REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 5/2011

In the matter between:

SAMUEL CHAUNE	**APPLICANT**
and	
HUBERT TIDIMALO DITSHABUE	**FIRST RESPONDENT**
BAKGALAGADI TRADITIONAL AUTHORITY	**SECOND RESPONDENT**
MINISTER OF REGIONAL, LOCAL GOVERNMENT AND HOUSING	**THIRD RESPONDENT**
GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**FOURTH RESPONDENT**
PIET SENWAMADI	**FIFTH RESPONDENT**

Neutral citation: *Chaune v Ditshabue* (A 5/2011) [2013] NAHCMD 111 (22 April 2013)

CORAM: UEITELE, J

Heard: **24 JANUARY 2013**

Delivered: **22 APRIL 2013**

Flynote: Administrative law **-** Administrative action - What constitutes - Decision to recommend removal of a person as a senior traditional councillor - Such being administrative action and thus reviewable.

Administrative law - Administrative action - Procedural fairness - Reasonable opportunity to make representations - Whether the mere fact that affected individual present at meeting where his removal was discussed amounts to an opportunity to be heard. Person unaware that the meeting is intended as opportunity for making of representations, and decision-makers not disclosing concerns that might lead them to adverse decision - Opportunity not given.

Summary:

The applicant was elected as a traditional councillor of the Bakgalagadi Traditional Authority on 25 August 2007. His appointment as traditional councillor was made known by publication of that fact in the *Government Gazette* of 27 March 2008.

On 02 October 2009, Chief Hubert Tidimalo Ditshabue convened a meeting of the Bakgalagadi Traditional Authority. That meeting was attended by members of the Bakgalagadi Traditional Authority and at that meeting the removal of the applicant as traditional councillor was discussed and a decision taken to recommend to the Minister of Regional, Local Government and Housing that the applicant be dismissed as a traditional councillor. The participants at the meeting were unaware that the meeting is intended to serve the purpose of enabling applicant to make representations why he should not be removed.

Held that, the exercise of the power to remove the applicant as a traditional councillor constitutes administrative action and is thus reviewable.

Held further that where a person has a right to be heard before a decision is taken it is important that, whatever the form of the hearing or the subject-matter of the hearing the opportunity to make representations must be made clear to the affected parties, in order that the right to make representations may be effective.

Held further that the meeting of 02 October 2009 did not constitute a sufficient opportunity for the applicant to make representations to the second respondent concerning his possible removal and the reasons therefor.

ORDER

1 That the decision of the second respondent to recommend the removal of the applicant as a senior traditional councillor of the second respondent is reviewed and set aside.

2 The appointment of the fifth respondent as a traditional councillor of the second respondent is hereby reviewed and set aside.

3 The first and second respondents are ordered to pay the applicant's costs (the one paying the other to be absolved) on a party and party scale.

JUDGMENT

UEITELE, J

A INTRODUCTIOIN AND BACKGROUND

[1] The applicant, namely, Samuel Chaune brought an application on notice of motion seeking the following relief:

> '1. Reviewing, correcting and or (*sic)* setting aside the decision of the First Respondent to remove the Applicant as a Senior Traditional Councillor of the Second Respondent.
>
> 2. Ordering such First Respondent and such further Respondents electing to oppose this application to pay the costs of this application the one paying the other to be absolved.
>
> 3. Granting such further and/or alternative relief to the Applicants as the above Honourable Court may deem fit.'

[2] Before I give a brief background to the dispute between the parties, I will highlight the facts which are not in dispute between the parties. The common cause facts are that:

(a) Chief Hubert Tidimalo Ditshabue (I will refer to him as the First Respondent in this judgment) is the designated chief of the Bakgalagadi of Namibia community and head of the Bakgalagadi Traditional Authority.

