REPUBLIC OF NAMIBIA **REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 87/2010

In the matter between:

MARK ADCOCK	**APPLICANT**
and	
ERWIN MUNIKA MBAMBO	**1ST RESPONDENT**
THE HAMBUKUSHU TRADITIONAL AUTHORITY	**2ND RESPONDENT**
THE CHAIRPERSON OF THE HAMBUKUSHU CUSTOMARY COURT	**3RD RESPONDEN**
VICKY MUTORA	**4TH RESPONDENT**
SENIOR HEADMAN MAHERO	**5TH RESPONDENT**
JUNIOR HEADMAN MBAREMA	**6TH RESPONDENT**
THE SECRETARY OF THE HAMBUKUSHU CUSTOMARY COURT	**7TH RESPONDENT**
THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**8TH RESPONDENT**

Neutral citation: *Adcock v Mbambo* (A 87/2010) [2012] NAHCMD 35 (24 October 2012)

Coram: GEIER J

Heard: **19 September 2012**

Delivered: **24 October 2012**

Flynote: Review – application to set aside proceedings of the traditional court – applicant not a member of the particular traditional community – question arose whether in terms of the Traditional Authorities Act 25 of 2000 or customary law respondents had authority and jurisdiction to subject a non-member to proceedings before a traditional court – Traditional Authorities Act 25 of 2000 – interpretation of section 3 – as read with section 1 – court deciding that no such authority conferred by the Traditional Authorities Act – given the definition of 'customary law' in section on 1 of the Act and in so far as customary law in conflict with such provisions – customary law not prevailing - proceedings therefore set aside

Summary: Applicant had been subjected to proceedings before the Hambakushu traditional court which had sentenced and fined him. Applicant seeking the review and setting aside of these proceedings also on the grounds that the Traditional Authorities Act 25 of 2000 did not confer on the respondents the authority and jurisdiction to subject the applicant, not being a member of the Hambakushu traditional community to proceedings before a traditional court of the Hambakushu –

Held: That on the interpretation of section 3 as read with section 1 – of the Traditional Authorities Act 25 of 2000 – no authority or jurisdiction conferred on a traditional court to try a non-member of such traditional community – unless non-member had assimilated the culture and traditions of that traditional community by marriage or adoption or by any other circumstance and such non-member had been accepted by the traditional community as a member thereof.

Held: Even if respondents at one time had authority and jurisdiction to subject persons like the applicant to a trial before the traditional court in terms of their customary law such part of their customary law could no longer prevail given the definition of the term 'customary law' as contained in section 1 – of the Traditional

Authorities Act 25 of 2000 – as Traditional Authorities Act conferring no authority or jurisdiction on a traditional court to try a non-member of such traditional community –

Held: As the applicant was not a member of the Hambakushu traditional community respondents had no jurisdiction or authority to try him - the applicant's trial before such traditional court thus amounted to a nullity which fell to be set aside – review accordingly granted -

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ORDER

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1. The decision of the First and Second Respondents to subject the Applicant to a trial or hearing in the Hambukushu traditional court is declared to be null and void and is hereby reviewed and set aside.

2. The proceedings of the Hambukushu traditional court of 20 February 2010 in respect of the purported trial or hearing of the Applicant, is declared to be null and void and is hereby reviewed and set aside.

3. The First and Second Respondents are ordered to repay to Applicant the amount of N$60,000.00 on or before 30 October 2012 together with interest at the rate of 20% per annum from 2 March 2010 to date or payment.

4. The First and Second Respondents are ordered to return to the Applicant the Applicant's digital reorder as confiscated on 20 February 2010 on or before 30 October 2012.

5. The First to Third Respondents are to pay the costs of this application on an attorney and own client scale.

JUDGMENT

GEIER J:

[1] The applicant in this matter is the sole proprietor of a camp called Ngeti Camp at which he is been operating a lodge on the banks for the Okavango river for over 20 years.

[2] On 14 February 2010 a guest reported that an amount of U$100 had been stolen from her room. Upon investigation it was established that the 4th respondent was on duty and had cleaned the room of the particular guest at the relevant time. The 4th respondent was confronted by applicant and another female and then body searched out of sight of the applicant.

[3] There is a dispute on the papers whether 4th respondent was stripped naked during this search in the presence of the 4th respondent.

[4] Applicant was subsequently accused of having stripped naked the 4th respondent and of bribing the 4th respondent and police.

[5] Late on Friday 19 February 2012 the 5th and 6th respondents, being a senior and junior headman respectively, came to the applicant and requested him to attend a meeting of the Hambukushu Traditional Authority. Applicant was not informed of the purpose of the meeting but assumed the matter was connected to the incident involving the 4th respondent.

