANESE (PTY) LTD v MINISTER OF MINES AND ENERGY AND OTHERS;GLOBAL INDUSTRIAL DEVELOPMENT (PTY) LTD v MINISTER OF MINES AND ENERGY AND ANOTHER* 2009 (1) NR 277 (HC) AT PARA 10.

[21] *NTAME v MEC FOR SOCIAL DEVELOPMENT, EASTERN CAPE, AND TWO SIMILAR CASES* 2005 (6) SA 248 (E) PARA 24-29

A period Of 12-13 months was held not to be unreasonable in the case of *Chesterfield House (Pty) Ltd V Administrator Of The Transvaal And Others* [23].

A period of six months was found not to be unreasonable delay in the case of *Scott and Others v Hanekom and Others* [24] .

A period of more than five years was condoned in the case of *Ntame v MEC For Social Development, Eastern Cape* [25]and two similar cases

The applicants had provided an explanation that the reason why they did not lodge the application immediately was that they needed to raise funds to pay lawyers and it will be submitted that, that explanation is a reasonable explanation under these circumstances [26].

The applicants had further given notice of legal action to the first and second respondents immediately after the first respondent took her decisions [27].

In determining whether there was an unreasonable delay or not there is no one size fits all approach, each case must be decided on its own merits [28],[29].

The applicants had solicited the intervention of the third respondent with a view to have the matter resolved amicably [30].

It will be submitted that, in the event that, the court finds that there was an unreasonable delay, the reasons, advanced by the applicants, coupled with their social circumstances constitute grounds upon which the court can condone the delay [31].'

[18] During oral argument Mr Khama submitted that the only point the respondents' had on their unreasonable delay defence was the quantification of the period it took the applicants to bring their application. That was not the only test. The

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[22] Para 3 of the 1st -2nd respondents answering affidavit
[23] 1951 (4) Sa 421 (T) C At Pages 425 -426

[24] 1980 (3) sa 1182 (c) at pages 1192-1193

[25] 2005 (6) sa 248 (e) para 24-29

[26] Record page 289-293 para 9.2-11.9
[27] Record page 303-305.

[28] Samicor supra

[29] Purity Manganese (PTY LTD) v Minister of Mines and Energy and Others 2009 (1) NR 277 (HC) at para 8.

[30] Record page 30.

[31] Record page 289-293 para 9.2 -11.9

applicants had endeavoured to explain the alleged inaction. With reference to the factors listed in *Ogbokor*[32] he submitted that it had to be taken into account also that the applicants had firstly sought the intervention of the Minister, that the applicants did not simply rush to court and had sought the advice of their legal practitioner and had also caused a letter of demand to be sent before launching the review, which was then delayed also because of financial constraints. He also argued that the bringing of the application was further delayed by the translation of some of the supporting documentation, which was required before any papers could be issued. He submitted that the applicants had thus done all that could reasonably be required of them, and, that in so far as any condonation was required, it should be granted as the delay in this instance was not unreasonable.

[19] Mr Boesak who argued the aspect of unreasonable delay on behalf of the respondents, at the hearing, emphasized that the applicants had not asked for condonation by way of a formal application. Such an application could not be made in reply only. This submission was however not made in categorical terms in that he submitted further that the applicants had simply not asked for condonation and should thus not even be able to argue the point.

[20] With reference to the letter of demand written on behalf of applicants by their legal practitioners on 7 October 2011, he pointed out that the applicants did not immediately follow up through the institution of legal action, as threatened in the letter. In regard to the delay caused by the translation of the required documentation he submitted that this could have been done during the period allowed for the amplification of the founding papers. So, even if one were to ignore the initial delay, the further period of delay from October 2011 to February 2012 was still so unreasonable that it should result in the dismissal of the application.

[21] Mr Khama responded to these submissions in reply by pointing out that the issue of delay was a ‘legal principle’, which, once it had been raised, had to be dealt with by the court. The issue also, once raised, triggers the exercise of a discretion, which the court would then have to exercise in the circumstances of the case.

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[32] *Ogbokor v The Immigration Selection Board* (A223/2011)(2012)NAHCMD 33 referred to above

THE APPLICABLE PRINCIPLES

[22] The issue of unreasonable delay has recently been considered by the Namibian Supreme Court in *Chairperson, Council of The Municipality of Windhoek, and Others v Roland and Others*[33] and *Keya v Chief of Defence Force*[34]. The various arguments made on behalf of the parties in this instance must of course be determined with reference to those decisions, to which counsel, inexplicably, made no reference.

[23] The first aspect to be noted is that the Supreme Court has recognized that the defence is not an interlocutory matter, but a substantive issue that may determine the rights of the parties.[35]

[24] The proper approach to be followed in this regard was formulated by O'Regan AJA in *Keya* as follows:

> 'Proper approach to the question of unreasonable delay
>
> [21] This court has held that the question of whether a litigant has delayed unreasonably in instituting proceedings involves two enquiries: the first is whether the time that it took the litigant to institute proceedings was unreasonable. If the court concludes that the delay was unreasonable, then the question arises whether the court should, in an exercise of its discretion, grant condonation for the unreasonable delay.[36] In considering whether there has been unreasonable delay, the high court has held that each case must be

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[33] 2014 (1) NR 247 (SC)
[34] 2013 (3) NR 770 (SC)
[35] *Chairperson, Council of The Municipality of Windhoek, and Others v Roland and Others* at [38]
[36] See *Krüger v Transnamib Ltd (Air Namibia) and Others* 1996 NR 168 (SC) at 170 – 171, citing with approval the South African decision *Radebe v Government of the Republic of South Africa and Others* 1995 (3) SA 787 (N) at 798G – 799E. See also *Purity Manganese (Pty) Ltd v Minister of Mines and Energy and Others; Global Industrial Development (Pty) Ltd v Minister of Mines and Energy and Another* 2009 (1) NR 277 (HC); *Namibia Grape Growers and Exporters v Minister of Mines & Energy and Others* 2002 NR 328 (HC); *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011 (2) NR 437 (HC) in paras 41 – 43 and *Ogbokor and Another v Immigration Selection Board and Others*, as yet unreported decision of the High Court, [2012] NAHCMD 33 (17 October 2012). For other South African decisions, see *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 39 B – D; *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n Ander* 1986 (2) SA 57 (A); *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) ([2004] 4 All SA 133) in paras 46 – 48; *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA) ([2006] 3 All SA 245) in paras 5 and 22

judged on its own facts and circumstances[37] so what may be reasonable in one case may not be so in another. Moreover, that enquiry as to whether a delay is unreasonable or not does not involve the exercise of the court's discretion.[38]

[22] The reason for requiring applicants not to delay unreasonably in instituting judicial review can be succinctly stated. It is in the public interest that both citizens and government may act on the basis that administrative decisions are lawful and final in effect.[39] It undermines that public interest if a litigant is permitted to delay unreasonably in challenging an administrative decision upon which both government and other citizens may have acted. If a litigant delays unreasonably in challenging administrative action, that delay will often cause prejudice to the administrative official or agency concerned, and also to other members of the public. But it is not necessary to establish prejudice for a court to find the delay to be unreasonable, although of course the existence of prejudice will be material if established.[40] There may, of course, be circumstances when the public interest in finality and certainty should give weight to other countervailing considerations. That is why once a court has determined that there has been an unreasonable delay, it will decide whether the delay should nevertheless be condoned. In deciding to condone an unreasonable delay, the court will consider whether the public interest in the finality of administrative decisions is outweighed in a particular case by other considerations.'

[25] This approach was confirmed in *Roland* at [39] [41].

[26] If I thus follow the so laid down approach, which I am obliged to do, it will have been noted that it firstly becomes incumbent on this court to determine whether the time, it took the applicants to institute their review proceedings, was unreasonable, and then, if I should conclude that the delay was unreasonable to secondly consider, whether the court should, in the exercise of its discretion, grant condonation for the unreasonable delay nevertheless.

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[37] See *Disposable Medical Products (Pty) Ltd v Tender Board of Namibia and Others* 1997 NR 129 (HC) at 132 (per Strydom JP). See also *Purity Manganese (Pty) Ltd v Minister of Mines and Energy and Others; Global Industrial Development (Pty) Ltd v Minister of Mines and Energy and Another* cited above n1 in para 14

[38] See *Radebe* cited above n1 at 798I; *Setkosane* cited above n1 at 86E – F; *Gqwetha* cited above n1 at para 48

[39] See *Wolgroeiers Afslaers* cited above n1 at 41E – F; *Associated Institutions Pension Fund* cited above n1 at 321; *Gqwetha* cited above n1 in para 22

[40] See *Wolgroeiers Afslaers* cited above n1 at 42C; *Gqwetha* cited above n1 in para 23

[41] '[39] Deciding whether there has been unreasonable delay involves two enquiries: was the time taken by the litigant to institute proceedings unreasonable? And if it is decided that the time was unreasonable, the question is whether the court should in the exercise of its discretion grant condonation for the unreasonable delay.'

[27] In the course of establishing whether there has been an unreasonable delay the court must also keep in mind that each case must be judged on its own facts and circumstances.[42]

WAS THE DELAY IN THIS CASE REASONABLE

[28] Subsequent to their suspension from all offices on 13 June 2011, the applicants were notified that they had finally been relieved of their positions, with immediate effect, on 15 August 2011.

[29] The review proceedings were instituted on 9 February 2012. That constitutes a delay of 5 months and 24 days.

[30] The first aspect to be noted here is that the position, taken by the respondents, that the delay was one of almost 8 months, in the case of first applicant, is thus incorrect. The record, as per the dismissal notifications, reflects that all three applicants were finally dismissed on 15 August 2011. The allegation made to the effect that the delay, as far as the second and third applicants are concerned, was one of almost 6 months, is thus more accurate. Surely the relevant period is to reckoned from date of final dismissal to the date of the institution of the application, and not from date of suspension.

[31] What did then occur during this period of 5 months and 25 days?

[32] The general explanation was motivated as follows in the reply:

'I deny that there was any delay in bringing the review application as alleged or at all. I furthermore deny that, the institution of the review application was unreasonable as alleged and deny further that, such an application causes severe prejudice to the first and second respondents. I point out that, litigation is neither cheap nor free and the applicants could only institute the review application at a time when they could financially do so .From the time when the first respondent took the decisions sought to be reviewed, the applicants maintained their position to have such decisions reviewed by a court of law. After the decisions sought to be reviewed were taken, the applicants sought legal advice and after

[42] See *Keya* cited above at p 774F – See also *Samicor Diamond Mining (Pty) Ltd v Minister of Mines and Energy and Others* 2014 (1) NR 1 (HC) at [23] to [26]

that advice was given, the applicants opted to institute a review application but could not at that point in time afford the services of a legal practitioner. Under those circumstances, the applicants started to save money so that they can instruct a legal practitioner to lodge the review application and after the required funds were raised, the review application was immediately instituted. I point out that, the applicants are not employed and have no regular source of income and consequently, they could not raise the required money at once. In view of this, I assert that the review application was instituted without any unreasonable remissness.'

[33] In the further replying papers filed later in response to the answering affidavits filed on behalf of the 4th to 8th respondents, those are the respondents that were joined subsequently after the institution of the review, first applicant again, on behalf of all the applicants, denied that there had been an unreasonable delay. He dealt with the issue follows:

'In addition, I deny that, the tabulation of time frames as the deponent has done is a determining factor to determine the aspect of unreasonable delay in instituting a review. As I averred in my earlier replying affidavit at paragraph 5 and as I shall demonstrate herein below at paragraph 10 hereof, the applicant took all reasonable steps to institute the review application timeousiy.

I deny that the applicants never gave notice to the first or the second respondent of their intention to institute the review, that allegation is not correct and it is refuted by the facts set out herein below.

On the 7th of October 2011 our Legal Practitioners of record dispatched to the first respondent alternatively both the first and second respondents a letter of demand and notice of the applicants intention to institute these proceedings if the first respondent does not reinstate us. I attach hereto a copy of that letter marked GPSH1 and incorporate all its contents into this affidavit.

On the same date (7 October 2011), our Legal Practitioners of record dispatched a letter to the messenger of Court of Ondangwa requesting him to serve the letter of demand and notice on the first and second respondents. I attach hereto a copy of that letter and mark it GPSH2 and incorporate all its contents into this affidavit.

On the 11 of October 2011 the messenger of Court of Ondangwa provided our Legal Practitioners of record with a copy of the return of service of the aforesaid letter of demand

and notice. I attach hereto a copy of that letter and mark it GPSH 3 and incorporate all its contents into this affidavit.

On the 4th of November 2011 the erstwhile Legal Practitioners of the first and second respondents dispatched a letter acknowledging the receipt of the letter of demand and notice to the applicant's Legal Practitioners of record. I attach hereto a copy of that letter and mark it GPSH 4 and incorporate all its contents into this affidavit.

On the 8th of November 2011, our Legal Practitioners of record dispatched a letter to the first and second respondent's erstwhile Legal Practitioners acknowledging the receipt of their letter. A copy of that letter is attached hereto and marked GPSH 5.

I submit that the facts I have demonstrated in the aforesaid documents clearly and unequivocally refutes the unfounded allegation that suggests that the first and second respondents were not given a notice of the applicant's intention to institute these proceedings. It is evident from the letter of demand that the letter of demand relates to all the applicants, it relates to the same subject matter raised in these proceedings, specific demands were made in the letter and a clear notice was conveyed to the first respondent that failure to comply with our demands will result in the institution of legal action without any further notice to the first respondent. In the light of the aforesaid averments, I deny that the applicants did not give notice to the first or the second respondents.'

[34] He also went on to state:

' … I have tendered evidence that demonstrates what steps we took before we instituted these proceedings but the first and second respondents went ahead with their unlawful decisions despite the warning that we conveyed to them through our Legal Practitioners of record.

I further deny that we served our papers late. I point out the following, it was necessary for us as the applicants to take all reasonable steps that were necessary to resolve this matter. Furthermore It was also necessary for us to prepare the necessary documents that we were going to rely on in launching these proceedings. I further point out that, most of these documents were in the vernacular language of Oshikwanyama and at the time we took the decision to institute these proceedings we immediately gave instructions to our lawyers to have these documents translated so that we could use them in these proceedings.