(b) The applicant was elected as a traditional councillor of the Bakgalagadi Traditional Authority on 25 August 2007. His appointment as traditional councillor was made known by publication of that fact in the *Government Gazette* of 27 March 2008.[1]

(c) On 01 October 2009, Chief Hubert Tidimalo Ditshabue (I will refer to him as the First Respondent in this judgment) addressed a letter to the Permanent Secretary of the Ministry of Regional, Local Government and Housing advising the Permanent Secretary that the Bakgalagadi Traditional Authority (I will refer to it as the second respondent in this judgment) is recommending that the applicant be dismissed as a traditional councillor of the second respondent. In that letter the first respondent further informed the Permanent Secretary that the second respondent has appointed a new councillor known as Piet Senwamadi as councillor to replace the applicant with immediate effect (i.e. from 01 October 2009).

(d) In terms of section 17 of the Traditional Authorities Act, 2000[2] recognised traditional councillors receive a monthly allowance. The applicant has since 25

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[1] See Government Gazette No. 4018 of 27 March 2008.

[2] Traditional Authorities Act, 2000 (Act 25 of 2000) Section 17 of that Act reads as follows:

> ‘(1) Subject to subsection (2), there shall be paid from moneys appropriated by Parliament for such purpose allowances-
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> (a) to the following traditional leaders of a traditional community, namely:
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> (i) One chief or head of a traditional community, as the case may be;
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> (ii) not more than six senior traditional councillors; and
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> (iii) not more than six traditional councillors,
>
> designated and recognised, or appointed or elected, as the case may be, in accordance with this Act, notwithstanding the fact that more than six senior traditional councillors and more than six traditional councillors may have been appointed or elected in respect of a particular traditional community under this Act.’

August 2007 been receiving the allowance. He however stopped receiving the allowance after January 2010.

[3] It is not clear whether the third respondent acted on the recommendations of the second respondent and removed the applicant as a traditional councillor. I say it is not clear because I have not been provided with a letter from the first, second or third respondent addressed to the applicant informing him that he has been removed as a traditional councillor. Apart from the absence of such a letter the third respondent has not deposed to an affidavit confirming or denying the removal of the applicant as a traditional councillor. I, however, accept that the applicant has been removed as traditional councillor of the second respondent.

[4] The events which led to the removal of the applicant are as follows. During May 2009, the Herero Traditional Authority allegedly invited the second respondent to a ceremony or meeting in the Arminius village. The first respondent informed several traditional councillors (including the applicant) of the second respondent of the meeting/ceremony. The applicant requested the first respondent for a written invitation to the ceremony or meeting. The first respondent informed applicant that the invitation was send verbally. The applicant as a result of no written invitation did not attend the ceremony or meeting.

[5] Applicant was then invited (by the first respondent) to a meeting of second respondent. The meeting took place on 15 May 2009, and it was presided over by the first respondent. In the meeting the applicant was informed that he was charged with two counts of misconduct, the first being that he refused to attend a ceremony or meeting with the Herero Traditional Authority (the first respondent denies that applicant faced such a charge). The second charge was that applicant allegedly leaked information of the first respondent to the media. The applicant was found guilty of the charges and the penalty that was imposed on him was a fine, he had to pay a young calf.

[6] The applicant was not satisfied with the conviction and the penalty imposed on him and he accordingly appealed against both the conviction and the sanction imposed. The appeal was heard on 02 July 2009 by the first respondent, twenty three traditional

councillors from the Ovaherero Traditional Authority, Ovambanderu Traditional Authority, Tsawna Traditional Authority and nine councillors from the second respondent. The appeal meeting, referred the matter back to the second respondent in order for second respondent to deal with the matter as it deemed fit.

[7] The second respondent reconsidered the matter at a meeting held on 02 October 2009 and at that meeting it decided to recommend to the third respondent that the applicant be removed as a traditional councillor.

[8] The applicant is aggrieved by the decision taken at the meeting of 02 October 2009 and it is that decision which he wants this court to review and set aside. The grounds on which the applicant challenges the validity of the decision to remove him are, that; his constitutional right to a fair hearing was infringed and that the first respondent has no power in law to remove him, that the appeal body was irregularly constituted because the first respondent and some of the traditional councillors of the second respondent who tried him in the first instance could not form part of the appeal body and that the Ovaherero traditional authority, the Ovambanderu traditional authority and the Tswana traditional authority have no jurisdiction (both under Customary law and the Traditional Authorities Act, 2000) over him. The first, second, third and fourth respondents initially all opposed the relief sought by the applicant. The third and fourth respondents, however, later withdrew their opposition and did not take any further part in the proceedings.