[6] It appears from the answering affidavits that the respondents allege that the applicant was summoned in terms of the laid down guidelines and procedures of ‘the traditional court’. Such guidelines or where however not spelt out in the papers, nor were they properly proved.

[7] The respondents were also adamant that no ‘community courts’ in terms of the Community Courts Act no. 10 of 2000 had at that time been established and that the applicant was thus summoned to appear in the ‘traditional court’ which had allegedly been operational since ‘ times immemorial’.

[8] It was in such circumstances that the applicant came to attend a meeting on the following day – Saturday 20 February 2010 - at what turned out to be a traumatic experience in the traditional court of the Hambakushu, where he was subjected to the abusive procedures which he described as those of ‘a kangaroo court’.

[9] In the founding papers, the proceedings, to which he was subjected, are described as follows:

‘The allegations of bribery and corruption against the First Respondent were made over the National Broadcasting Corporation’s (NBC) Rukavango radio service, and it is common cause that the said radio has a large listenership in (the) Kavango region, where the First Respondent, being a Chief and leader of the Hambukushu community, wields considerable influence. By the nature of the allegations against me that I bribe or bribed the First Respondent, the First Respondent was also an accused or a complainant, and under such circumstances, the First Respondent ought not to have participated in the hearing as an adjudicator wherein the allegations of bribery and corruption were central to the issues. As I stated above, it appeared that he was in charge of the hearing.

Throughout the hearing, I was accused by the First Respondent of (the) stripping naked the Fourth Respondent. The First Respondent also accused me of being a racist, rapist and a murderer, and he openly incited the community throughout the trial to take Ngepi from me. In my opinion this exposes the true underlying purpose and intent of the trial, as I have good reason to believe that it is intended to give my company to others who are prepared

to pay money for this great prize when I am gone. The First Respondent was therefore not the independent and impartial presiding officer one would expect.

Further, no written summons calling upon me to appear in the community court was ever served on me as contemplated by regulation 2(1) of the regulations issued in terms of the Community Courts Act. I am certain that no such summons was ever issued by the clerk of the community court in the first place. … I had no opportunity to prepare for the trial to enable me to properly respond to the charges that I ultimately faced or enlist the services of a competent legal practitioner to assist in the matter

… During the duration of trial or hearing, I had to prove my innocence. The First Respondent and the others who were present (including the Chairperson of the proceedings) refused to listen to my version, and even if the burden of proof rested on me. It did not help.

I was not permitted to call witnesses to testify in my favour nor was I allowed to cross-examine the witnesses who were testifying against me, three of whom could not possibly have been at the scene anyway. I am advised and I submit that these are such fundamental breaches of the principles of fairness and natural justice that it cannot be said I had a fair trial as contemplated in Article 12 of the Namibian Constitution. … The First Respondent refused my request that the witnesses testifying against me should leave the hearing so that I can individually cross-examine them.

None of the witnesses, who testified in the purported hearing, took the oath or made the affirmation …

Most of the testimonies of various witnesses and statements by the First Respondent were in the Hambukushu language. It is known to the First Respondent and the witnesses that I do not understand Hambukushu. Nonetheless, some portions of the testimonies were not translated into English, putting me at a disadvantaged position as I could not follow the essential parts of the proceedings.

I was subjected to intimidation throughout the trial. The members of the public who were observing the trial would clap hands and shout very loud and in a hostile manner whenever they liked what the First Respondent was saying – especially when he said that they should take Ngepi Camp and throw me out, and laughed at my statements. I am also informed that clapping or marking any noise in the Second Respondent community court is strictly forbidden. This was certainly done to intimidate me.

In the course of the trial, the First Respondent stated that they will throw me out and take Ngepi Camp over, among many other angry outbursts to deliberately incite the members of the public who were present. At one point, an unknown man sitting near me started chanting "KILL HIM, KILL HIM!". Which was obviously heard by the First Respondent, but he did not stop the man.

To further intimidate me, I was not permitted to take notes of the proceedings and I was not allowed to sit down or allowed to sit down or allowed to drink water – the hearing took more than 6 hours and it was held in the middle of summer in a room full of people. The presiding officer (i.e. First Respondent), the other headmen or traditional leaders present, and some of the members of the public who were present at the hearing were all making threatening remarks at me in the course of the hearing. I took the threats seriously and did not leave the hearing (which I strongly considered) for fear that my two nieces and a friend who accompanied me to the hearing and I, may be seriously harmed or even killed by the very hostile public spectators in the community court, for disrespecting the community court or the First Respondent as we attempted to leave. Standing for more than six hours resulted in me being in bed most of the following day, and having to take numerous pain killers due to muscle aching and dehydration and physical mental exhaustion. Also I am now suffering from an old injury to my back which since the hearing has flared up again.