I have already demonstrated that we gave notice of our intention to institute these proceedings to the first respondent in October 2011. As a result of our instructions a letter of demand was indeed served on the first respondent and she was further advised that a failure to reinstate us will result in us instituting these proceedings without further notices. This took place before December 2011 when the alleged permanent appointments of the 4 -8 respondents were effected.

After the first respondents had failed to reinstate us as demanded in our letter of demand, we gave instructions to proceed with these proceedings. Our Legal Practitioners of record informed us that we are required to place them in funds to the amount of N$30,000.00 which we did not have at that point in time. I attach hereto a letter dated 31 October 2011 from our Legal Practitioners of record confirming this aspect, it is marked GPSH6. After this, and in preparation to institute these proceedings, our Legal Practitioners of record dispatched a letter to a sworn translator of the High Court of Namibia requesting him to translate the documents that we were going to use in this litigation. I attach hereto a copy of the letter and mark it GPSH7.

I submit that it is evident from the annexures that we have attached to our founding affidavits that there were a number of documents that needed to be translated. Furthermore, it is common cause that all these steps took place during December when most offices close during the December holidays and only open and resume business in January. Despite this situation, I aver that the translation of the documents was completed in January 2012 and, instructed counsel was appointed and briefed by our Legal Practitioners of record who in turn took instructions, consulted us and perused all the translated documents, drafted and settled founding papers during January 2012.

I further point out that, before the papers were to be served on the erstwhile Legal Practitioners of the first and second respondents they withdrew their legal representation of the first and second respondents. My Legal Practitioners of record then dispatched the papers to the deputy Sheriff for Ondangwa to be served on the first and second respondents. I attach hereto a copy of the return if service and mark it GPSH 8.

In the light of the above steps taken by the applicants, I submit that there is no basis to suggest that there was an unreasonable period in instituting these proceedings, this allegation is clearly not supported by the facts and it is refuted by the facts placed on record. I therefore deny any suggestion of aggravation of the alleged delay.'

[35] The following facts emerge:

a) that the first step, which the applicants took, was taken on 16 August 2011, when they wrote a letter to Minister Jerry Ekandjo, the Minister of Regional and Local Government and Housing, complaining about their suspensions and subsequent dismissals, requesting the Minister to intervene;

b) that the further delay up to 7 October 2011 was not explained, save in general terms, to the effect that the applicants, initially, had insufficient funds and that the assistance of their legal practitioners was only sought once their services could be afforded;

c) it can be presumed however that the applicants must have allowed some time to elapse, before approaching their legal practitioners for the first time, as they surely, at the very least, must have expected some answer from the Minister, which never came;

d) that it was only then that a letter of demand was sent. Fact is that such letter was dated 7 October 2011 and that it was served on 11 October 2011;

e) the inference can be made that the necessary consultation or consultations, resulting in the letter, must have occurred before 7 October 2011; that shortens the period;

f) it is not explained how long it took the applicants legal practitioners to draft and settle the said letter; it thus cannot be said by how much the period should be shortened;

g) it is a fact that the letter has a fairly detailed content of some three pages, which content and instructions must have been obtained at an initial consultation and possibly even also during a subsequent consultation, which would have preceded the drafting and settling process;

h) reference is made to Oukwanyama customary law, the Traditional Authorities Act, 25 of 2000 and the Constitution; this, in turn, is indicative of some research, which would also have taken up some time;

i) the letter was served on 11 October 2011 and it took the erstwhile legal practitioners of the first respondent up to the 4th of November 2011 to respond;

j) on 31 October 2011 applicants were advised that a deposit of N$ 30 000.00 was required to brief counsel and to prepare the papers and prosecute the application in the High Court;

k) on 5 December 2011 instructions were given to Mr Shivangulula to translate the required documentation;

l) these translations were received back from the sworn translator during Janaury 2012, in spite of the intervening holiday period;

m) counsel was instructed and briefed to draft the application during January 2012;

n) the papers were apparently already ready for service during January 2012;

o) service of the settled papers was delayed due to the withdrawal of Tjombe-Elago Law Firm Inc as legal practitioners for the respondents;

p) service of the application, which was issued on 9 February 2012, was effected on the first and second respondents on 18 February 2012.

[36] The established facts then show that, although the initial inactivity, save for the immediate request for the Ministers intervention, was only explained in general terms – that is the inactivity from 16 August to 7 October 2011 - it must be inferred that this period must actually have been shorter, if it is acknowledged that it must have taken the applicants' legal practitioners some time to consult, research, draft and settle the letter of demand and that the applicants, legitimately, would have been entitled to await the Minister's response before approaching their legal practitioners.

[37] Recognition must also be given to some extent to the delaying factor advanced by applicants that litigation has its price and that legal practitioners are entitled to insist on a deposit before engaging in substantial work on behalf of a client – which occurred in this instance – and - that the applicants were not immediately

able to put down the required amount. I say this with some hesitation in this case - as it remains inconceivable to me - how senior traditional councillors, such as the applicants, who were also leaders in their community and who surely must have qualified and received the allowances payable to traditional councillors in terms of Section 7 of the Act – were incapable of jointly raising the required deposit of some N$ 30 000.00 – through those benefits or through the sale of cattle - which they must be presumed to possess, if regard is had to the practices and customs followed in this regard in the Namibian rural communities.

[38] In addition it will have been noted that the applicants, already on 16 August 2011, wrote a letter to Minister Jerry Ekandjo, the Minister of Regional and Local Government and Housing, complaining about their suspensions and subsequent dismissals, requesting the Minister to intervene. No relief had emanated from that quarter by the time that the application was launched in February 2012.

[39] To the critical eye it appears further that there was some inactivity during the period 4 November 2011 to 5 December 2011 – ie, the period subsequent to the response received from Tjombe-Elago Law Firm Inc[43] to the date of instruction of the sworn translator.

[40] Realistically some cognisance can also be given to the intervening holiday period, where after the translations became available and the application was drafted and settled by counsel, after having conducted the necessary consultations therefore. All this occurred in January 2012.

[41] It can surely and legitimately be acknowledged that the translations and the drafting of the review papers, by necessity, must have taken some time in this instance, given the volume of the founding papers.

[42] If regard is then had to the further general factors mentioned by Damaseb JP (as he then was) in *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay*[44] at [41] that:

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[43] Informing applicants that their clients would persist with their decision and vigorously defend any legal action instituted against them.
[44] 2011 (2) NR 437 (HC)

'(iv) An applicant seeking review is not expected to rush to court upon the cause of action arising: She is entitled to first ascertain the terms and effect of the decision sought to be impugned; to receive the reasons for the decision if not self-evident; to obtain the relevant documents and to seek legal and other expert advice where necessary; to endeavour to reach an amicable solution if that is possible; to consult with persons who may depose to affidavits in support of the relief.

(v) The list of preparatory steps in (iv) is not exhaustive but in each case where they are undertaken they should be shown to have been necessary and reasonable.

(vi) In some cases it may be necessary for the applicant, as part of the preparatory steps, to identify the potential respondent(s) and to warn them that a review application is contemplated.[45] In certain cases the failure to warn a potential respondent could lead to an inference of unreasonable delay … ' …

it emerges that this was precisely the route that was followed by the applicants, in this case, before instituting their review.

[43] The Supreme Court has re-affirmed that, in considering whether there has been an unreasonable delay, each case must be judged on its own facts and circumstances[46] and therefore what may be reasonable in one case, may not be so in another.[47]

[44] If I then have regard to the overall facts and circumstances of this case - as enumerated and analysed above – and although not entirely free from criticism – I come to the conclusion that the applicants delay, in this instance, was not unreasonable.

[45] The question of condonation thus does not arise.

[46] The consequence of this finding then means that the defence of unreasonable delay raised by the respondents cannot be upheld.

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[45] Where a respondent in review proceedings is given notice that a decision is about to be taken on review such respondent knows it is at risk and can arrange its affairs so as to be the least detrimental: *Kruger v Transnamib Ltd (Air Namibia) and Others* 1996 NR 168 (SC) at 170H et 172A

[46] See *Disposable Medical Products (Pty) Ltd v Tender Board of Namibia and Others* 1997 NR 129 (HC) at 132 (per Strydom JP). See also *Purity Manganese (Pty) Ltd v Minister of Mines and Energy and Others; Global Industrial Development (Pty) Ltd v Minister of Mines and Energy and Another* cited above n1 in para 14

[47] See *Keya* cited above at [21]

SHOULD THE APPLICANTS HAVE BROUGHT A SUBSTANTIVE APPLICATION FOR CONDONATION

[47] One issue remains. That is the point raised on behalf of the respondents by Mr Boesak that the applicants have not substantively applied for condonation and have only responded to the *in limine* objection of unreasonable delay in reply and that – therefore – the court would be precluded from considering the question of condonation.

[48] I believe that there is no merit in this point for the following reasons:

a) The defence of unreasonable delay is not an interlocutory matter, but a substantive issue[48] to be decided on the facts of each case;[49]

b) The facts of each case in motion proceedings, (administrative reviews are usually instituted by way of motion proceedings), are usually established through the affidavits filed of record.

c) The defence is thus usually raised in the answering papers of the respondents filed in review applications; in such scenario the response thereto is usually found in the replying affidavits;

d) The defence is then decided on the facts and circumstances of each case, as established in these affidavits.

e) If the delay in question is found not to be unreasonable, no question of condonation arises; in such event it clearly makes no sense, to require of the parties to a file a separate application, to enable the determination of a defence, already pleaded, and which can thus easily be determined with reference to the papers already serving before the court;

f) Only if the delay is found to be unreasonable then the question arises whether the court should, in the exercise of its discretion, grant condonation for the unreasonable delay.[50]

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[48] *Chairperson, Council of The Municipality of Windhoek, and Others v Roland and Others* at [38]
[49] See *Keya* cited above at [21]

g) It is here that certain recognized 'public interest factors' also come into play. They were succinctly summarized in *Keya* by O'Regan AJA[51]. - and – if I understand the learned judge correctly – it is then ultimately with reference to these factors that a court will - in deciding whether or not to condone an unreasonable delay – also 'consider whether the public interest in the finality of administrative decisions is outweighed, in a particular case, by other considerations.'[52]

h) Thus, also in the event that condonation would be required, it cannot be said that it would make sense to then require the parties to lodge a separate interlocutory application for condonation for something that has already been fully ventilated in the papers. In this regard it should not be forgotten that leave, to file a further affidavit or affidavits, can always be asked for, should this be required. To not require a separate application would also be in line with the objectives of the case management system which seek to limit the costs of litigation, which would be increased by imposing the requirement to file a separate application.

[49] It appears that a distinction should be made between the type of condonation that may be required in reviews, to ward off a substantive defence, and the run- of-the- mill condonation applications, ancillary to main litigation, in which the issue of condonation is merely an interlocutory matter. But - ultimately, and like with so many other legal procedures, 'there is more than one way to skin a cat'. Is it thus material whether or not a substantive application for condoning the delay in addition to the main review is filed, or whether the defence, once raised, is responded to in reply

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[50] See *Krüger v Transnamib Ltd (Air Namibia) and Others* 1996 NR 168 (SC) at 170 – 171, citing with approval the South African decision *Radebe v Government of the Republic of South Africa and Others* 1995 (3) SA 787 (N) at 798G – 799E. See also *Purity Manganese (Pty) Ltd v Minister of Mines and Energy and Others; Global Industrial Development (Pty) Ltd v Minister of Mines and Energy and Another* 2009 (1) NR 277 (HC); *Namibia Grape Growers and Exporters v Minister of Mines & Energy and Others* 2002 NR 328 (HC); *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011 (2) NR 437 (HC) in paras 41 – 43 and *Ogbokor and Another v Immigration Selection Board and Others*, as yet unreported decision of the High Court, [2012] NAHCMD 33 (17 October 2012). For other South African decisions, see *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 39 B – D; *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n Ander* 1986 (2) SA 57 (A); *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) ([2004] 4 All SA 133) in paras 46 – 48; *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA) ([2006] 3 All SA 245) in paras 5 and 22

[51] At [22]

[52] See *Keya* cited above at 775D - E

and the necessary condonation is then sought there, with- or without amplified papers? I believe not.

[50] In this case I have found that the delay was not unreasonable. That decision was based on the facts and circumstances of this matter, as placed before the court, in the affidavits filed of record. The question of condonation did accordingly not arise. Although I am not impressed by the point so raised, as already indicate above, I have to decline to decide this issue finally [53], as this has become unnecessary for this case.

ARE THE DECISIONS TO BE REVIEWED ADMINISTRATIVE OR EXECUTIVE DECISIONS?

[51] The next fundamental issue which was raised by the respondents was whether or not the decisions, which the applicants seek to have reviewed, amount to reviewable decisions, which have thus become subject to the requirements for fair administrative action, as prescribed by Article 18 of the Constitution, or whether or not they amount to executive decisions, which have not.

THE ARGUMENTS ON BEHALF OF RESPONDENTS

[52] Mr Chibwana formulated his original written submissions against the backdrop of the decisions made in *Mbanderu Traditional Authority v Kahuure* 2008 (1) NR 55 (SC), *Fedsure Life Assur Ltd v Greater Jhb TMC* 1999 (1) SA 374 (CC) (1998 (12) BCLR 1458; [1998] ZACC 17), *President of the RSA v SARFU* 2000 (1) SA 1 (CC) (1999 (10) BCLR 1059; [1999] ZACC 11), *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) ((2008) 29 ILJ 73; 2008 (3) BCLR 251; [2008] 2 BLLR 97; [2007] ZACC 23), *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) (2005 (10) BCLR 931; [2005] 3 All SA 33; [2005] ZASCA 43) and *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) (2004 (2) BCLR 120; [2003] ZASCA 142). They read as follows:

'One submits that the simple question to determine is whether the power exercised is executive or administrative in nature. One submits that the head of the second respondent is

[53] *Kauesa v Minister of Home Affairs* 1995 NR 175 (SC) (1996 (4) SA 965; 1995 (11) BCLR 1540) at p 183 E – I – in which it was held, further, that a Court should decide no more than what was absolutely necessary for the decision of a case, … '.

the first Respondent. One submits that the first Respondent is the holder of executive authority in the second Respondent. It follows that the second Respondent exercised executive power in dismissing the applicants. The examination would then move to the nature of the power exercised. One submits that the first Respondent exercised original powers conferred upon her by virtue of her position as head of second Respondent. It follows that the power exercised by the first Respondent in dismissing the applicants is not subject to judicial review.