[9] The first and second respondent are resisting the applicant's application on the basis that it is not first respondent who took the decision to remove the applicant as a traditional councillor, it was the second respondent who decided to recommend to the third respondent to remove the applicant and it was the third respondent that removed the applicant as a traditional councillor. The first respondent thus contends that the applicant not only seeks to have reviewed and corrected the decision of the wrong entity but also failed to make out a case that the decision that he must be removed as a traditional councilor must be reviewed.

B ISSUE FOR DECISION

[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.

C THE REVIEWABILITY OF THE DECISION TO REMOVE THE APPLICANT AS A TRADITIONAL COUNCILLOR

[11] 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*[3]. In that matter Mtambanengwe AJA after a review of decisions of the Constitutional Court of South Africa and academic writings laid down the following guideline:

> '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[4] 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 (art 18 of the Namibian Constitution) and that this can best be done on a case by case basis. In substance, the provisions of art 18 of the Namibian Constitution are similar to those of s 33 of the South African Constitution.

[12] In the present matter the applicant alleges that the decision to remove him was taken at a meeting held on 02 October 2009. It is common cause that the meeting of 02 October 2009 was a meeting of the second respondent. The second respondent was established pursuant to the provisions of section 2 of the Traditional Authorities Act, 2000[5]. Since the second respondent is a creature of statute its acts or decisions would

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3 2008 (1) NR 55 (SC).

4 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.

5 Section 2 of the Traditional Authorities Act, 2000 (Act 25 of 2000) provides as follows:

'2 Establishment of traditional authorities

ordinarily qualify as administrative actions and thus reviewable, but the courts have cautioned that it is not so much the functionary as the function that matters[6]. The question is whether the task itself is administrative or not. In the South African case of *President of the Republic of South Africa v South African Rugby Football Union*[7] the Constitutional Court said the following:

> "[141] In s 33 the adjective 'administrative' not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure*[8], that some acts of a legislature may constitute 'administrative action'. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is 'administrative action' is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.

[13] In the matter of *Chirwa v Transnet Ltd and Others*[9], Ngcobo J said the following:

> "[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

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> (1) Subject to this Act, every traditional community may establish for such community a traditional authority consisting of-
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> (a) the chief or head of that traditional community, designated and recognized in accordance with this Act; and
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> (b) senior traditional councillors and traditional councillors appointed or elected in accordance with this Act.
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> (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.

6 Also see *Esterhuizen v Chief Registrar of the High Court and Supreme Court, and Others* 2011 (1) NR 125 (HC); *Mbanderu Traditional Authority and Another v Kahuure and Others* (*supra* footnote 3) *Claude Neon Ltd v Germiston City Council and Another* 1995 (3) SA 710 (W).

7 Supra foot note 4 at paragraph 141.

8 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998).

9 2008 (4) SA 367 (CC); 2008(3) BCLR 251 (CC).

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."

[14] T W Bennett[10], remarked as follows:

'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 in so far 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. <u>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</u>.' { My Emphasis}

[15] In the case of *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*[11]:

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

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10 In the South African Law Journal vol 110 Part II, (1993), under the heading: "Administrative-law Controls Over Chiefs' Customary Powers of Removal."

11 2005 (6) SA 313 (SCA) (2005 (10) BCLR 931 at paragraph 24.

into law, with direct and immediate consequences for individuals or groups of individuals.'

[16] 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[12]. 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:

'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.'

