



**REPORTABLE**

CASE NO: SA 27/2015

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

<b>MWADINOMHO MARTHA KRISTIAN NELUMBU</b>	<b>First Appellant</b>
<b>OUKWANYAMA TRADITIONAL AUTHORITY</b>	<b>Second Appellant</b>
<b>MINISTER OF REGIONAL, LOCAL GOVERNMENT, HOUSING AND RURAL DEVELOPMENT</b>	<b>Third Appellant</b>
<b>GHIDINIHAMBA URIA NDILULA</b>	<b>Fourth Appellant</b>
<b>ELIAS WAANDJA</b>	<b>Fifth Appellant</b>
<b>SAMUEL MATEUS</b>	<b>Sixth Appellant</b>
<b>JOSEF KAMATI</b>	<b>Seventh Appellant</b>
<b>LINDA NAUYOMA</b>	<b>Eighth Appellant</b>
and	
<b>GEORGE P.S. HIKUMWAH</b>	<b>First Respondent</b>
<b>SIPORA WEYULU DAN</b>	<b>Second Respondent</b>
<b>VATILIFA F. HANGULA</b>	<b>Third Respondent</b>

**Coram:** DAMASEB DCJ, SMUTS JA and HOFF JA

**Heard:** 3 April 2017

**Delivered:** 13 April 2017

**Summary:** The respondents were dismissed during June 2011 from their positions as traditional councillors of the Oukwanyama Traditional Authority on grounds of misconduct in that they conducted meetings with members of the community outside their areas of jurisdiction concerning matters of the Oukwanyama and at times of rest (onghata) contrary to tribal law and against the wishes of the first appellant, the queen of the Oukwanyama. The decision made by the first appellant in her capacity as 'chief' of the Oukwanyama Traditional Authority was challenged by way of review in the High Court on the basis that it was made without the respondents being afforded a hearing contrary to Art 18 of the Constitution. The appellants had in the answering papers complained about the lack of specificity as regards the complaint based on Art 18.

The High Court observed that the particularity of the extent to which Art 18 was allegedly breached was not obvious from the founding papers and relied on the annexures attached to the affidavits to sustain the allegations maintained by the respondents. The court *a quo* held that the notices sent to the respondents advising of an impending investigation which later formed the basis for their dismissal, did not measure up to the required standard of procedural fairness and reasonableness, in that the respondents: were not informed of the charges that they would face, the true nature of the forum at which they were to appear which only subsequently was established to be disciplinary in nature, and were not afforded ample time for preparation before appearing before the investigation committee. The court *a quo* set aside the dismissals based on inferences drawn from annexures but not specifically relied on in the founding affidavit; and ordered reinstatement of the respondents.

*Held that* Art 18 implicates the right to fair administrative justice and the duty to act reasonably; that the respondents bore the onus to allege the specific Art 18 ground and to make out the case for review.

*Held that audi alteram partem* is flexible and its application will depend on the circumstances of each case; that the particular circumstances of the case may oust *audi* or significantly attenuate its operation. Accordingly, the respondents failed to discharge the onus and failed to put forward a proper factual basis in their papers to vitiate the decision to terminate their services based on the denial of *audi*. *Held further* that the court *a quo* was bound by the discipline of motion proceedings: affidavits must contain all the averments necessary to sustain a cause of action or a defence and the court is not entitled to rely on grounds not raised in the founding affidavit.

*Held further that* where reliance is placed on material contained in annexures, the deponent must clearly state what portions in the accompanying annexures he or she relies on. What is required is the identification of the portions in the annexures on which reliance is placed and an indication of the case which is sought to be made out on the strength of those portions. It does not suffice to simply 'incorporate' annexures as part of one's case.

*Held that* the allegations of breach of Art 18, without more, did not sustain the conclusions reached by the court *a quo*. Appeal upheld with costs.

---

## APPEAL JUDGMENT

---

DAMASEB DCJ (SMUTS JA and HOFF JA concurring):

### Context

[1] The dispute in the present appeal concerns the lawfulness or otherwise of decisions taken by the first appellant as queen of the Oukwanyama community, to suspend, investigate and dismiss traditional councillors (first to third respondents) falling under her jurisdiction. It is common cause that the first appellant is recognised as a 'chief' in terms of s 6 of the Traditional Authorities Act 25 of 2000 (the Act). In that capacity, the first appellant is the chief of the Oukwanyama Traditional Authority (second appellant).