One takes this submission further as follows; the applicants are in essence representatives of the first Respondent to the members of the second respondent. One submits that their authority is derived from their appointment by first Respondent. It foIlows that the first Respondent is their executive authority.
One submits that on this basis alone the application ought to be dismissed with costs.'

[53] This version was subsequently improved upon. It was now submitted:

'We submit that the starting point in making a determination as to whether the exercise of power in question amounts to executive or administrative action is Section 10 (2) of the Traditional Authorities Act Number 25 of 2000 which reads verbatim as follows:

"Appointment of senior traditional councilors, traditional councilors and secretary and their powers, duties, and functions

(1)……
(2) The qualifications for appointment or election and the tenure of, and removal from, office of a senior traditional councilor or traditional councilor shall be regulated by the ***customary law*** *of* ***the traditional community*** *in respect of which such* ***councilor*** *is appointed or elected. (my emphasis)*

We submit that the law that must be ascertained is the customary law of the Oukwanyama traditional authority."

WHAT IS THE CUSTOMARY LAW?

The Applicants allege at page 17 of the record at paragraphs 38 of the founding affidavit the following:

"The Oukwanyama Traditional Community has developed and codified its customary law that is followed in regulating the affairs of the Oukwanyama people."

These averments are denied and fully explained. Further and most importantly despite a clear and unequivocal challenge the Applicants do not place any information to prove their allegations.

With reference to page 204 of the record at paragraph 22 of the intervening Respondents answering affidavit which we quote verbatim here for ease of reference

"I submit that Annexure "GH27"is a book by the first Applicant on Oshikwanyama law. I submit that the law of the Oshikwanyama have not been codified and the attempt by the first Applicant to pass of his book as the codified laws of the Oshikwanyama is misleading and fraudulent. ***I challenge the first Applicant*** *to say,* ***where*** *and* ***when*** *the book was passed as the codified law of the second Respondent. The clear intention of first Applicant can only be to mislead this honourable court."(my emphasis)*

We point out that serious allegations are made by the Respondents against the Applicants. The Respondents allege that the Applicants were

i) Misleading this honourable court
ii) Acting fraudulently

We submit that in reply there is no response or answer for that matter proferred by the Applicants, to very serious allegations made against first Applicant. All that the Applicant does is issue a composite bare denial covering six paragraphs at paragraph 15.4.[54]

We submit that reliance being placed on the *Plascon-Evans rule*[55], the version of the Respondents must be accepted over that of the Applicants. Therefore the customary law of the Oukwanyama is verbal and not codified.

The next question that arises is in terms of the customary law what powers does the Queen possess which relate to the removal of senior traditional councilors.

We submit that the Respondents have set out in the answering affidavits that the first Respondent is a Royal and that such is the position in terms of the Oukwanyama customary

[54] See Record page 346 to 347.
[55] *Plascon-Evans Paints (TVL (Ltd) vs Van Riebeck Paints (Pty) Ltd* 1984 (3) S.A 623 (A)

law. We submit that the position is akin to that of the British royal in terms of the common law. These powers or prerogatives can be exercised at the Royal discretion[56].

UNCONTESTED FACTS

We make reference to the following documents amongst others to enforce our point that the first Respondent is a Royal and that is the position in terms of the customary law of the Oukwanyama traditional community. We point out that the issue we are addressing is not limited to the documents we refer to.

i) Annexure "GH1" page 29 of the Record
ii) Annexure "GH3" page 32 of the Record
iii) Annexure "GH4" page 33 of the Record
iv) Annexure "GH8" page 39 of the Record
v) Annexure "GH10" page 41 of the Record

There are numerous other documents which reflect the fact that the first Respondent is a Royal. In terms of the documents referred to the first Respondent is at all times referred to as:-

"Her Majesty the Queen".

We submit that in terms of the customary law when Her Majesty the Queen dismisses a traditional councilor she does so in terms of prerogative powers which power she utilizes at her discretion.

THE *CHAUNE* JUDGMENT

At this point of the discussion it is prudent to address the decision of Justice Ueitele in the *Chaune* matter[57]

At paragraph 16 of the judgment the court made the following findings:

"In my view therefore their (reference to traditional authorities) exercise of power by traditional authorities pursuant to the Traditional Authorities Act, 2000 is plainly the

[56] Rautenbach – Malherbe – Constitutional Law 6th Edition Lexis Nexis at page 33 – 35 - See Para 8.1 – 8.3 of the 1st – 2nd Respondents answering affidavit
[57] *Samuel Chaune vs Hubert Tridimalo Ditshabue and four Others* (2013) NAHCMD 111 delivered on 22 April 2013). Page 10

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

Before we address this decision, we submit that there are three fundamental issues that must be highlighted.

a) Firstly in the *Chaune* matter the traditional councilor had not been appointed but rather elected (our emphasis)

b) Secondly, that the customary law of the Bakgadagadi Traditional Community is different from the Oukwanyama Traditional Community.

c) Thirdly that there was a hearing in the present matter proceeded by notification of the hearing before the decision was made.

THE NATURE OF THE POWER

In the present matter the dispute is whether the decisions are of an administrative nature. This question can be answered by interrogating the nature of the power.

We shall rely extensively in addressing this court on the judgment in:

Minister of Defence and Military Veterans vs General Matau and 2 Others[58]

We submit that of importance in determining the question at hand is the source of the power. We submit that the source of the power to remove a traditional councilor is the customary law. We submit that the relevant provision[59] is clear and unambiguous in this regard.

It is clear from the provision itself that the legislature deferred that exercise of power to each individual traditional community. Thus the removal would be regulated by the customary law of each traditional community.

It is important to note that in deferring such power the legislature utilized peremptory language. To emphasize this point we quote the phrase utilized verbatim.

"shall be regulated by the customary law of the traditional community……"

[58] Unreported Constitutional Court judgment delivered on 10 June 2014 case number CCT 133/13.
[59] Section 10 (2) Traditional Authorities Act 25 of 2000

In *Masetlha* Moseneke DCJ[60] held that the President's power to dismiss the Director-General of the National Intelligence Agency was sourced in and flowed from the Constitution. In the *Minister of Defence and Military Veterans* supra[61] the Court pointed out that administrative action may derive from a number of sources, including the constitution and vice versa the converse is also correct.

In this instance the source of the power is customary law of the Oukwanyama Traditional Authority.

We submit that the second consideration in interrogating the nature of the power is what are the constraints imposed on the functionary in exercising the power.

In *Ed – U - College*[62] the Constitutional Court was persuaded that the power was administrative by, among other things,

"the constraints upon the exercise of the power as well as its relatively restricted scope."

We note that in terms of the customary law the power of the first Respondent to remove a traditional councilor suffers no constraints.

THE MBANDERU JUDGMENT

In *Mbanderu Traditional Authority*[63] the exercise of power by a Traditional Community acting in terms of Section 10 (1) (a) was found to be legislative and therefore not subject to review.

We submit that the Supreme Court of Namibia came to the conclusion that at times when Traditional Authorities exercise power in terms of the Traditional Authorities Act such exercise of power may not always be administrative. Thus the mere fact that a power is exercised in terms of the Act is not enough to render such power administrative.

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[60] *Maseltha vs President of the Republic of South Africa and Another* 2008 (1) S.A 566 (C.C) but paras 65 and 69 - 70
[61] At page 23 and 24 paragraphs 39 - 40
[62] *Permanent Secretary Department of Education and Welfare Eastern Cape & Anothers vs Ed-U-College* 2001 (2) S.A 1 (cc) at paragraph 21
[63] *Mbanderu Traditional Authority and Another vs Kahuure and Others* 2008 (1) N.R 55 (S.C)

Lastly, we submit that the mere fact that a power is derived from legislation is insufficient on its own for such power to be defined as administrative. In Geuking[64] where notwithstanding the fact that a power derived, from legislation, it was considered executive in nature.

The last and most important consideration is the legal framework imposed by the Traditional Authorities Act. We have already addressed the relevant provision and make reference to Section 3 (2) and Section 10 which clearly elevate the customary law and defer exercise of power to the customary law of the traditional community by submitting.

We submit to conclude our discussion that the exercise of power was executive in nature and not subject to stringent review as would be the case in administrative law.'

THE ARGUMENTS ON BEHALF OF APPLICANTS

[54] The counter-argument, mustered by Mr Khama, was made along the following lines:

'The respondents contend that any action of the first respondent taken in her capacity as a Queen is not subject to review. They contend that the first respondent exercises a Royal prerogative [65].

It will be submitted that the applicants did not cite the first respondent in her capacity as Queen. In fact, the applicant will submit that, for the purposes of these proceedings that capacity is irrelevant and it has no significance at all in these proceedings. In these proceedings, the first respondent is cited in her official statutory capacity as Chief as defined in the Traditional Authority Act [66]. It will be submitted that, the first and second respondent's claim of Royal prerogative of the first respondent in her capacity of Queen is legally irrelevant in determining whether the decisions she took in her capacity as a Chief constitutes an administrative act or not.

In the pleadings, the citation and capacity of Chief in respect of the first respondent is not in issue and has been admitted by the first and second respondents in their answering affidavit [67].

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[64] *Geuking vs President of the Republic of South Africa and Others* 2003 (3) VSA 34 (C.C) at paragraphs 26
[65] Para 8.1-8.3 of the 1st -2nd respondents answering affidavit.
[66] Record page 6 para 6
[67] Para 9 of the 1st -2nd respondents answering affidavit

The first respondent's powers as a Chief are prescribed in the Act. Its long title provide s as follows:

"TO PROVIDE FOR THE ESTABLISHMENT OF TRADITIONAL AUTHORITIES AND DESIGNATION, ELECTION, APPOINTMENT AND RECOGNITION OF TRADITIONAL LEADERS; TO DEFINE THE POWERS, DUTIES AND FUNCTIONS OF TRADITIONAL AUTHORITIES AND TRADITIONAL LEADERS; AND TO PROVIDE FOR MATTERS INCIDENTAL THERETO"

It is evident from the long title of the Act that, the powers, duties and functions of chiefs are prescribed by law and on this basis, it will be submitted that, a chief cannot exercise any other power except the power prescribed by law [68]. The same goes for the second respondent. On this basis alone, it will be submitted that, in determining whether a conduct constitutes an administrative action one looks at the nature of the power that is being exercised rather than upon the identity of the person who does so [69],[70].

The State of Namibia is founded on the principle of the rule of law and all legal subjects are subject to the rule of law. Consequently, since the powers, duties and functions of the first respondent are prescribed by law, it will be submitted that, when the first respondent exercises any power conferred by law, she exercise a public power and on this basis alone her decisions are administrative in nature and they are consequently reviewable [71],[72],[73].

On the contention of the respondents with regard to reviewability of decisions of Chiefs, the learned author on Customary law remarked as follows[74]:

"Any administrative act performed by a chief would obviously have to conform to whatever customary-law requirements there happen to be; common-law standards, however, are more stringent. The decisions of all bodies obliged to act in the public interest are subject to review, and insofar as their decisions fall short of the requirements of

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[68] *SECTION 11 AND 14 OF THE ACT*

[69] *GREY"S MARINE HOUT BAY (PTY) LTD V MINISTER OF PUBLIC WORKS 2005 (6) SA 313 (SCA),*

[70] *TRANSNET LTD & OTHERS V CHIRWA (2006) 27 ILJ 2294 (SCA) ,*

[71] *PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS V SOUTH AFRICAN RUGBY FOOTBALL UNION AND OTHERS 2000 (1) SA 1 (CC)*

[72] *MBANDERU TRADITIONAL AUTHORITY AND ANOTHER V KAHUURE AND OTHERS 2008 (1) NR 55 (SC)*

[73] *OPEN LEARNING GROUP NAMIBIA FINANCE CC V PERMANENT SECRETARY ,MINISTRY OF FINANCE AND OTHERS 2006 (1) NR 275 (HC);*

[74] *THE SOUTH AFRICAN LAW JOURNAL (1993) 110 SALJ 276 UNDER THE HEADING: 'ADMINISTRATIVE-LAW CONTROLS OVER CHIEFS' CUSTOMARY POWERS OF REMOVAL BY TW BENNETT.*

authority, regularity, procedural fairness and reasonableness, they may be declared invalid. In principle chiefs should not be able to claim exemption from these requirements merely because their powers happen to derive from customary law. They are still officials acting in the public interest; their office is part of the state administration; they are paid their salaries from public funds; and they are under the control of a Minister."

It will further be submitted that both the first and the second respondents are creatures of a statute and consequently they are bound by the *audi alteram partem* principle and are expected to comply with the terms of article 18 of the Namibian Constitution [75],[76].

The powers of the 1st respondent are prescribed in the Act and as such, when the 1st respondent exercises such powers,she is exercising public power and her decisions in that regard are reviewable. This Court has stated as follows with regard to exercising public power[77]:

"It appears therefore that the exercise of all public power must be exercised in accordance with the Constitution and the law."

In the light of the above submissions, it will be submitted that the first respondent's actions constitutes administrative acts which are justiciable and reviewable [78].

THE APPLICABLE PRINCIPLES

[55] Although it will have been noticed that counsel, for both sides, cited a myriad of foreign case law they, disappointingly, again, failed to refer to the applicable leading Namibian authorities, as they should have done[79].