[17] 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}

[18] 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

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

Namibia. In the present matter it is common cause that the applicant was invited to a meeting of the second respondent on 15 May 2009, at that meeting the applicant was confronted with disciplinary charges (I do not find it necessary to make a finding as to whether the applicant faced a single charge or two charges). It is further common cause that the applicant was never given prior notice of the charges proffered against him or given time to prepare his defence. The applicant was found guilty as charged. From the evidence before me it is not clear whether the applicant was given an opportunity to present mitigating factors before the sanction was imposed on him.

[19] When the applicant was not happy with his conviction and sentencing he appealed. The appeal was purportedly heard, on 02 July 2009, by the First Respondent nine Councillors from the second respondent and twenty three councillors from the Ovaherero Traditional Authority, Ovambanderu Traditional Authority and Tsawna Traditional Authority. This body which was constituted as an appellate body referred the matter back to the second respondent for the second respondent to deal with the applicant as it deemed fit.

[20] The applicant's version is that on 02 October 2009 the first respondent convened a meeting of the second respondent. At that meeting the first respondent informed the meeting that he has resolved to remove the applicant as traditional councillor. The appellant further alleges that he was never given prior notice that his removal will be discussed at the meeting of 02 October 2009. The first respondent's response to these allegations was simply to deny that he has removed the applicant as a traditional councillor and argues that the decision to remove the applicant was taken at meeting attended by the applicant. First respondent further alleges that it was the second respondent who decided to request the third respondent to remove the applicant and it was the third respondent that removed the applicant as a senior traditional councilor.

[21] I have no hesitation in arriving at the conclusion that the actions of the first, second and third respondents are irregular and thus in violation of the Article 18 of the Constitution of Namibia. I say so for the reasons set out in the following paragraphs.

[22] The Namibian constitutional dispensation which came into being with the independence of Namibia requires greater transparency than in the past and this is also

the policy of the Government of Namibia[13]. There can be no doubt that article 18 of the Constitution of Namibia pertaining to administrative justice requires not only reasonable and fair decisions, based on reasonable grounds, but inherent in that requirement is a fair procedure which is transparent.

[23] Where a person has a right to be heard before a decision is taken it is important that, whatever the form of the hearing or the subject-matter of the hearing an opportunity to make representations must be made clear to the affected party or parties, in order that the right to make representations may be effective. The point is illustrated by the case of *Zondi and Others v Administrator, Natal, and Others*[14]. The brief facts of that case are as follows: Striking workers had been given an ultimatum to return to work by a fixed date and invited to make representations to an official, stating why they should not be dismissed for participating in an illegal strike. The date given in the ultimatum for the return to work was thereafter extended, as was the date upon which they were to make representations. When the workers did not respond to either the ultimatum or the invitation to make representations, letters of termination were issued to them, but, in an attempt to persuade them to return to work, a public statement was made by the respondent employer that, provided they returned to work by a particular date, they 'may have their letters terminating their employment withdrawn and in doing so retain their pension and leave benefits'. That deadline was then extended from the Friday to the Monday morning and then again to close of business on the Monday. As a matter of fact, all workers who reported for duty before this extended deadline had their letters of dismissal withdrawn.

[24] Some of the employees, however, only received the message about the extension when it was too late to report for work on the Monday and, instead, reported for duty when work started on the Tuesday. The employer refused to withdraw the notices of termination already served upon them.

[25] The employer, the provincial administration, accepted that it was obliged to give the workers a hearing before dismissing them. It contended that it had discharged this obligation by inviting them to make representations when the original ultimatum was given. However, the appeal court held that the termination of their employment did not

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13 See the case of *Aonin Fishing (Pty) Ltd and Another v Minister of Fisheries and Marine Resources 1998* NR 147 (HC)

14 1991 (3) SA 583 (A); (1991) 12 ILJ 497).

flow solely from their participation in the original illegal strike and non-compliance with the original ultimatum, but also from their failure to return to work before the extended deadline at close of business on the Monday. It accordingly held that the dismissed workers lost their employment, partly because of their initial participation in the strike, and partly because they failed to return to work by the stipulated deadline. As far as the latter factor was concerned, the workers adversely affected by it did not have an opportunity of explaining why they failed to comply with the deadline. The failure by the employer to give them an opportunity to explain why they had not returned to work before the deadline, when conceivably they could have advanced reasons that would have exonerated them from any blame in not doing so, invalidated the dismissals.