[2] It is common cause that the first to third respondents were appointed as traditional councillors of the second appellant in terms of s 10(1) of the Act. In terms of s 10(1)(b), a traditional councillor's function is to 'advise . . . the chief. . . and the senior traditional councillors of that community with regard to the performance of their functions, and exercise or perform such powers, duties or functions as may be delegated or assigned to. . . them by such chief or head'.

[3] As chief, the first appellant enjoys powers under s 7 of the Act. In particular, she is the 'custodian of the customary law of the traditional community she leads'; exercises 'her powers and perform. . . her duties and functions . . . in accordance with . . . customary law'; performs 'such other powers and exercise such other duties

or functions as may be conferred upon . . . her by statutory law or the customary law’.

[4] It is not in dispute that by virtue of their appointment as traditional councillors under the Act, first to third respondents enjoyed certain benefits. For example, in terms of s 17(1)(a) of the Act they receive an allowance paid from State funds.

[5] Section 10(2) of the Act provides that:

‘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.’ (My underlining.)

[6] It is apparent then that no specific procedure exists under the Act for the removal of a traditional councillor.

[7] There is common ground that the first appellant dismissed the first to third respondents as traditional councillors and appointed other persons in their positions. That dismissal was challenged with success in the High Court by way of review. The High Court set aside the dismissals, reinstated the first to third respondents as traditional councillors and directed the first and second appellants to pay the arrear allowances to the dismissed respondents. The first and second appellants now appeal that decision of the High Court.

#### The parties

[8] The founding affidavit was deposed to by the first respondent (first applicant *a quo*) who was authorised by second and third respondents (respectively as second

and third applicants *a quo*) to also depose on their behalf. The first respondent was a junior traditional councillor of second appellant and 'administratively responsible' for the Ongcha village. The second respondent was a senior traditional councillor of second appellant and 'administratively responsible' for the Ohaingu district. The third respondent was a senior traditional councillor of the second appellant and 'administratively responsible' for the Okalemba district. All three respondents, it is common cause, fell within the jurisdiction of the second appellant which is headed by the first appellant.

[9] The first appellant is cited in her official capacity as a 'duly designated Chief' in accordance with the Act. The decisions which were the subject of the review application were taken by the first appellant.

[10] The third appellant (the minister) was cited in the review *nominio officio* as the responsible minister exercising powers under the Act. No costs order or other relief is sought against the minister.

[11] In addition to the appointment he held as a traditional councillor, the first respondent was also appointed by the Minister of Lands and Resettlement under the Communal Land Reform Act 5 of 2002 as a member of the Communal Land Board for the Ohangwena region to represent the second appellant. He was also a member of the Board of Trustees of the Oukwanyama Community Trust Fund (the Trust Fund). The Trust Fund, it is common cause, was created under s 18(3) the Act.

[12] The answering affidavit on behalf of the first and second appellants was deposed to by Mr Theophilus Nelulu in his capacity as chairperson of the second appellant. I shall hereafter refer to him as Mr Nelulu.

### Material background facts

#### *The founding affidavit*

[13] According to the first respondent, in 2010 he raised the alarm about irregularities in the administration of the Trust Fund to, amongst others, the first appellant. Mr Nelulu was implicated in the irregularities. The concerns raised by the first respondent were shared by the second and third respondents.

[14] The first respondent alleges that it was because of the concerns he raised about the Trust Fund that the first appellant, by letter dated 17 September 2010, removed him as a member of the Board of Trustees of the Trust Fund. He states that he did not accept the removal and called for an investigation. Towards that end he and other concerned members of second appellant resolved to seek a meeting with the first appellant to address their concerns about the way the Trust Fund was being administered. That meeting took place on 5 February 2011. At the meeting the delegation raised their concerns about the Trust Fund's administration. They asked the first appellant to 'intervene' and to investigate the matter. The first appellant advised them to have a meeting about their concerns with Mr Nelulu who was also the chairperson of the Trust Fund's Board of Trustees. They approached Mr Nelulu for a meeting but he refused to meet them.