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[75] VILJOEN AND ANOTHER V INSPECTOR-GENERAL OF THE NAMIBIAN POLICE 2004 NR 225 (HC)

[76] IN MEDICAL ASSOCIATION OF NAMIBIA LTD AND ANOTHER V MINISTER OF HEALTH AND SOCIAL SERVICES AND OTHERS 2010 (2) NR 660 (HC) THE COURT STATED AS FOLLOWS AT PARAGRAPH 109 :

[77] MEDICAL ASSOCIATION OF NAMIBIA LTD AND ANOTHER V MINISTER OF HEALTH AND SOCIAL SERVICES AND OTHERS 2010 (2) NR 660 (HC) THE COURT STATED AS FOLLOWS AT PARAGRAPH 109 :

[78] *Chaune v Hubert Ditshabue* (A5/2011) (2013)NAHCMD 111, a decision of this Court delivered on 22 April 2013.

[79] *Westcoast Fishing Properties v Gendev Fish Processors Ltd* 2013 (4) NR 1036 (HC) at [8] to [11]

[56] This court in *Esterhuizen v Chief Registrar of The High Court and Supreme Court, and Others*[80], (where it also had to determine whether or not the to be impugned decision there was administrative in nature or not), said the following in regard to the leading Namibian authority :

'[58] Reliance was also placed on the leading Namibian Supreme Court authority of the *Permanent Secretary of the Ministry of Finance v Ward* 2009 (1) NR 314 (SC) where Strydom AJA analysed the applicable case law and were the learned Judge of Appeal stated:

'. . . The cases suggested various guidelines and principles which, applied on their own or cumulatively with other guidelines and/or principles, may determine on which side of the dividing line a particular decision or action may fall.'[81]

[59] I can do no better that to cite from that thorough and comprehensive judgment in an effort to extract therefrom the relevant 'guidelines and principles' for purposes of determining this cardinal issue in the present case. These are as follows: … '.

[57] I will therefore, also, in the first instance, again, have regard to- and apply those principles, as formulated in *Ward,* by Strydom AJA (Shivute CJ ,and Chomba AJA concurring), who did so in the following manner:

'[30] In the case of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) (1999 (10) BCLR 1059) (the Sarfu case) it was stated that what matters was not the functionary but the function performed by him or her. In the same case it was stated that the implementation of legislation would ordinarily constitute administrative action in contrast to policy matters which would ordinarily not be administrative action. Although this was said in connection with s 33 of the South African Constitution the same would also apply to art 18 of our Constitution.

[31] To distinguish between policy matters and implementation of legislation regard should be had to the source of the power, the subject-matter thereof and whether it involves the exercise of a public duty. (See in this regard also *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) (2000 (3) BCLR 241); *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA) (2001 (10)

[80] 2011 (1) NR 125 (HC)
[81] *Permanent Secretary of the Ministry of Finance v Ward* at para 39

BCLR 1026) and *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC) (2008 (3) BCLR 251; (2008) 29 ILJ 73; [2008] 2 BLLR 97).)

[32] In the *Chirwa* case supra at para 186 Langa CJ stated in regard to whether a function or duty was public as follows:

"[186] Determining whether a power or function is public is a notoriously difficult exercise. There is no simple definition or clear test to be applied. Instead, it is a question that has to be answered with regard to all the relevant factors, including: (a) the relationship of coercion or power that the actor has in its capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercised in the public interest. None of these factors will necessarily be determinative; instead, a court must exercise its discretion considering their relative weight in the context."
(See also *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) (2005 (10) BCLR 931; [2005] 3 All SA 33).)

[33] It further seems that decisions taken in regard to tenders and disciplinary matters are ordinarily regarded as administrative acts which would attract the constitutional principles set out in art 18. (See in this regard *Administrator, Transvaal, and Others v Zenzile and Others* 1991 (1) SA 21 (A) ((1991) 12 ILJ 259) and *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) ([2003] 1 All SA 424).)

[34] The application of these principles, set out above, is also not free from difficulty. For instance the source of power acted upon by a functionary can almost always be traced back to some statutory enactment which, in practical terms, and if applied indiscriminately, will mean that every decision or act by a functionary could be classified as administrative action. If that was correct the burden on the State would be tremendous and would put naught to the State's freedom to enter into contracts like any private individual.'

THE FUNDAMENTAL FLAW UNDERLYING THE RESPONDENTS' CASE

[58] Before applying these principles to the case now serving before the court it may prove useful to consider the correctness of one of the central submissions, running through the main argument, mustered on behalf of the respondents.

[59] In this regard it will have been noticed that the case of the respondents' is, in the main, based on the provisions of section 10(2) of the Traditional Authorities Act

25 of 2000. The section regulates the appointment and removal of traditional councillors in the following manner:

'(2) The qualifications for appointment or election and the tenure of, and removal from, office of a senior traditional councillor or traditional councillor shall be regulated by the customary law of the traditional community in respect of which such councillor is appointed or elected.' *(my underlining)*

[60] On the realization, that the removal of traditional councilors is thus regulated by customary law, the following further submissions of the respondents were obviously based:

a) that the law that must be ascertained is the customary law of the Oukwanyama traditional authority;

b) that the customary law of the Oukwanyama is verbal and not codified;

c) that the question that then arises is what powers does the Queen possess which relate to the removal of senior traditional councilors in terms of the customary law;

d) that the first Respondent is a Royal and that such is the position in terms of the Oukwanyama customary law.

e) that her position is therefore akin to that of the British royal in terms of the common law and that her powers or prerogatives can thus be exercised at the Royal discretion;

f) that there are numerous documents which reflect the fact that the first Respondent is a Royal. In terms of the documents referred to the first Respondent is at all times referred to as: - *"Her Majesty the Queen".*

g) that in terms of the customary law, when *'Her Majesty the Queen'* dismisses a traditional councilor, she does so in terms of her prerogative powers which power she utilizes at her discretion.

[61] On closer scrutiny of section 10(2) of the Traditional Authorities Act 2000 it however emerges that the position is not as straightforward as the respondents might have it, as, the seemingly straightforward provisions of the section are qualified by the definition of the concept 'customary law', as contained in section 1 of the act. The definition does so in the following terms

"customary law" means the customary law, norms, rules of procedure, traditions and usages of a traditional community in so far as they do not conflict with the Namibian Constitution or with any other written law applicable in Namibia;'

[62] The definition thus determines that the customary law, where applicable, only applies in so far as such customary law is not in conflict with the Namibian Constitution and any other written law. The act thus superimposes the Namibian Constitution and any other written law on the customary law.

[63] When the submissions, made on behalf of the respondents, are thus considered, they must be considered also against the provisions of the Constitution and the Traditional Authorities Act 2000 in order to determine whether the applicable customary law can prevail.[82]

THE APPLICABLE CUSTOMARY LAW

[64] When it comes to the applicable customary law, as relied on by the parties, it appears that a material dispute of fact exists in this regard. The parties have not asked that this dispute be referred to the hearing of oral evidence. Both the deponents to the main affidavits filed on behalf of the parties claim to be experts and thus to be knowledgeable and versed in the applicable customary law. Applicants contend that the customary law of the Oukwanyama is that as codified in a book published in January 2007 by the first applicant. First applicant states:

'The Oukwanyama Traditional Community has developed and codified its customary law that is followed in regulating the affairs of the Oukwanyama people This law applies to the first and second Respondent. In terms of article 4 of this law, a traditional leader may be removed from office by reason of death, mental incapacity or any other lawful reason. It

[82] See also : *Adcock v Mbambo & Others* (A87/2010) [2012] NAHC 276 (24 October 2012) at [50] reported on the SAFLII website at : http://www.saflii.org/na/cases/NAHC/2012/276.html

further provides that a person charged shall be entitled to a fair hearing accorded to such person by the first Respondent and or Council. ! attach hereto a copy of the customary law of the Oukwanyama Traditional community … '.

[65] On behalf of the respondents the aforementioned Mr Theophilus Nelulu alleged:

'I submit that the decision of the Queen is not subject to review. In order to fully explain this submission I shall give a brief history of the Oukwanyama kingdom. … '.

…

The Oukwanyama Kingdom has since been re- established and is led by the Queen (the first respondent) who in appointing and dismissing her senior traditional councilors exercises her royal prerogative to make, in terms of custom, such decisions. I emphasize the fact that these senior traditional councilors are representatives of the Queen, they act as representatives and act on behalf of the Queen. It is an exercise of royal prerogative. I submit that such exercise of royal prerogative is not administrative action and not subject to review on this basis the application should be dismissed with costs.'

[66] It so emerges that the applicable customary law position, as advanced by the applicants, is vehemently denied by the respondents, who, in addition even allege that the advanced position is also highly misleading as no decision to codify the applicable customary law was ever taken by the community. They claim on the other hand that the customary law is oral and based in the Oukwanyama traditions and customs handed over from generation to generation.[83] With reference to the applicable principles to disputed facts in motion proceedings, Respondents accordingly argue that their version of the customary law must prevail in accordance with the principles of the *Plascon- Evans*[84] rule in terms of which their version is to prevail. I have to agree.

[67] Respondents then go on to argue that in accordance with their version of the oral customary law the first respondent is a *'royal*', known as '*Her Majesty the Queen'* who can exercise her powers or prerogatives, as they put it, by way of royal discretion.

[83] See also the affidavit deposed to by Mr Ndilula, the fourth respondent.
[84] As cited above

[68] The next question that logically arises is whether this position accords with the Traditional Authorities Act 2000 and the Constitution.

THE CONSTITUTION

[69] The only relevant Chapter of traditional authorities seems to be Chapter XII of the Namibian Constitution which provides for the establishment of 'Regional and Local Government' for the Republic of Namibia. Article 102 deals with the structures that were to be established in terms of this chapter. Article 102 (4) then goes on to stipulate that:

'For the purposes of this Chapter, a Local Authority shall include all municipalities, communities, village councils and other organs of local government defined and constituted by Act of Parliament.' *(my underlining)*

[70] It appears that, in terms of this provision, a local authority shall also include other organs of local government, as defined and constituted by Act of Parliament.

[71] The question which thus arises is whether or not Parliament, through the enactment of the Traditional Authorities Act 2000, has intended that the traditional authorities, which it allowed to be established for their respective communities through the enactment, are to form part of local government? This question, in turn, and whether or not such a link is created, will have to be answered with the reference to the provisions and scheme created by Parliament through the enactment of the Traditional Authorities Act.

[72] It is apposite to note in this regard that the Constitution, in the next sub-article, (and thus in the context of providing for the regional and local government of Namibia), expressly provides in Article 102(5) for the establishment of a Council of Traditional Leaders, which Council is to advise the President on the control and utilization of communal land and all such matters as may be referred to it by the President for advice.

THE SCHEME CREATED BY THE TRADITIONAL AUTHORITIES ACT, ACT NO 25 OF 2000

[73] The purpose for the statutory enactment of the Traditional Authorities Act (hereinafter referred to as 'the Act') is recorded in its preamble. The Act was seemingly promulgated:

'to provide for the establishment of traditional authorities and the designation, election, appointment and recognition of traditional leaders; to define the powers, duties and functions of traditional authorities and traditional leaders; and to provide for matters incidental thereto.'

[74] Accordingly – and in terms of Section 2 –

'(1) … every traditional community may establish for such community a traditional authority consisting of-

(a) the chief or head of that traditional community, designated and recognized in accordance with this Act; and

(b) senior traditional councillors and traditional councillors appointed or elected in accordance with this Act.

(2) A traditional authority shall in the exercise of its powers and the execution of its duties and functions have jurisdiction over the members of the traditional community in respect of which it has been established.'

[75] All this is expressly made subject to the further provisions of the Act.[85]

[76] It also appears that the establishment of a traditional authority, in terms of the Act, is voluntary, so much is signified by the use of the word 'may'.

[77] It also appears that the appointments of all leaders in a traditional authority so established, that is the appointment of a chief or head for a particular traditional community and the appointments of traditional councillors, be they senior or not, are to be done in accordance with the Act, in terms of which they are then designated and recognized.

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[85] See Section 2(1)

[78] The powers, functions and duties of traditional authorities are futher determined in Section 3. Section 3 is made subject to Section 16. Section 16 regulates the relationship of traditional authorities with government organs. It does so in the following terms:

'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.'

[79] It is to be noted that the exercise of the powers, functions and duties of traditional authorities are to be supportive of the policies of the said government organs and that the acts of the traditional authorities are also not to undermine the authority of such government institutions.

[80] In addition traditional authorities are also obliged to co-operate with all government institutions and even the Namibian police. This obligation is expressly provided for by Section 3(2), which also imposes the following further duties:

'(2) A member of a traditional authority shall in addition to the functions referred to in subsection (1) have the following duties, namely-

(a) to assist the Namibian police and other law enforcement agencies in the prevention and investigation of crime and, subject to the provisions of the Criminal Procedure Act, 1977 (Act 51 of 1977), the apprehension of offenders within their jurisdiction;

(b) to assist and co-operate with the Government, regional councils and local authority councils in the execution of their policies and keep the members of the traditional community informed of developmental projects in their area;'.

[81] In the performance of its duties and functions under the Act, a traditional authority may even exercise quasi-judicial functions in that it can hear and settle disputes between the members of the traditional community in accordance with the customary law of that community.[86]

[82] It so appears that the traditional authorities, established in accordance with the Act, at least have a supportive role to play, in the above mentioned respects, as

[86] See Section 3(3)(b)

far as government, regional councils and local authority councils are concerned, particularly, at least, in so far as the local government of the communities is concerned in whose area of jurisdiction the particular traditional community resides, as seems to have been contemplated by Article 102(4) of the Constitution, if the article is to be given a wide, liberal and purposive interpretation.[87]

[83] This conclusion is fortified by the further fact that the Act also falls under the administration of a Minister, as defined[88], who, coincidentally, is the Minister responsible for Regional and Local Government.