[26] The *Zondi* case[15] illustrates the point that, in order for a hearing or an opportunity to make representations to be effective, it is necessary that the hearing must concern the matters giving rise to the decision, and the opportunity to make representations must relate to those matters. If the occasion identified as the opportunity to make representations is a meeting, but the participants are unaware that it is intended to serve the purpose of enabling representations to be made, and the ultimate decision-maker does not disclose the concerns that might lead him or her to take an adverse decision, it seems to me that no opportunity to make representations has been given.

[27] To sum up, therefore, in my view, the meeting of 02 October 2009 did not constitute a sufficient opportunity for the applicant to make representations to the second respondent concerning his possible removal and the reasons therefor, so as to satisfy any requirement that he be given a hearing before his removal was effected. There was no notice that this was the purpose of the meeting, and such notice is necessary in order for the person affected to appreciate the significance of the meeting. Whilst issues relevant to the question of removing the applicant may have been discussed at the meeting of 02 October 2009, the second respondent did not identify the grounds upon which it was contemplating removing the applicant, and accordingly the applicant was not aware of the gist or substance of the case he had to meet. The consequence of these deficiencies is that the applicant was not afforded an opportunity, before the decision to recommend his removal was made, to make representations to

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15 Op cit.

the second respondent why he should not be removed. The first respondent's proposition that the applicant's attendance at the meeting of 02 October 2009 served that purpose (i.e. making representations), is misplaced, in my view it did not. The mere fact, that some things were said at that meeting that had a bearing on the question of the removal of the applicant, does not convert the meeting into a proper opportunity to make representations on that issue. The first respondent's further proposition that it is not him who took the decision to remove the applicant can also not save him. The process leading to the making of the recommendations id riddled with fatal irregularities.

[28] The consequences of the failure to afford the applicant the opportunity to make representations is articulated by Baxter[16] as follows:

> 'Since natural justice seeks to promote an objective and informed decision, it is important that it be observed *prior* to the decision. Once a decision has been reached in violation of natural justice, and even if it has not yet been put into effect, a subsequent hearing will be no real substitute: one has then to do more than merely present one's case and refute the opposing case - one also has to convince the decision-maker that he was *wrong*. In a sense the decision-maker is already prejudiced. As a general principle, therefore, failure to observe natural justice before the decision is taken will lead to invalidity. { My Emphasis} It will be noticed that this passage refers to 'natural justice' in general. It hardly needs to be added that the *audi alteram partem* requirement is an element, indeed one of the most important elements, of the requirements of natural justice. {My Emphasis}

[29] In the present matter no reasons have been advanced as to why the general rule must not be applied. I therefore find that the applicant has made out a case, the failure by the first or second respondent to grant the applicant an opportunity to be heard invalidates the recommendations made to the third respondent. In view of the conclusion that I have arrived at, I do not consider it necessary to deal with the other grounds on which the applicant attacks the respondents' decisions and actions.

[30] In the result I make the following order:

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16 Lawrence Baxter Administrative Law (1984) at 587.

(a) That the decision of the second respondent to recommend the removal of the applicant as a senior traditional councillor of the second respondent is reviewed and set aside.

(b) The appointment of the fifth respondent as a traditional councillor of the second respondent is hereby reviewed and set aside.

(c) The first and second respondents are ordered to pay the applicant's costs (the one paying the other to be absolved) on a party and party scale.

SFI UEITELE
Judge

APPEARANCES

APPLICANT:	N TJOMBE OF TJOMBE-ELAGO LAW FIRM INC
FIRST AND SECOND RESPONDENTS:	Z GROBLER OF GROBLER & CO LEGAL PRACTITIONERS
THIRD RESPONDENT:	NO APPEARANCE
FOURTH RESPONDENT	NO APPEARANCE
FIFTH RESPONDENT	NO APPEARANCE