[15] The deponent further alleges that he and the others felt that the members of the community should be made aware of the alleged irregularities. They therefore called a meeting with 15 community members of the second appellant. He and the second and third respondents attended the meeting. According to the first respondent it was because of their calling this meeting that the first appellant, by letter dated 14 June 2011, suspended him as traditional councillor and as a member of the Ohangwena Communal Land Board. He maintains that it is apparent from the letter that he was being suspended because of the allegations he made against Mr Nelulu.

[16] After the suspensions, the first appellant appointed other individuals to replace the first to third respondents as traditional and senior traditional councillors respectively. These persons were cited in the review and appear as fourth to eighth appellants in the present appeal.

[17] In June 2011 the first appellant appointed a special committee (the committee) to investigate what the first respondent refers to as the 'so-called misconduct' charges against him and the second and third respondents. In June 2011 the first appellant wrote letters to the three respondents inviting them to a hearing before the committee tasked to investigate the irregularities they raised so that they would provide information and answer questions from the committee. The trio appeared before this committee where, he says, they were:

' . . . subjected to harassment and rebuke and we were accused of sowing disharmony 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.'



[18] The respondents were then presented by the committee on 15 August 2011 with its 'findings' which purported to be the record of the hearing at which they appeared. Briefly, the findings record that the respondents were guilty of, amongst other, conducting meetings with members of the community outside their areas of jurisdiction concerning matters of the Ovakwanyama and at times of rest (onghata) contrary to tribal law and against the wishes of the queen. That they sought the intervention in the traditional matters of the Ovakwanyama by ministers who bore no political responsibility for traditional matters.

[19] Upon being presented with the committee's findings, the first appellant by letter under her hand dated 15 August 2011 dismissed the respondents as traditional councillors purporting to do so under the provisions of the Act.

*Review grounds in the founding affidavit*

[20] It is alleged by the first respondent that the decisions taken by the first appellant are unreasonable and were made capriciously. In particular, the decisions to suspend and eventually terminate their services 'has no lawful authority in law'. There was no lawful authority to suspend him 'indefinitely'. An 'indefinite' suspension is 'absurd and unreasonable' as it did not inform him whether he will be reinstated or not, and when. It is alleged that the decisions were taken to 'protect some individuals that are close to' the first appellant. It is further alleged that the decisions were taken to 'victimise' them because they exposed the irregularities concerning the administration of the Trust Fund. They assert further that the first appellant failed to comply with Art 18 of the Constitution by denying them their right to administrative

justice. In particular that that the first appellant denied them *audi* before suspension and dismissal. In regard to the suspensions, it is also said that no reasons were given therefor and, if such reasons were given, they were unreasonable as the circumstances did not warrant a suspension. They were not allowed to make representations before the suspension and dismissal decisions. It is alleged that the first and second appellants did not apply their minds correctly in regard to the allegations the respondents made concerning the Trust Fund.

[21] According to the first respondent, under the codified Oukwanyama customary law in which he is an acknowledged authority, a traditional leader may only be removed from office through death, mental incapacity or 'any other lawful reason'. An accused is entitled under customary law to a fair hearing. These customary laws were violated in regard to the respondents' suspensions and dismissals.

*Answering affidavit*

[22] According to Mr Nelulu for the appellants the respondents were suspended to 'ensure that there is peace and harmony' in the community; and that he too was suspended by the queen 'pending an investigation' ordered by her. The allegations of harassment and rebuke of the respondents at the disciplinary hearing are denied.

[23] Mr Nelulu denies that the respondents were victimised for asking for an audit and states that an audit of the Trust Fund was in fact underway prior to and during the suspensions. He dismisses the allegation of people being protected by the queen as vague and unsubstantiated.

[24] The alleged breach of Art 18 in the respondents' suspension and dismissal is denied and, in any event, it is asserted that he, and the respondents, were afforded a hearing by the committee. He maintains that the suspensions were not indefinite but pending an investigation, whose findings were known within two months.

[25] Mr Nelulu pertinently denied the allegation that the first appellant failed to comply with Art 18 of the Constitution in dismissing the respondents. Not only that, he lamented the lack of specificity relative to the allegation in the following terms:

'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.'