[84] The Act assigns the following roles to the Minister:

a) the appointment of chiefs or heads of traditional communities is to be made on application to the Minister, in the prescribed form;[89]
b) it is the Minister that may grant approval to such application, which approval is to be made in writing;[90]
c) if the Minister is of the opinion that the person sought to be designated as a chief or head of a traditional community represents a group of persons who are members of a traditional community in respect of which a chief or head of a traditional community has been designated and recognised under this Act; or such group of persons do not constitute an independent traditional community inhabiting a common communal area detached from another traditional community; or such group of persons do not comprise a sufficient number of members to warrant a traditional authority to be established in respect thereof; and that there are no reasonable grounds for recognizing such group of persons as a separate traditional community, the Minister is to advise the President accordingly;
d) the President shall then refer the matter to the Council of Traditional Leaders for its consideration and recommendation; the further procedure to be followed is then also set in Section 5;
e) the act specifically provides that if the designation is not done in accordance with the act, the designation will be invalid;

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[87] See for instance: *Minister of Defence, Namibial v Mwandinghi* 1992 (2) SA 355 (NmS)
[88] See Section 1 of the Act
[89] See Section 5(1) of the Act
[90] See Sections 5(1) and (2) of the Act

f) if the Minister is satisfied that the designation was in accordance with the Act, he is to advise the President accordingly, who is to recognise the designation of the chief or head of the traditional community concerned by proclamation in the Gazette;[91]

g) in the event of the removal of a chief or head of a traditional community by a community the Minister is to notify the President of such removal in writing, and the President shall recognize the removal from office of the chief or head of the traditional community concerned by proclamation in the Gazette;

h) the Minister also has a role to fulfill in the event of a dispute arises amongst the members of a traditional community in regard to the designation of a chief or head of the traditional community, or his or her succession where the members of that traditional community fail to resolve that dispute, in which event they may petition the Minister;[92] who then commissions an investigation committee, the receipt of which then entitles him to make a finding;

i) if a chief or head of a traditional community is elected or appointed to a political office, the chief or head of a traditional community is to forthwith notify the Minister of this in writing;[93]

j) allowances are paid to traditional leaders, which allowances the Minister, in consultation with the Minister responsible for Finance, may prescribe;[94]

k) the Minister may make regulations generally in respect of matters which are required or permitted or to be prescribed by the Act. or which are necessary or expedient to be so prescribed in order to achieve the purposes of the Act.

[85] A traditional authority, in relation to the traditional community which it leads, is further obliged to ensure the observance of the customary law of that community by its members, and in particular to administer and execute the customary law of that traditional community.[95] Given the definition of 'customary law' this means that such observance, administration and execution is not to conflict with the Namibian Constitution or with any other written law applicable in Namibia.

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[91] See Section 6 of the Act
[92] See Section 12 of the Act
[93] See Section 15 of the Act
[94] See Section 17 of the Act
[95] See Section 3(1)(b)

[86] The Act, in Section 14, then goes on to expressly limit the powers of traditional authorities, and by implication the customary law, in the following further way:

'In the exercise of the powers or the performance of the duties and functions referred to in section 3 by a traditional authority or a member thereof-

(a) any custom, tradition, practice, or usage which is discriminatory or which detracts from or violates the rights of any person as guaranteed by the Namibian Constitution or any other statutory law, … , shall cease to apply;'

[87] Already through these provisions a traditional leader, by virtue of his or her membership of a traditional authority, becomes obliged to administer and execute the customary law of that community in accordance with the Constitution and any other applicable written law. By that same token it appears that customary laws, which are discriminatory or which detract from or violate the rights of any person as guaranteed by the Namibian Constitution or any other statutory law, can no longer be administered or executed by a traditional authority, as they have ceased to apply.

[88] The Act then fortifies this conclusion in Section 7:

'A chief or head of a traditional community -

….

(b) shall exercise his or her powers and perform his or her duties and functions and in accordance with that customary law [96];

….

(d) shall perform such other powers and exercise such other duties or functions as may be conferred upon him or her by statutory law or the applicable customary law [97]; …'. *(emphasis added)*

[89] Section 10 regulates the appointment of senior traditional councillors, traditional councillors and their powers, duties, and functions, as well as their removal from office. Section 10(2) does so as follows:

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[96] as defined
[97] as defined

'(2) The qualifications for appointment or election and the tenure of, and removal from, office of a senior traditional councillor or traditional councillor shall be regulated by the customary law [98] of the traditional community in respect of which such councillor is appointed or elected.' *(my underlining)*

[90] Again it emerges that all these matters - and particularly also the removal from office of senior traditional councillors or traditional councilors – relevant for this case - are subject to the Constitution and any other applicable written law. It should perhaps be added that it is to be taken into account in this regard that also all discriminatory customary laws or those customary laws which detract from or violate the rights of any person, as guaranteed by the Namibian Constitution or any other statutory law, have ceased to exist and thus can no longer be utilized for this purpose.

[91] What is then to be made of this analysis, from which the following three main facets have emerged, namely:

1) that traditional authorities are supportive public organs of local government created in terms of an act of parliament as envisaged by Article 102(4) of the Constitution;
2) that, once a traditional authority is established in terms of the Act, it becomes subject to the regime imposed by the Act, as administered under the authority of the Minister responsible for Regional and Local Government;
3) that all powers and functions performed by traditional leaders and the traditional authorities in terms of their customary law are to be performed in such manner that their execution is not in conflict with the Namibian Constitution or with any other written law applicable in Namibia, such as the Traditional Authorities Act 2000, in respect of which also all customs, traditions, practices, or usages which are discriminatory or which detract from or violate the rights of any person, as guaranteed by the Namibian Constitution or any other statutory law have ceased to apply

[98] as defined

[92] It is in the first instance this analysis which enables this court to determine the central issue to this case, namely whether the, to be impugned decisions, are of an administrative nature or not. Secondly the analysis is also of assistance in assessing whether or not the submissions by counsel, on behalf of the applicants in this case, based on the *TW Bennett's* article, published in (1993) 110 SALJ 276 under the heading: *'Administrative-law Controls Over Chiefs' Customary Powers of Removal'*, have merit and can be applied. The learned author wrote:

'Any administrative act performed by a chief would obviously have to conform to whatever customary-law requirements there happen to be; common-law standards, however, are more stringent. The decisions of all bodies obliged to act in the public interest are subject to review, and insofar as their decisions fall short of the requirements of authority, regularity, procedural fairness and reasonableness, they may be declared invalid. In principle chiefs should not be able to claim exemption from these requirements merely because their powers happen to derive from customary law. They are still officials acting in the public interest; their office is part of the state administration; they are paid their salaries from public funds; and they are under the control of a Minister.'

[93] Incidentally it is to be noted that also counsel for the applicants in the *Mbanderu* [99]matter, to which the respondents have referred me, and in respect of which they have pointed out that the submissions based on the text were not upheld in the *Mbanderu* case, again relied on this article in this case, on the basis of which it had been submitted in the Supreme Court that:

'… generally the decisions taken by traditional authorities and chiefs are administrative acts performed by such organs of traditional leadership. Such bodies are accordingly obliged to act in the public interest and their decisions are subject to administrative review: The particular decisions taken by the appellants must thus be viewed in the light of these principles.'[100]

[94] It is however not surprising that the Supreme Court, in the *Mbanderu* case, could not uphold these submissions as the court there was tasked to decide whether or not the adoption of the *Mbanderu* constitution amounted to an administrative

[99] *Mbanderu Traditional Authority v Kahuure* 2008 (1) NR 55 (SC) at [28]
[100] *Mbanderu Traditional Authority v Kahuure op cit* at [29]

decision rendering it liable to review. It is also in my respectful and retrospective view, as was ultimately also found by the learned judges of appeal, that the Supreme Court correctly found that the adoption of the *Mbanderu* constitution did not amount to a reviewable decision. All this is however a far cry from the present matter where the applicants faced disciplinary action by a traditional authority as a result of which they were dismissed from their positions.

[95] When counsel for the respondents in this case then submitted further that the Supreme Court, in the *Mbanderu* judgment, on their reading, came to the conclusion 'that at times when Traditional Authorities exercise power, in terms of the Traditional Authorities Act, such exercise of power may not always be administrative', this submission was not factually correct, as the decision, which in the *Mbanderu* case was taken on review, ie. the decision to adopt a constitution, was not taken by the 'traditional authority' but actually by the 'traditional community'.[101] On this basis, save for the general principles stated, the *Mbanderu* decision is then also to be distinguished on the facts from the present matter.

[96] If one then reverts back to Mr Khama's submissions, based on the *Bennett* acticle, it needs to be taken into account that the learned author there has described the interrelation of the exercise of customary law powers by traditional leaders in South Africa with the requirements imposed on them by the common law under the South African Constitution and the relevant South African statutes.

[97] If one however superimposes the Namibian legal position, as analysed above, on the *Bennett* text it is mindboggling with what accuracy the article, not really intended for that purpose, at the time it was written, also aptly describes the current interrelation of the exercise of customary law powers and functions by traditional leaders, in Namibia, in relation to the requirements imposed on them by the Namibian Constitution and the Traditional Authorities Act 2000, an piece of legislation that was not even in existence at the time that the article was written.

[98] In my view the submissions by counsel, made both in the *Mbanderu* matter and in this case, based on the Bennett article, have substance and must, for his

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[101] *Mbanderu Traditional Authority v Kahuure op cit* at [40]

reason, be of value to this court, as a factor, in the overall determination of this matter.

FURTHER FACTORS

[99] It now becomes apposite to consider and apply the factors and principles enunciated in *Ward*[102]:

THE SOURCE OF THE POWER

[100] The first respondent has dismissed the applicants. She is the traditional leader of the Oukwanyama traditional authority. The Oukwanyama traditional authority was established in terms of the Traditional Authorities Act 2000. The first respondent is recognized as the head of that traditional authority in terms of the Act. That Act allows her to exercise her customary law powers and functions subject to the Constitution and the Traditional Authorities Act. Would it not have been for the establishment of the Oukwanyama Traditional Authority and her consequential recognition in terms of the Act as a traditional leader she would not have been able to exercise any powers in terms of the Act. The Act must therefore be regarded as the source of her powers.

THE NATURE OF THE POWER/FUNCTION EXERCISED

[101] In this regard I keep in mind that it has been recognized that the determination of whether a power or function is public is a notoriously difficult exercise and that there is no simple definition or clear test to be applied and that it is thus a question that has to be answered with regard to all the relevant factors, including: (a) the relationship of coercion or power that the actor has in his or her capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercised in the public interest. I also keep in mind that none of these factors will necessarily be determinative; instead, a court must exercise its discretion considering their relative weight in the context.[103]

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[102] As cited above
[103] See *Permanent Secretary of the Ministry of Finance v Ward* at [32] quoting from *Chirwa* at [186]

[102] The powers and functions of the first respondent are listed in Section 7 of the Act:

'Powers, duties and functions of chief or head of traditional community
A chief or head of a traditional community-

(a) shall be the custodian of the customary law of the traditional community which he or she leads;

(b) shall exercise his or her powers and perform his or her duties and functions and in accordance with that customary law;

(c) may, subject to sections 8(2) and 15(5), appoint any other member of his or her traditional community to act in his or her place, when he or she is for any reason unable to act as chief or head of that traditional community;

(d) shall perform such other powers and exercise such other duties or functions as may be conferred upon him or her by statutory law or the applicable customary law;

(e) shall assign one or two senior traditional councillors to assist him or her in the administering of the affairs of the Chief's Council or the Traditional Council, as the case may be.'

[103] These powers and functions must be read in conjunction with sections 2 and 3 of the Act.

[104] Section 2(1) states in unequivocal terms that a traditional authority consists of a chief or head of that traditional community and senior traditional councillors and traditional councilors.

[105] Tellingly sub-section (2) provides that a traditional authority shall, in the exercise of its powers and the execution of its duties and functions, have jurisdiction over the members of the traditional community in respect of which it has been established.

[106] As a traditional authority is comprised of a chief or head of that traditional community and senior traditional councillors and traditional councilors it follows that also the chief or head of that traditional community and senior traditional councillors and traditional councilors shall, in the exercise of their powers and in the execution of their duties and functions, have jurisdiction over the members of the traditional community in respect of which they hold leadership positions. It does not take much

to conclude that the exercise of these powers by a chief or head of that traditional community and by senior traditional councillors and traditional councilors, in the execution of their duties and functions, in relation to their communities, must be a public power.

[107] This conclusion is reinforced by the powers, duties and functions of traditional authorities and members thereof as listed in Section 3 of the Act, which are all exercised in respect of a particular traditional community.

[108] Important for this conclusion is also the realisation that traditional authorities constitute supportive public organs of local government, which organs slot into the overall governing structures through which the Namibian State is also governed at the traditional community level with the support of traditional authorities, who are obliged by law at least to cooperate with the government in this regard.

THE IMPACT OF THE DECISION ON THE PUBLIC/COMMUNITY

[109] In order to determine this factor one needs to go no further than to consider the contents of the letters of suspension, the contents of the 'summaries of final outcome of the committee of investigation of the queen', and the letters of final dismissal.

[110] These documents reflect the following impact:

AD THE FIRST APPLICANT:

THE LETTER OF SUSPENSION:

'You are suspended from all activities of the Ongha village leadership as all authorities given to you are upheld, within the Oukwanyama Traditional Authorities as well as your representation on the landboard in the Ohangwena Region.

Arrangements are in progress to cater for the administration of the Ongha village during your suspension.

You are hereby requested to surrender all books as well as all assets that are used by the Authorities between 10H00-14H00- on Friday the 17'" June 2011.'

THE SUMMARY OF FINAL OUTCOME …

‘ … He exceeded the boundaries of his leadership powers of his office and …

‘ … I come to the final conclusion that the community leaders failed in the execution of their responsibilities which was imposed on them by the community, … ii) To work for the Ovakwanyama as their job providers and to honestly fulfill their duties;’

‘George Hikumwa :I relief you from your responsibilities as member of the Land Board with immediate effect, and; I order the Headman of Mhedi, Johannes Moshana, to relief George Hikumwa from his responsibilities as Headman for the Ongha village, with immediate effect.’