#### The High Court's approach

[26] The court *a quo* observed as follows:

'[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 the 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.'

[27] It becomes immediately apparent that the court *a quo* was satisfied that the allegation of breach of Art 18 made in the founding affidavit was not particularised by

the respondents. The court then delved into the annexures to see if they contained evidence supporting the allegation of non-compliance with Art 18, in particular the respondents' right to procedural fairness.

[28] Based on the notices sent out to the respondents by the first appellant informing them of the establishment of the committee, the court *a quo* took the view that the invitation to the respondents to appear before the committee was stated to be 'to gather information and to ask questions', yet it turned out to be a disciplinary committee. The learned judge reasoned that the invitation to the committee deliberations was not adequate notice and did not set out the 'procedure and time lines'. According to the learned judge, the notice also suffered from the defect that the respondents were not informed of the charges they would face, did not forewarn them of the possible questions to be asked, the consequences that might result from the answers they might give and the possible sanctions they faced.

[29] The learned judge found that:

'[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 informed of the charges that would be preferred against them which would 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.'

[30] The High Court went on to point out that it only became apparent from the 'findings' of the committee that its true purpose was to serve as a disciplinary forum

and not just to collect information and to ask questions as was stated in the queen's notice. The court *a quo* was satisfied that the committee, being a disciplinary process possibly resulting in their dismissal, was not foreshadowed by the queen in the notice.

[31] The High Court concluded that:

'[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 Art 18 of the Constitution.'

### Submissions on appeal

#### *The appellants*

[32] In his 'note on argument', Mr Semenya SC submits that the above conclusions of the judge *a quo* constitute a misdirection. In the first place, he argues that the Oukwanyama customary law does not prescribe a particular procedure for a disciplinary hearing and that *audi alteram partem* is a flexible doctrine whose content and application may vary according to the power exercised and the circumstances of the case. Counsel argued that the circumstances of the present case called for a flexible application of *audi* given, firstly, that the proceedings in question took place in the context of customary law administered by a tribal leadership who are lay persons and in relation to persons claiming to be experts in the practice of customary law.

[33] Thus considered, according to Mr Semenya, the process followed in the present case satisfied the requirements of *audi* in that the respondents were first suspended (together with Mr Nelulu), followed by a notice of a hearing before an investigating committee which then prepared the 'findings' on the strength of which

the first appellant dismissed the respondents. Mr Semenya argued that the notice made clear that the respondents were informed that they were required to provide information and to answer questions from the committee. On the basis of this, Mr Semenya argued, the High Court's conclusion imposes exacting standards for a hearing conducted by a traditional authority.

[34] Mr Semenya also submitted that, in any event, the High Court misdirected itself in coming to the conclusions it did by relying on bases or grounds not advanced by the respondents in their founding affidavit. According to counsel, the case that the appellants were called upon to meet was that the respondents were not afforded a hearing before the first appellant made her decision and not that they did not know that the proceedings before the committee were of a disciplinary nature. He added that the respondents did not object to the proceedings on the basis that its true nature was not made known to them prior to it taking place.

[35] Mr Semenya argued that the respondents, as traditional leaders, would have been aware that they were facing disciplinary proceedings when called upon to appear before the committee. Additionally, Mr Semenya argued that the findings by the court *a quo* that the respondents were not presented with charges prior to the hearing, that the respondents did not have adequate notice and sufficient time for preparation, are a misdirection because they constitute grounds and complaints which the appellants were not called upon to meet and which, if raised, they would have answered.

[36] In the appellants' written submissions reliance is placed on two Namibian decisions for the proposition that the bases that the court *a quo* relied on for its inferences should have been stated clearly in the founding affidavit and that since it was not, that court was not entitled to do so: *Matador Enterprises (Pty) Ltd t/a National Cold Storage v Chairman of the Namibian Agronomic Board* 2010 (1) NR 212 (HC); *Standard Bank Namibia Ltd & others v Maletzky & others* 2015 (3) NR 753 (SC).

#### *The respondents*

[37] Mr Khama for the respondents submitted that the respondents in their founding affidavit make it plain that the first appellant was obliged to comply with Art 18 in her decision-making and that the respondents had sufficiently pleaded the bases relied on by the High Court for its conclusions, by 'incorporating' as part of their case the annexures from which the court *a quo* drew those inferences.

[38] Mr Khama submitted that the respondents' case was not that the committee denied them a hearing but rather that it was the first appellant who, as the decision-maker, denied them a hearing. Counsel rejected the argument that the court *a quo* should not have relied on material appearing in the annexures and that the court was entitled to rely on all 'admissible evidence' placed before it.

#### Issues to be decided

[39] The appellants' main complaint on appeal is that the High Court relied for its conclusion that the respondents were denied *audi* on grounds and allegations not made in the founding affidavit. Mr Semenya submitted that it is only if we find against



the appellants in that regard that, in any event, the High Court had set too exacting a standard to determine if *audi* was observed or not and that, on the facts of this case, the respondents were afforded adequate procedural fairness.

#### The discipline of motion proceedings

[40] Evidence in motion proceedings is contained in the affidavits filed by the parties. In motion proceedings the affidavits constitute both the pleadings and the evidence and the applicant cannot make out a particular cause of action in the founding papers and then abandon that claim and substitute a fresh and different claim based on a different cause of action in the replying papers: *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A). It has been held that:

‘A cause of action ordinarily means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court.’<sup>1</sup>

[41] Since affidavits constitute both the pleadings and the evidence in motion proceedings, a party must make sure that all the evidence necessary to support its case is included in the affidavit: *Stipp & another v Shade Centre & others* 2007 (2) NR 627 (SC) at 634G-H. In other words, the affidavits must contain all the averments necessary to sustain a cause of action or a defence. As was stated in *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa*<sup>2</sup>:

‘It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the

---

<sup>1</sup> *Mackenzie v Farmers' Cooperative Meat Industries Ltd* 1922 AD 16 at 23; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 815 (A) at 838E–G.

<sup>2</sup> 1999 (2) SA 279 (T).

issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits.’

As the adage goes, in motion proceedings you stand or fall by your papers.

[42] When reliance is placed on material contained in annexures, the affidavits must clearly state what portions in the accompanying annexures the deponent relies on. It is not sufficient merely to attach supporting documents and to expect the opponent and the court to draw conclusions from them. In that regard, practitioners will do their clients a great service by heeding the following warning by Cloete JA in *Minister of Land Affairs and Agriculture v D & F Wevell Trust*:<sup>3</sup>

‘It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest – the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. . . . A party cannot be expected to trawl through lengthy annexures to the opponent’s affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush is not permitted.’<sup>4</sup>

[43] O’Regan AJA stated in *Standard Bank Namibia Ltd & others v Maletzky & others* 2015 (3) NR 753 (SC) at 771B-C para 43 that it is not sufficient for a litigant to attach an annexure without identifying in the founding affidavit the key facts in the annexure upon which the litigant relies.

---

<sup>3</sup> 2008 (2) SA 184.

<sup>4</sup> *Minister of Land Affairs and Agriculture* (n 22) at 200C–E.

[44] It is not open to a litigant merely to annex to an affidavit documentation and to invite the court to have regard to it in support of the relief sought or the defence raised: What is required is the identification of the portions in the annexures on which reliance is placed and an indication of the case which is sought to be made out on the strength of those portions.

[45] In review proceedings applicants are aided by the procedure set out in rule 76 of the High Court Rules (formerly rule 53). The procedure enables the person aggrieved by administrative decision-making to require the administrative decision-maker to produce the record, which should include the reasons if available. The applicant for review may upon receiving the record of proceedings amend, add to or vary the review grounds raised in the founding papers. In a borderline case, the failure to require the production of the record to the court (which is an important part of the evidence in review proceedings), could well prove decisive against the applicant especially where the respondent places in dispute the facts relied on by the applicant. (Compare *SACCAWU v President, Industrial Tribunal* 2001 (2) SA 277 (SCA) para 7). In these proceedings the respondents, at their peril, elected not to proceed in terms of rule 76 and did not require a copy of the complete record of the decision taken on review.