AD THE SECOND APPLICANT:

THE SUMMARY OF FINAL OUTCOME …

‘Sipora Weyulu-Dan She exceeded the boundaries of her powers, when She refused to submit the total number of her subjects (villages, houses as well as business places and shebeens in her district, in not submitting it to the Oukwanyama Traditional Authority (OTA); …

She also refuse to forward money that derived from her district, to send it to OTA \t the time of her suspension she refused to surrender the books, minutes (records) so as to hand it over to OTA. …

One of the major issues is this that the accused, after having been suspended, pressed ahead as if they were not suspended, and the instigation of the community not to cooperate with OTA/the Queen,. This completely conflicted with what was expected by the community from them; they are always confiding to uphold and to strengthen peace, unity and the protection of the Ovakwanyama in Namibia …

I come to the final conclusion that the community leaders failed in the execution of their responsibilities which was imposed on them by the community, … ii) To work for the Ovakwanyama as their job providers and to honestiy fulfill their duties; …

SIPORA WEYULU-DAN I relief you from your responsibilities as senior traditional councilor for the Haingu district, entering into force as from now. …’ .

THE LETTER OF DISMISSAL

‘You are hereby informed through this notice that you are relieved from your duties as Senior headman for the Ohaingu district as from the 15’" August 2011. …

Let me thank you for the period you had been working as Senior Headman in the district.’

AD THE THIRD APPLICANT:

THE SUMMARY OF FINAL OUTCOME …

'HangulaVatilifa He exceeded the boundaries of the powers conferred to him, by refused to surrender the books, the minutes (records) and the date stamp, even though he was requested to bring it OTA. …

… After having been suspended, pressed ahead as if they were not suspended, and the instigation of the community not to cooperate with OTA/the Queen, This completely conflicted with what was expected by the community from them; …

I come to the final conclusion that the community leaders failed in the execution of their responsibilities which was imposed on them by the community, … ii) To work for the Ovakwanyama as their job providers and to honestly fulfill their duties; …

HangulaVatilifa I relief you from your responsibilities as senior traditional councilor for the Kelemba district, entering into force as from now. … '.

THE LETTER OF DISMISSAL

You are hereby informed through this notice that you are relieved from your duties as Senior Headman for the Akelemba district as from the 15 August 2011. …

Let me thank you for the period you had been working as Senior Headman in the district.'

[111] All applicants held leadership positions within their community from which they were removed. It does accordingly not come as a surprise that the First Respondent also considered it necessary to inform the community, which was obviously affected, by these decisions, through a public announcement, which was made in the following terms:

'RE: INTERIM ADMINISTRATION OF ONGHA VILLAGE

The residents of the village as well as all listeners who are gathered here are informed that the headman of the Ongha village Mr. George Hikumwa has been relieved from his duties for an unspecified period due to investigations in the affairs of the Oukwanyama Traditional Authorities for the following reasons:

(a) Issues being alledged.
(b) Isues that he is alledging against the chairperson of the Oukwanyama Traditional Authorities, Mr. George Hikumwa.

The administration of the Ongha village will be under the control of Mr. Josef Kamati during the period of suspension of Mr. George Hikumwa.
Kindly be of assistance to him in the execution of his duties.

Yours
SIGNED
Martha Mwadinhomo yaKristian Nelumbu
Queen of Oukwanyama'

[112] It so emerges that, on the ground, the decisions affected the administration, and, I presume thus, also the day- to- day running, of the Ongha village, as well as the Ohaingu and Akelemba districts.

[113] Finally the point is made by the public reaction to the suspensions, which apparently occurred on the 24th of June 2011 when members of the Ohaingu, Okelemba, Onamutai, Onamhinda and Omhedi communities expressed their dissatisfaction with the suspensions.

WAS THERE A NEED FOR THE DECISION TO BE EXERCISED IN THE PUBLIC INTEREST? WHAT IS THE RELATIONSHIP OF COERCION OR POWER THAT THE FIRST RESPONDENT HAS IN HER CAPACITY AS A PUBLIC INSTITUTION?

[114] It will by now have become clear through the motivations contained in the letter of suspension, the 'summaries of final dismissal', the final letters of dismissal as well as through the public announcements, quoted above, that the first respondent considered and acted upon her perceived need to exercise her powers in the interest of the affected communities and also, fore mostly, in the interests of the Oukwanyama Traditional Authority, whose administration and unity she perceived to be under threat. She thus felt that she had to make a decision in respect of these community interests, being public interests.

[115] The powers which she consequentially exercised were also disciplinary powers, as her decisions show. Decisions taken in regard to disciplinary matters are ordinarily regarded as administrative acts which would attract the constitutional principles set out in Article 18.[104]

[104] See *Permanent Secretary of the Ministry of Finance v Ward* at [33]

[116] It emerges at the same time that the powers, which she exercised, when she made the decision to dismiss, were all fundamentally derived from the establishment of the Oukwanyama Traditional Authority and her consequent statutory recognition, as head of that traditional authority, in terms of the Act. Such powers could thus only have been exercised in her capacity as a public institution established in terms of the Traditional Authorities Act 2000.

[117] If regard is then had to all the above considered factors, taking into account also that none will necessarily be determinative, and, that a court, instead, must exercise its discretion considering their relative weight in their context, I come to the conclusion that all these factors, cumulatively, militate towards the conclusion that all the complained of decisions are administrative in nature, rendering them liable to review in terms of Article 18 of the Namibian Constitution.

[118] When the respondents thus contended that the decisions of the first respondent are of an executive nature and that she exercised a royal prerogative in this regard, based on the customary law of the Oukwanyama community, it has emerged that this contention cannot be upheld as the relied upon version of the customary law cannot prevail, given the constraints imposed on that version through the definition contained in the Act.

[119] Also the uncritical and almost thoughtless submissions made by counsel for the respondents that the first respondent's position *' .. is akin to that of the British royal in terms of the common law and that these powers or prerogatives can be exercised at the Royal discretion … '* do not improve on this position, in respect of which the following should be said:

a) The constitutional dispensation of Britain (United Kingdom) has been characterized as being a 'constitutional monarchy'.
b) Without wanting to be legally exhaustive, and just for purposes of illustrating the fallacy of counsel's argument, a quick search of the internet, under the reference of the key words 'constitutional monarchy', will already reveal that the *Encyclopaedia Brittanica*, for instance describes this system of government for the lay person as follows:

'**constitutional monarchy,** system of government in which a monarch (*see* monarchy) shares power with a constitutionally organized government. The monarch may be the de facto head of state or a purely ceremonial leader. The constitution allocates the rest of the government's power to the legislature and judiciary. Britain became a constitutional monarchy under the Whigs; … '

The Wikipedia Free Online Encyclopeadia does so as follows:

'Compare with Absolute monarchy

A **constitutional monarchy**, **limited monarchy**, **parliamentary monarchy** or **crowned republic**,[1][2][a] is a form of monarchy where the governing powers of the monarch are restricted by the terms of a constitution.[3]

A constitutional monarchy may refer to a system in which the monarch acts as a non-party political head of state under the constitution, whether written or unwritten.[4] While the monarch may hold formal reserve powers and government may officially take place in the monarch's name, they do not set public policy or choose political leaders. Political scientist Vernon Bogdanor, paraphrasing Thomas Macaulay, has defined a constitutional monarch as "a sovereign who reigns but does not rule."[5] In addition to acting as a visible symbol of national unity, a constitutional monarch may hold formal powers such as dissolving parliament or giving Royal Assent to legislation. However, the exercise of such powers is generally a formality rather than an opportunity for the sovereign to enact personal political preference. In *The English Constitution*, British political theorist Walter Bagehot identified three main political rights which a constitutional monarch could freely exercise: the right to be consulted, the right to advise, and the right to warn. Some constitutional monarchs, however, retain significant power and influence and play an important political role.

The United Kingdom and fifteen of its former colonies are constitutional monarchies with a Westminster system of government. … '.

c) The first respondent is not merely a ceremonial leader. She exercises real powers and functions in terms of the Traditional Authorities Act. The exercise of such powers and functions are not just a formality or nominal or ceremonial. They touch the lives of the members of her traditional community. They are public powers. However she does so in the context of a constitutional democracy, which Namibia is, and were the traditional authorities play a subordinate and supportive role in the local government of the country.

d) Counsel's submissions on this score also fail to take into account that the first respondent's title is 'merely' a 'traditional title'. It is not a constitutionally entrenched title or one that signifies that she is a head of state like the Queen of England is. The choice and use of first respondents title is recognized, governed and circumscribed by the Traditional Authorities Act, which does so in Section 11, in the following terms:

> 'Nothing in this Act contained shall be construed as precluding the members of a traditional community from addressing a traditional leader by the traditional title accorded to that office, but such traditional title shall not derogate from, or add to, the status, powers, duties and functions associated with the office of a traditional leader as provided for in this Act.'

e) Also these provisions make it clear that the likening of the first respondent to the Queen of Britain was totally misplaced.

ANCILLARY ASPECTS

[120] Counsel for the respondents have also placed great reliance on certain South African authorities. If regard is had, for instance, to the decision in *Minister of Defence and Military Veterans vs General Motau and Others* [105], in respect of which counsel expressly stated that *'they would rely on extensively',* it needs to be pointed out that the decision in *Motau* was made against the backdrop of three South African statutes, namely *The Promototion of Administrative Justice Act* 3 of 2000 and the *Armaments Corporation of South Africa Limited Act* 51 of 2003, as read with the *Companies Act* 71 of 2008. The statutory framework against which the decision in this matter is to be made is thus dramatically different and based on a totally different statutory dispensation. It needs to be kept in mind that it has on numerous occasions been said that the judgments of a superior foreign court, including South Africa's, are not binding on the courts of Namibia but may have persuasive force.[106] It would thus be unwise to place reliance on the *Motau* matter, particularly in circumstances were the Namibian Supreme Court has pronounced itself on the governing principles in

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[105] [2014] ZACC 18

[106] *Ongopolo Mining Ltd v Uris Safari Lodge (Pty) Ltd and Others 2014 (1) NR 290 (HC)* at[29]; See also *Attorney-General of Namibia v Minister of Justice and Others* 2013 (3) NR 806 (SC); *Westcoast Fishing Properties v Gendev Fish Processors Ltd and Another* 2013 (4) NR 1036 (HC)

the *Ward and Mbanderu* decisions cited above and were the Supreme Court has also held that such decisions are best made on a case by case basis.[107]

IS THE DECISION IN *CHAUNE v DITSHABUE* WRONG?

[121] In *Chaune v Ditshabue & Others*[108] Ueitele J formulated the crux of the decision to be made by him as follows:

'[10] In the light of the background that I set out in the preceding paragraphs I am of the view that the issue which I am called upon to decide is whether the removal of the applicant as traditional councillor of second respondent was legal and lawful.'[109]

[122] He went on to consider:

'The question whether or not a decision taken by a traditional authority is reviewable or not was considered by this Court and the Supreme Court in the matter of *Mbanderu Traditional Authority and Another v Kahuure and Others …*[110]'

and concluded:

'There is nothing private or personal about the exercise of the power conferred on traditional authorities. The powers are given to the traditional authorities in the interests of the proper conduct of the affairs of traditional communities[111]. In my view therefore their exercise of power by traditional authorities pursuant to the Tradional Authorities Act, 2000 is plainly the exercise of a public power, and in exercising those powers the traditional authority is an administrative body as contemplated in Article 18 of the Namibian Constitution. The decision to remove applicant is an administrative act and it must therefore comply with the requirements of Article 18 of the Namibian Constitution which provides as follows:

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[107] See also *Mbanderu Traditional Authority v Kahuure* cited above, where Mtambanengwe AJA stated at [38]: *'The starting point in determining whether or not an action performed by a body is administrative, and, therefore, reviewable, is to identify the body concerned. In most review cases no problem arises in this regard. The South African Constitutional Court in the SARFU matter (supra) was correct, however, to caution that 'difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purpose of s 33 of the South African Constitution (of art 18 of the Namibian Constitution) and that this can best be done on a case by case basis … '.*

[108] Case (A 5/2011) [2013] NAHCMD 111 (22 April 2013) reported on the SAFLII website at http://www.saflii.org/na/cases/NAHCMD/2013/111.html

[109] *Chaune v Ditshabue & Others* at [10]

[110] *Chaune v Ditshabue & Others* at [11]

[111] See section 3(1) of the Traditional Authorities Act, 2000(Act 25 of 2000)

> "Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal."

In the present matter the common law requirements which are relevant here are the principles natural justice (in particular the *audi alterm partem* and the *nemo in iudex sua causa* rules), the relevant legislation is the Traditional Authority Act, 2000. Section 10 (2) of that Act provides as follows:

> "10 Appointment of senior traditional councillors, traditional councillors and secretary, and their powers, duties, and functions
> (1) …
>
> (2) The qualifications for appointment or election and the tenure of, and removal from, office of a senior traditional councillor or traditional councillor shall be regulated by the customary law of the traditional community in respect of which such councillor is appointed or elected.' {My Emphasis}

The question therefore to be asked in this matter is whether the first, second or third respondents complied with the prescripts of Article 18 of the Constitution of Namibia…'.[112]

[123] On behalf of the respondents it was contended that the decision was wrongly decided as it failed to take into account firstly that in the *Chaune* matter the traditional councilor had not been appointed but was rather elected, secondly, that the customary law of the Bakgalagadi Traditional Community is different from the Oukwanyama Traditional Community and thirdly that there was a hearing in the present matter preceeded by notification of the hearing before the decision was made. It was submitted during oral argument that the decision to remove was not administrative as the Act was merely regulatory and that the Minister has no powers to remove. The determination of whether or not the decision in question was administrative or not had to be decided on a case by case basis and that on the facts of the present matter the court should conclude that the first respondent exercised her original customary law powers, which indicated that the decision was of an executive nature.

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[112] *Chaune v Ditshabue & Others* at [16] to [18]

[124] Besides having found already in this instance that the first respondent's decisions constitute public administrative acts, rendering them liable for review, a conclusion also arrived at by the learned judge in the *Chaune* matter, I cannot detect that manner of appointment of a traditional councilor would have any impact on the question of his or her dismissal. The dismissal in both instances surely must be effected in terms of Section 10(2) of the Act, keeping in mind the requirements imposed by Article 18 of the Constitution. Section 10(2) expressly regulates such removal in the same way, irrespective of whether the councilor in questions was appointed or elected.