### Analysis

[46] As Mr Semenya for the appellants correctly submitted, Art 18 is multi-faceted: Amongst others it implicates the right to fair administrative justice and the duty to act reasonably. The first leg, for its part, entails the principles of natural justice such as *audi alteram partem* and *nemo iudex sua causa*. Reasonableness deals with the

substantive part of administrative justice: a decision which no reasonable decision-maker could have taken is reviewable. It is the duty of an applicant for review to say which of these possible avenues of attack he or she relies on and on what factual material. The applicant for review bears the onus in its full sense: the evidential burden and making out the case for review. True, once there is prima facie evidence the decision-maker bears the onus of rebuttal; that is to say to justify the decision-making.

[47] It is now necessary to set out in full the specific allegations made by the respondents in the founding affidavit directly dealing with the denial of a hearing and non-compliance with Art 18. The first respondent deposed as follows:

'30. 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 15<sup>th</sup> 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 and they are marked, "GH 14", "GH 15", "GH 16" "GH 17" and "GH 18" respectively. I incorporate the contents of all these attachment into this affidavit and rely on the contents thereof to substantiate our relief.

33. 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 the provisions of article 18 of the Namibian Constitution and she has accordingly violated our right to administrative

justice. In my case the first respondent states in the letter suspending me that I have been suspended indefinitely. I submit that there is no lawful authority for a suspension that is indefinite. An indefinite suspension is absurd and unreasonable in that it does not inform me whether I will be reinstated or not and if I will, by when. I submit that on this basis alone, there is a need to review the decisions taken by the first respondent. I submit further that I was not given a hearing before the decision to suspend me was taken. I submit that I am entitled and or I have right to be given a hearing in any decisions that is about to be taken against me especially if such a decisions prejudices me. I submit that the decisions of the first respondent is indeed prejudicial to me and she should have accorded me a hearing before she took the decisions of suspending me. Furthermore her decisions warrants a review in that, I was not given reasons for my suspension, alternatively, if reasons were given, then in that event, I submit that those reasons are unreasonable and they do not warrant a suspension such as the one deployed by the first respondent.

34. 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.

35. In particular, the first respondent failed to afford the applicants an opportunity to make representations prior to such decisions being taken. Alternatively, the first respondent did not apply her mind correctly when she took these decisions including the stage when a so-called inquiry was conducted.'

[48] The above passages from the founding affidavit make clear that the respondents' main complaint as far as procedural fairness goes is that they were not afforded a hearing before the decision to suspend them was taken. They also complained that their right to fair administrative action was breached in relation to the first appellant's decision to suspend and thereafter dismiss them as traditional councillors. The question is, are those allegations sufficient to justify the conclusions reached by the court *a quo*?

[49] It will be recalled that Mr Nelulu denied that the first appellant did not comply with Art 18 and complained of the lack of specificity which rendered the allegation vague.

[50] It admits of no doubt that the specific reference to denial of *audi* relates to the suspensions. No allegation is made of denial of *audi* in respect of the dismissals. That notwithstanding, Mr Khama submits that the inferences drawn by the High Court are supported by the annexures to the founding affidavit which, according to him, set out the history of the matter and the conduct of the first appellant. Although invited several times by the court to point in the record to any allegations made in the founding affidavit which rely on the bases found by the court *a quo* to vitiate the decision-making, Mr Khama was unable to do so. That is not surprising: No such allegations were made!

[51] It is correct, as Mr Semenya justifiably submitted, that the case the appellants were called upon to meet bears scant resemblance to that made by the respondents in the founding affidavit. The High Court was bound by the discipline which motion practice imposed on the parties. Because the party seeking review bears the onus in the sense that I have described, the review court ought to have approached the matter on the basis of the pleadings.

[52] The importance of specificity in relying on breach of *audi* under Art 18 of the Constitution is accentuated by the fact that *audi* is not a one-size-fit all but a flexible principle. As has correctly been stated by Hoexter in *Administrative Law in South Africa* (2012) 2 ed at p 362:

‘ . . . [P]rocedural fairness is a principle of good administration that requires sensitive rather than heavy-handed application. Context is all important: the context of fairness is not static but must be tailored to the particular circumstances of each case. There is no longer any room for the all-or-nothing approach to fairness. . . An approach that tended to produce results that were either overly burdensome for the administration or entirely unhelpful to the complainant.’