[125] It may also be that the customary law of the Bakgalagadi traditional community is differerent to that of the Oukwanyama community. In both instances the customary law is however instructed by the Constitution and the Traditional Authorities Act. Respondents' counsel have acknowledged that the determination, of whether or not a decision is administrative or executive, is to be made on a case by case basis. In that acknowledgement – and - in their submission that the customary laws of the Bakgalagadi and Oukwanyama traditional communities differ – is the inherent concession that the decision is *Chaune*, made on the facts of that case, which differ from this case, may thus be correct.

[126] The same observation can be made in regard to the third factor adduced by the respondents, which factor essentially seeks to distinguish the cases from each other on the basis that there was a hearing in the present matter which was preceded by notification of the hearing before the decision to dismiss was made.

[127] Ultimately I am not persuaded by the arguments advanced on behalf of the respondents that the *Chaune* judgment was wrongly decided. The reasoning of Ueitele J in *Chaune* may not have been as detailed as the reasoning in this case. Ultimately however the same conclusion was arrived at. I can therefore not say that the case was wrongly decided. The *Chaune* decision thus remains supportive of the decision I have made in this case.

ARE THE DECISIONS OF THE FIRST RESPONDENT TO BE SET ASIDE?

[128] In support of their quest to be re-instated as traditional- and senior traditional councillors respectively, the applicants have advanced a number of grounds of review on the basis of which they claim that the decisions made against them should be reviewed and set aside.

[129] Essentially the applicants also contend that the decisions to dismiss them were not in accordance with the principles of natural justice in that the principles of *audi alterem partem* were not complied with in that they were also not given an adequate opportunity to make representations. They also allege that they were not given a fair hearing.

[130] They go on to allege that there was both a lack of substantive and procedural fairness, on which bases alone they seek the setting aside of their dismissals.

[131] The respondents, save for denying that the decisions to dismiss are liable for review, contend that they complied with the principles of natural justice in that the applicants were given a fair hearing. They also contend that the decisions were reasonable and taken after careful consideration and that the letters of dismissal are clear and concise and set out what the applicants were found guilty of.

WAS THERE PROCEDURAL FAIRNESS

[132] Upon closer scrutiny of the affidavits that were exchanged between the parties - no record of the disciplinary proceedings having been made available – the following picture emerged:

THE APPLICANTS'ALLEGATIONS

'In August 2011, the first Respondent appointed a committee to investigate the so called misconduct charges against me and my fellow applicants. I and my fellow applicants were summoned to appear before this committee and when we appeared before it, we were subjected to harassment and rebuke and we were accused of sowing divisions in the community. The committee accused us that we did not respect the Queen and that we were not supposed to call and attend a community meeting. On the 15th day of August 2011, this committee presented to us what was termed a summary of the final outcome of the committee of investigation. Each of the applicants received this document purporting to set

out the charges against us and the decisions taken. I attach hereto copies of these documents … and incorporate the contents of all these attachments into this affidavit and rely on the contents thereof to substantiate our relief.

On the same date of the 15th day of August 2011, the first Respondent delivered a letter titled notice of termination of service as a member of the Land Board to me. … On this same day the second and third applicants also received dismissal tetters signed by the first Respondent …'. …

I submit that the first Respondent in her capacity as Chief is obliged by law to act in conformity with the provisions of article 18 of the Namibian Constitution and she did not act In accordance with that provision. I therefore submit that the decisions taken by the first Respondent is in conflict with article 18 of the Namibian Constitution and she has accordingly violated our right to administrative justice. …

… Furthermore, the first Respondent failed to adhere to the *audi alteram partem* principle by failing to grant the applicants an opportunity to be heard before the decisions to suspend and or terminate their services was taken. …
… In particular, the first Respondent failed to afford the applicants an opportunity to make representations prior to such decisions being taken. …
… I and my fellow applicants were not accorded that fair hearing at all. I submit that a fair hearing entails among other things substantive and procedural aspects and these were not at all afforded to us by the first and or second Respondents. …
… The applicants are entitled to a fair administrative process and the first Respondent did not comply with this requirement. The applicants' case for review is both framed and developed on both the common law basis of review as well the Constitutional basis of review envisaged under article 18 of the Namibian Constitution. …
… I assert that our rights to a fair administrative process has been violated by the first Respondent and we seek relief …
… I further submit that, there are both substantive and procedural irregularities in the decisions that the first Respondent took against us. I rely in this regard on the lack of such substantive and procedural procedures in the procedures she followed as reflected in the documents that emanated from the first Respondent which I have referred to in this affidavit which the first Respondent deployed in her decisions making process. And on this basis alone, I pray that her decisions be reviewed and set aside '.

THE ANSWER OF THE RESPONDENTS

'I (it should be kept in mind that Mr Theophilus Nelulu deposed to the main answering affidavit on behalf of the respondents) confirm that I have been advised by the Chairperson of the investigation committee that, who attaches his confirmatory affidavit hereto, the Applicants were never rebuked, harassed or accused of sowing divisions in the community. I confirm that I also appeared before the very same committee as I was suspended pending an investigation and I was queried in relation to the allegations against myself I submit that the full report of the committee shall form part of the record for review. I submit all accused persons, myself included, were given an opportunity to appear before the committee and answer to the allegations against them. I point out that the investigation committee comprised people who are neither advisors nor traditional councilors. …

This is denied. In amplification of my denial I say that in the absence of specific particulars as to how the Queen violated the Applicants' rights in terms of Article 18 the allegation is vague. Further as already stated in this affidavit the Queen is a royal and exercises sovereign power in appointing or dismissing traditional councilors and advisors. I say such acts are not subject to administrative review. In any event the applicants and myself were accorded a hearing before an impartial body, that is the investigation committee.

… I submit that the decision by the Queen to dismiss the second Applicant was lawful. …

… This is denied. I point out that the deponent admits that the decisions by the first Respondent are clearly expressed and stated. I deny firstly that such decisions are subject to administrative review and in any event submit that such decisions were made in line with the principles of natural justice. I submit that the same are reasonable and were taken after careful consideration without any form of bias. I deny that these decisions may be reviewed as these decisions were taken after hearing both sides. Further submit that the traditional councilors are representatives of the Queen and are answerable to the Queen who has the sole prerogative on who to appoint as a additional councilor and that person acts on behalf of the Queen in the area they are entrusted. Therefore they are accountable to be community and finally the Queen who is the sole appointing authority. …

'" I submit that the first, second and third Applicants in the present matter have no rights that have been infringed and in any event the decisions in question cannot be the subject of a review. …'.

[133] During oral argument Mr Khama submitted, in response to a question of the court, whether the applicants were given notice of the charges that they would be facing and whether they had a reasonable time to prepare for their hearing, that

none of these requirements had been met in that they were just informed to appear before the committee and were not at all informed about the charges or even that they would be facing any. Also on this basis the applicants had not received a fair hearing.

[134] The counter-submissions from Mr Boesak were that the applicants had been given adequate notice through a letter dated 20 June 2011, which had invited them to the meeting in order to answer certain questions. He pointed out that also Mr Nelulu had been subjected to the same process. The applicants were also given an opportunity to answer to the charges and could thus have contested the versions they were presented with, as was confirmed by the chair of the investigative committee. He pointed out further that the applicants could have objected to the process and procedure employed, which they chose not to do. Ultimately, so the argument went, there was substantial compliance with the *audi alterem partem* principle.

[135] In reply the argument was made that the applicants had been denied a fair hearing as they had been subjected to rebuke and harassment. The point was further made that no evidence was given before the committee through the calling of any witnesses. In such circumstances the committee became its own prosecution, judge and jury.

WERE THE ARTICLE 18 RIGHTS OF THE APPLICANTS' VIOLATED?

[136] At first glance it appeared that there was merit in the submission made in the answering papers that there was an absence of specific allegations in the applicants papers in regard to how the Article 18 rights of the applicants were violated by the first respondent, particularly also in regard to the procedural fair hearing rights which they claim have been breached. In this regard it will however also have been noted that the applicants expressly sought to rely on the documentation received during the process leading up to their dismissals, whose contents they expressly asked to be incorporated into their affidavits and in respect of which they indicated that they would rely on in order to substantiate the relief sought.

WAS THERE PROCEDURAL FAIRNESS?

[137] The veracity of these arguments can best be tested by a closer examination of the referred to documentation, which reflects the procedure which was followed. For ease of reference I will not copy the entire contents, but only those portions I deem relevant for this purpose.

[138] All the applicants received the already mentioned notices of suspension, dated 13 June 2011.

[139] The first applicant was informed of the reason for this step as follows:

‘ … As investigations have commenced in determining your accusations in you accusing the chairperson of the Oukwanyama Authority, Headman George Nelulu, I am suspending you, in my capacity as Queen, of the village for an unspecified period. … ‘.

[140] The second and third respondents were officially informed in the following terms:

‘ … While investigations are underway regarding the allegations made against you and that which you made against the chairperson of the Council Headman George Nelulu, I hereby suspend you from your duties as Headman for an indefinite period of time. …’.

[141] The ‘invitations’ which the applicants received, inviting them to appear before an ‘Interim Special committee’, dated 20 June 2011, was worded as follows:

‘Dear Sir

RE: HEARING OF IRREGURALITIES IN THE OUKWANYA TRADITIONAL AUTHORITIES

I appointed an interim special committee to deal with the matters pertaining to the district as stated above in which you are included.
You are cordially invited to be at the Queens Palace on Tuesday the 28 June 2011 at ten o’clock forenoon, so as to come and provide information and to answer to questions : from the committee.

SIGNED
Mwadinomho Martha yaKristian Nelumbu

The Queen of Oukwanyama'

[142] The following observations can be made:

AD THE NOTICES OF SUSPENSION

a) They informed the applicant that an investigation was underway in regard to allegations which had been made against them;
b) The referred to allegations are not specified;
c) They informed the applicants that an investigation was underway in regard to allegations which had been made by them against Council Headman George Nelulu;
d) The referred to allegations are not specified;
e) No indication is given as to what would happen once the investigation would have been completed.

AD THE INVITATIONS

a) They informed the applicants that the investigation, of which they had been informed, in their suspension letters, would be conducted by an 'interim special committee';
b) The applicants were informed further that the 'interim special committee' had been appointed 'to deal with the matters pertaining to the district as stated above';
c) The 'matters' referred to were not identified;
d) The manner in which the referred to 'matters' would be dealt with, was not specified;

e) What was 'stated above' was formulated as : 'Re Hearing of irregularities in the Oukwanyama Traditional Authorities';
f) The referred to 'irregularities in the Oukwanyama Traditional Authorities' were not specified;
g) The applicants were expressly invited 'to come and provide information';
h) The applicants were expressly invited to also come and 'answer questions from the committee';
i) No indication as to the nature of the questions was given;

j) No indication of any consequences or sanctions was given.

[143] In the 'Summaries of Final Outcome' of the committee the applicants were all of a sudden now informed of certain adverse findings, that the committee had made against them, which the Queen evidently endorsed and embellished in 'The Final Outcome of the Queen' and through her decision to dismiss:

THE FINDINGS AGAINST FIRST APPLICANT

a) George Hikumwa

THE PERSON'S ACTIVITY

i. 'He exceeded the boundaries of his leadership powers of his office and he disobeyed the leadership powers of OTA, in that he collected bank statements from the bank, well knowing that he was officially relieved from doing so.

ii. He acted confidently as organizer of meetings that were directed to disrepute and tamish the name of OTA in and outside Namibia by going to the newspapers and he disobeyed the orders of a prominent member of the advisors council to the Queen, not to do it;

iii. He disobeyed orders from the Queen not to attend Land Board meetings.'

THE FINAL OUTCOME OF THE COMMITTEE

iv. 'The complainants did not use proper channels and they failed to honour to see the Queen first, before they proceeded;

v. … Their complaint of stating that money belonging to OTA was lost was proven to be lies, that were the final decision of the Auditor till present, and that decision cleared the name of George Nelulu. Even if they failed to find some proof, to proof that the money was embezzled, they refused to apologize, as they were requested.

vi. They proceeded to take their complaints outside to the newspapers, the traditional leaders as well as to some politicians withincertain Ministries who does not have anything to do with traditional issues. … lecided to drag the name of OTA through the dirt, as well as that of the Ovakwanyama people in and outside the country. They did not set about it the right way.

vii. … One of the major issues is this that the accused, after having been suspended, pressed ahead as if they were not suspended, and the instigation

of the community not to cooperate with OTA/the Queen,. This completely conflicted with what was expected by the community from them; …'.

THE FINAL OUTCOME OF THE QUEEN

viii. 'I come to the final conclusion that the community leaders failed in the execution of their responsibilities which was imposed on them by the community, to clear themselves in the administration of OTA, to work for the Ovakwanyama as their job providers and to honestly fulfill their duties; to be firm in the trust of the Queen; …

ix. This to me is an intentional wrong in the highest degree, if a person has to maliciously do his work carelessly, in the manner in which they behaved; even if they were elevated and they know their responsibilities very well;

x. There is nothing else I can think of, without saying that the idea is not popular and it was only invented (1) to plant a seed of disunity amongst the Ovakwanyama (2) to degenerate the good name of OTA in and outside Namibia as well as the Ovakwanyama. In this regard the accused showed, without a response, that they do not need to work together with OTA as Headmen in the Ovakwanyama community. OTA on its part cannot use people who are having their own agendas and does not work in accordance with its rules.'

THE FINDINGS AGAINST SECOND APPLICANT

b) Sipora Weyulu-Dan

THE PERSON'S ACTIVITY

xi. 'She persisted in her district, the agreement and convening of meetings that instigated people not to honour the leadership powers of OTA and the Queen. Thrice OTA send its messengers to her (Sipora) to admonish her to behave well, and for her to begin cooperating with the Queen, but this did not help at all;

xii. Fhe totally refused to accept the elections and its outcome, that was put in place by OTA/the Queen because those leaders who were appointed to lead Okambebe and Eengwena where not accepted by the community;

xiii. She exceeded the boundaries of her powers, when she went behind OTA's when she carried out OTA's intimal affairs to the outside traditional leadership;

xiv. She refused to submit the total number of her subjects (villages, houses as well as business places and shebeens in her district, in not submitting it to the Oukwanyama Traditional Authority (OTA);

xv. She also refuse to forward money that derived from her district, to send it to OTA section 18 (l)-(4);

xvi. At the time of her suspension she refused to surrender the books, minutes (records) so as to hand it over to OTA.'