[53] Gauntlett JA (as he then was) stated the following in the Lesotho case of *Matebesi v Director of Immigration & others LAC* (1995 – 1999) 616 at 621J–662:

‘Whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in her liberty or property or existing rights, unless the statute expressly or by implication indicates the contrary, that person is entitled to the application of the *audi alteram partem* principle.’

[54] His Honour went on to add (at 625J) that:

‘The right to *audi* is, however, infinitely flexible. It may be expressly or impliedly ousted by statute, or greatly reduced in its operation.’

[55] *Matebesi* is also authority for the proposition that although *audi* may be a statutory requirement, the particular circumstances of the case may oust *audi* or significantly attenuate its operation. Each case must be considered on its facts. That much is recognized in both South African and English jurisprudence.

#### South Africa

[56] In *President of the RSA v SA Rugby Football Union* 2000 (1) SA 1 (CC) para 219, the Constitutional Court observed that:

'The requirement of procedural fairness, which is an incident of natural justice, though relevant to hearings before tribunals, is not necessarily relevant to every exercise of public power. *Du Preez's* case is no authority for such a proposition, nor is it authority for the proposition that, whenever prejudice may be anticipated, a functionary exercising public power must give a hearing to the person or persons likely to be affected by the decision. What procedural fairness requires depends on the circumstances of each particular case.'

### England

[57] In *R v Secretary of State for the Home Department, Ex parte Dood* [1993] 3 ALL ER 92 (HL) at 106d-e, Lord Mustill put it thus:

'The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (Cited with approval by Corbett CJ in *Du Preez v TRC* 1997 (3) SA 204 (A) at 231I-234D).'

[58] Given the flexibility of *audi*, if the specific bases for the alleged absence of *audi* were clearly pleaded, the appellants could well have put forward facts and contentions why, on the particular facts, the manner in which the respondents were removed did not offend the Constitution. That they intended to do so if invited is apparent from Mr Nelulu's lamentation about lack of particularity. It bears mention that in his replying affidavit the first respondent skirts the issue of lack of specificity and does not at all deal with it.



[59] During argument Mr Khama was at pains to remind us that what the respondents were challenging was the first appellant's decision-making and not that of the committee. Two points should be made about that submission. The first is that it does not advance the cause of the respondents given our finding that no proper basis was established for impugning the queen's decision-making. Second, the process undertaken by the committee stands unchallenged and no attempt at all was made to set it aside. It is trite that administrative action remains valid until set aside: *President of the Republic of Namibia v Anhui Foreign Economic Construction Group Corporation Ltd* (SA 59/2016) [2017] NASC (28 March 2017), para 42. The queen acted on the committee's findings which were the result of deliberations in which the respondents participated without objection. The outcome of those proceedings established that they were, amongst others, guilty of sowing division in the community and undermining the queen.

[60] For all of the above reasons we are satisfied that the appellants are correct to say that the High Court misdirected itself in relying on review grounds and bases not relied on by the respondents in their founding affidavit.

### Disposal

[61] Mr Khama made no suggestion to us that in the event of the points raised on appeal by the appellants being successful, there still remained other viable grounds of review on the record which we must consider. I therefore decline to consider if the decision-making stood to be reviewed and set aside on grounds other than those on which the court *a quo* set it aside. The appeal must therefore succeed.

[62] The appellants have achieved success and are entitled to their costs in the appeal. However, the appellants have not set up a proper basis why they should be granted costs of two instructed counsel.

The order

[63] I therefore make the following order:

1. The appeal succeeds and the order of the High Court substituted for the following order:

‘1. The application is dismissed.

2. The first and second respondents are awarded costs against first, second and third applicants, jointly and severally, the one paying the other to be absolved, to include the costs of one instructing counsel.’

2. The first and second appellants are granted costs of appeal against first, second and third respondents, jointly and severally, the one paying the other to be absolved, to include costs consequent upon the employment of one instructing and one instructed counsel.

---

**DAMASEB DCJ**

---

**SMUTS JA**

---

**HOFF JA**

APPEARANCES:

APPELLANTS

I A M Semanya SC (with him K Shakumu)

Instructed by the Government Attorney

RESPONDENTS

D Khama

Instructed by Kwala & Co