THE FINDINGS AGAINST THIRD APPLICANT

c) Hangula Vatilifa

THE PERSON'S ACTIVITY

xvii. He called and addressed meetings that instigated and where opposed to OTA and beyond that, the fact that he used the offices of OTA as well as materials of OTA, during the meeting or meetings without the consent of OTA

xviii. He decided to ignore the advice of the Queen, so that at least (1) he should come to the Queen and consult with the Queen. (2) So that he should not call meetings to be held. While OTA is at Onghata. All this he ignored in giving advice that was unnecessary;

xix. He exceeded the boundaries of the powers conferred to him, by sending George Hikumwa to go and collect the statements from the bank, whilst well knowing that George Hikumwa was suspended by OTA/the Queen, in that respect;

xx. He refused to bring the money from his district to OTA;

xxi. At the time of his suspension he begin instigating people to ignore the orders of OTA/the Queen;

xxii. He refused to surrender the books, the minutes (records) and the date stamp, even though he was requested to bring it OTA.

THE FINAL OUTCOME OF THE COMMITTEE IN RESPECT OF SECOND AND THIRD APPLICANTS

xxiii. 'The complainants did not use proper channels and they failed to honour to see the Queen first, before they proceeded;

xxiv. … Their complaint of stating that money belonging to OTA was lost was proven to be lies, that were the final decision of the Auditor till present, and that decision cleared the name of George Nelulu. Even if they failed to find

some proof, to proof that the money was embezzled, they refused to apologize, as they were requested.

xxv. Even if they failed in i) and ii) they proceeded to take their complaints outside to the newspapers, the traditional leaders outside as well as to some politicians within certain Ministries who does not have anything to do with traditional issues. Such complaints, as theirs, clearly demonstrate that they are lost or made to get lost. They decided to drag the name of OTA through the dirt, as well as that of the Ovakwanyama people in and outside the country. They did not set about it the right way.

xxvi. From the evidence adduced during the disciplinary hearing, there was no one from the complainants who could find any evidence of their complaints-including the advisors to the Queen, only mentioned it during the meetings of OTA, while the Senior Headmen are not afforded sufficient the opportunity to speak. During the disciplinary hearing they themselves denied the truth, to state that the advisors to the Queen do not have authority to make decisions during meetings of OTA. They also confirmed the truth that politics are not discussed during OTA meetings. …

xxvii. One of the major issues is this that the accused, after having been suspended, pressed ahead as if they were not suspended, and the instigation of the community not to cooperate with OTA/the Queen,. This completely conflicted with what was expected by the community from them; they are always confiding to uphold and to strengthen peace, unity and the protection of the Ovakwanyama in Namibia.'

THE FINAL DECISION OF THE QUEEN IN REGARD TO SECOND AND THIRD RESPONDENTS

xxviii. 'I come to the final conclusion that the community leaders failed in the execution of their responsibilities which was imposed on them by the community, to clear themselves in the administration of OTA , to work for the Ovakwanyama as their job providers and to honestly fulfill their duties; to be firm in the trust of the Queen;

xxix. This to me is an intentional wrong in the highest degree, if a person has to maliciously do his work carelessly, in the manner in which they behaved; even if they were elevated and they know their responsibilities very well;

xxx. … the idea is not popular and it was only invented (1) to plant a seed of disunity amongst the Ovakwanyama (2) to degenerate the good name of OTA in and outside Namibia as well as the Ovakwanyama. In this regard the

> accused showed, without a response, that they do not need to work together with OTA as Headmen in the Ovakwanyama community. OTA on its part cannot use people who are having their own agendas and does not work in accordance with its rules.'

[144] The above closer scrutiny of the so-called 'findings' on each of the applicants' 'activities' and the 'summary of final outcome of the committee of investigation' then reveals that the actual purpose of the appointment of the 'interim special committee' was not just simply to gather information and ask questions, but that the 'interim special committee' was actually convened and intended as a disciplinary committee, which went on to make the abovementioned adverse findings in respect of each of the applicants' activities as well as those listed under the heading 'final outcome of the committee'. It appears further that the first respondent, the queen, on the basis of those findings, made her own findings and the so-called 'final decision' or 'Queens Decision' to dismiss the applicants from their positions.

[145] In this regard, some of the terminology employed is also telling, where the applicants, in paragraph C of annexure 'GH14' to the founding papers, styled *'final outcome of the queen'* were referred to as *'the accused'*, and, where, in paragraph iv) of annexure 'GH 6' to the founding papers, it is recorded that the applicants, *'during the disciplinary hearing'* 'denied the truth …'.

[146] All this was not foreshadowed in the invitations extended to the applicants on 20 June 2011, where no hint of an indication was given to them that they would be facing disciplinary proceedings as a result of which they might even face dismissal with all its consequences.

[147] Importantly the invitations did also not set out or specify the charges or possible sanctions which applicants would be facing, or what the procedure and time lines, to be followed, would be. Also the letters of suspension were vague, to the extreme, and could thus not have been of any assistance in this regard to the applicants.

[148] In addition I cannot see how, in such circumstances, where the applicants were invited 'to come and provide information' and 'to answer to questions from the

committee', not having been informed of the real nature of the committee or the questions that they might be facing, or the consequences that might be attached to any answers that might be given, were provided with adequate notice or with any opportunity to prepare and present any defence, never mind an adequate opportunity to do so and how, in such circumstances, any subsequent disciplinary hearing could be fair.

[149] I have already found that the exercise of the first respondents powers and thus the removal of the applicants' from their positions are subject to the demands imposed by Article 18 of the Constitution. Article 18 requires administrative bodies and administrative officials to act fairly and reasonably and to comply with the requirements imposed on them by the common law and any relevant legislation.

[150] These demands were succinctly formulated by Mainga J (as he then was) in *Kaulinge v Minister of Health & Social Services*[113] :

'Article 18 of the Constitution of the Republic of Namibia, which requires administrative bodies and administrative officials to act fairly and reasonably, in my view, goes beyond the principles of natural justice, ie the *audi alteram partem* rule, and should be seen against the background of a long history of abuse of governmental power in Namibia by the apartheid South Africa. The temper of art 18 is to repudiate anything that might be unfair and unreasonable from any administrative body or official. To say that the Hospitals and Health Facilities Act, 1994, does not make provision for a certain procedure to be followed when the respondent had to comply with the *audi alteram partem* principle, and that under those circumstances the respondent was at liberty to determine its own procedure, is of no consequence, as, whatever procedure the respondent might have considered in deciding the case against the applicant, the respondent had to meet the standard of fairness and reasonableness contemplated by art 18 of the Constitution. The article contemplates that any administrative action has to be procedurally fair and reasonable.
In *Loxton v Kenhardt Liquor Licensing Board* 1942 AD 275 at 315 it was said:

"Where an administrative authority entrusted with *quasi judicial* functions holds an enquiry on a question submitted for its decision, and the party whose rights or claims are the subject of such an enquiry is entitled to a hearing, it is one of the requisites of a fair hearing that, if the authority avails itself of its own knowledge, in regard to particular facts relevant to the question submitted to it, or of information in regard to such facts independently obtained

[113] 2006 (1) NR 377 (HC)

from outside sources, it should give the party concerned notice of any points, derived from such knowledge or information, which may be taken into account against him, so as to give him an opportunity of meeting such points. Such, I think, is the general rule which may be deduced from a series of cases in our Courts, and which has been recognised as applicable to proceedings before licensing authorities.'[114]

[151] In the context of the present matter it also remains useful to once again call to mind the basic demands of natural justice in regard to a fair hearing. Those rights, in my view, also include the right to be informed that disciplinary proceedings are contemplated, the right to be informed timeously of the charges that are to be preferred, to which right the right to be afforded adequate time for the preparation and presentation of a defence is linked, particularly where the exercise of disciplinary powers is contemplated with adverse consequences. These principles were for instance instructively considered by Hoexter JA, in a different context, in *Administrator, Transvaal & Others v Zenzile*[115] (a judgment with which Botha JA, E M Grosskopf JA, Milne JA and Nienaber AJA concurred), where the eminent judge of appeal stated:

'The fact that by the law of contract an indisputable right may have accrued to an employer to dismiss his employee does not, for the purposes of administrative law, mean that the requirements of natural justice can have no application in relation to the actual exercise of such right. And when, as here, the exercise of the right to dismiss is disciplinary, the requirements of natural justice are clamant. Mureinik (1985) 1 SAJHR 48 points out (at 50) that

'... perhaps pre-eminent amongst the qualities of a power that attracts natural justice is its susceptibility to be characterised as "disciplinary" or "punitive" '. The learned author explains that the reasons for this are rooted both in history and in principle; but that the latter are crucial. At 50 - 1 he summarises the reasons of principle thus:

'Where the power is disciplinary, all the usual reasons for importing natural justice generally apply, and generally apply with more than the usual vigour: the gravity of the consequences for the individual, consequences both concrete and such as affect his reputation; the invasion of the individual's rights; that fairness postulates inquiry; and so on. But more than this, there is a reason of principle peculiar to disciplinary or punitive proceedings: that even if the offence cannot be disputed, there is almost always something

[114] *Kaulinge v Minister of Health & Social Services* at p 383E - p 384A
[115] 1991 (1) SA 21 (A) ((1991) 12 ILJ 259; [1990] ZASCA 108)

that can be said about sentence. And if there is something that can be said about it, there is something that should be heard....'[116]

[152] It will have been noted that the tenor of the *Kaulinge* judgment is to the effect that the test against which the acts of administrative bodies and officials have to be measured has become even stricter since the advent of the Constitution in the sense that *'the temper of article 18 is to the effect that it will repudiate anything that might be unfair and unreasonable from any administrative body or official'*.

[153] To me it is beyond doubt that the procedure followed in this instance did not measure up to the required standards of procedural fairness and reasonableness. It is clear that the rules of natural justice in regard to a fair disciplinary process were not satisfied when the applicants were not informed that they would be subjected to disciplinary proceedings and were not informed of the charges that would be preferred against them which could lead to their dismissal, allowing them to prepare adequately or at all for the presentation of their cases to enable them to meaningfully participate in the disciplinary proceedings.

[154] When the applicants were then subjected to the disciplinary proceedings before the 'interim special committee' without warning and without any charges having been formulated against them, thereby not affording them adequate time or the opportunity for the preparation and presentation of their defences, such proceedings amounted to 'disciplinary proceedings by ambush', a situation which clearly offended not only against the principles of natural justice but also against the more stringent demands for fair administrative action imposed on the respondents by Article 18 of the Constitution.

[155] The arguments raised on behalf of the respondents that the applicants were given a fair hearing in the present matter, preceded by adequate notification before the decisions to dismiss were made cannot be upheld for all the above mentioned reasons which simply do not show that the notification was adequate and that the subsequent hearing was procedurally fair.

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[116] At p36 H to p37 C

[156] In view of this finding it then becomes unnecessary to deal with the other grounds of review, as advanced by the applicants.

[157] In the premises it also becomes clear that the first respondent's decisions to dismiss the applicants have to be set aside.

THE FIRST APPLICANT'S DISMISSAL FROM THE OHANGWENA COMMUNAL LAND BOARD

[158] The first applicant was appointed on 28 January 2009 by the Minister of Lands & Resettlement as a member of the Ohangwena Communal Land Board.

[159] This appointment was made in terms of Section 4(1) of the Communal Land Reform Act 25 of 2002.

[160] Section 4 of that Act, which regulates the composition of the Board, reflects that the appointments to the Board, are to be made by the Minister. The removal from such office is regulated by Section 6(3) and can be effected by the Minister, on specified grounds, and after giving the affected board member a reasonable opportunity to be heard.

[161] The chiefs or heads of traditional authorities are not assigned any powers in this regard by the Act. It does not take much to realize that the first respondent could never have dismissed the first applicant from this position and that the dismissal which she effected on 15 August 2011 was thus *ultra vires* and thus unlawful.

[162] However the review and setting aside of this blatantly illegal decision, now, during May 2015, will no longer have any practical effect given the fact that the first applicant's term of office has already expired on 28 February 2012. Any decision in these proceedings would accordingly be of an academic nature only, as was contended by Mr Chibwana, on behalf of the respondents. I agree and accordingly I decline to grant any relief in this regard. The first applicant's remedies for this dismissal lie elsewhere.

COSTS

[163] The applicants have sought an adverse costs order on the attorney and client scale. The parties are agreed that the award of costs is essentially a discretionary matter. Given the myriad of issues which arose in the determination of this case I cannot see that the opposition by the respondents of the review was frivolous or that their conduct in this matter should, for that or any other reason, attract an adverse costs order. I believe that in this instance justice would be served if costs would follow the result.

[164] Accordingly, and in the end result, I grant the relief sought in the following amended terms:

1. The decisions taken by the 1st Respondent on 15 August 2011 dismissing the first, second and third applicants from their positions as 'Junior Traditional Councillor' and 'Senior Traditional Councillors' respectively, are hereby reviewed and set aside.

2. The 1st Respondent is directed to forthwith reinstate the applicants to the positions they held in the structure of the 2nd Respondent namely at the time of their dismissal on 15 August 2011.

3. The 1st and or the 2ND Respondents are directed to pay the applicants all allowances that would have been paid to them had the 1ST Respondent not taken the decision set out in paragraph 1 hereof.

4. All such payments are to be made, to the applicants, on or before the close of business of 30 June 2015.

5. The 1st and/or 2nd Respondents are to pay the first, second and third applicants costs of this application, jointly and severally, the one paying the other to be absolved.

H GEIER

Judge

APPEARANCES

FOR THE APPLICANTS:	D. Khama Instructed by Kwala & Company, Windhoek
FOR THE RESPONDENTS:	AW Boesak (with him T Chibwana) Instructed by the Government Attorney, Windhoek