Leigh Kennedy was also present at the hearing, and my other digital recorder which was in her possession, was confiscated as apparently only one person – the secretary of the community court (i.e. the Seventh Respondent) – is allowed to record the proceedings. The Secretary did take some notes of the proceedings, but I doubt that the notes will be an accurate record of the proceedings, as he quite often did not take any notes and was not present all the time, and no one else acted as the secretary when he had left the room. I was then found guilty of disrespecting the court and fined an amount of N$10, 000 by the court when one of my staff members was recording the proceedings with this digital recorder! And it was then also confiscated. I was also prohibited from taking any notes of the proceedings, which I intended to use as memory aids – these were also confiscated and I was fined a further N$5,000.00 for this offence of taking notes in the community court.

It was required of me to place my hands behind my back and (I was) not permitted to gesture with my hands when I talked. This was very uncomfortable and painful, and I suspect that it was done to further intimidate and belittle me, which appeared to have a positive effect on the members of the public who observed the purported trial. The First

respondent wanted to score as many points as possible to be seen by his subjects as a tough leader, especially in light of the allegations of bribery and corruption against him on the radio. In fact I submit that I was subjected to the hearing in the light of the radio broadcast, and not on the facts, and to promote the underlying intent of stealing Ngepi from me.

As stated above I was fined N$ 60 000.00 … (I) am not knowledgeable of the customary laws of the Hambukushu community, but I understand that the fine imposed on me was four times in excess of fines imposed for murder, in which case the fines imposed on me are grossly unfair and disproportionate even if I was guilty (which I am not) and should be set aside for that reason too.'[1]

[10] Needless to say the respondents denied most of these allegations. They essentially endeavoured to demonstrate in reply how eminently fair the proceedings had been.

[11] The main thrust of the defences raised by respondents, in addition to certain points *in limine*, was that the proceedings before the traditional court were in accordance with Hambukushu custom and that the 1st respondent had merely overseen the proceedings, chaired by his appointee, a certain Nyambi Moyo, to assist Moyo in the process and 'to ensure that peace and order would prevail throughout the hearing'.

[12] In their answering papers respondents also repeatedly threatened to apply for the striking out of portions of the above quoted narration of events of the applicant on the basis that such allegations amounted to 'unsubstantiated hearsay' and that they were 'defamatory' 'slanderous' and 'irrelevant'. The threatened striking out was however never pursued, correctly so, in my view, as all the relevant parties were before court and as such allegations were in any event also borne out essentially by the transcript of the surviving 'digital recording'.

[1] Founding affidavit para's 28.2 -28.16

[13] Ultimately the court was however not called upon to finally decide these issues as will appear from what is set out herein below.

[14] It will by now have been noted from the above exposition that the applicant was ultimately sentenced to pay a fine of N$60 000.00. Interestingly enough this amount was made up as follows:

a) N$11 000 for assaulting and ambushing the 4th respondent;

b) N$25 000 for stripping naked the 4th respondent;

c) N$9000 for disrespecting 1st and 2nd respondents;

d) N$10 000 for electronically recording the proceedings of the hearing;

e) N$5 000 for taking notes during the hearing.

[15] Applicant was then told in no uncertain terms that he had to pay this fine within seven days or that he would have to leave the area.

[16] He was subsequently 'begged' by family and employees to pay - 'as the community were "hot right now, and we/*(they)* could be killed" - if he would refuse to pay. The First Respondent allegedly also stated that applicant's business – Ngepi Camp – would be taken away should applicant not pay the fine'.[2]

[17] Applicant thus made payment of the N$60 000 under duress on 01 March 2010.

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[2] Founding affidavit para 30

[18] Amongst two other applications in which urgent interdictory relief was also almost immediately sought against the first respondent and certain participants to these occurrences the applicant then also launched this application for review on 1 April 2010.

[19] All three applications were originally set down for hearing on 19 September 2012. On account of an agreement reached between the parties only the review application was to be argued in which application the applicant continued seek the following relief:

a) ‘Reviewing and correcting or setting aside the decision of the First and Second Respondents to subject the Applicant to a trial or hearing in the Hambukushu Customary Court, and declaring the aforesaid decision unconstitutional, and or null and void.

b) Reviewing and correcting or setting aside the proceedings of the Hambukushu Customary Court of 20 February 2010 in respect of the purported trial or hearing of the Applicant, and declaring the aforesaid proceedings unconstitutional, and or null and void.

c) That the First and Second Respondent return to the Applicant the amount of N$60,000.00 paid on 20 February 2010 to the First and Second Respondent by the Applicant purporting to be a fine imposed by the Hambukushu Customary Court.

d) That the First and Second Respondent return to the Applicant the Applicant’s digital reorder confiscated on 20 February 2010.

e) Directing that the First to Seventh Respondents pay the costs of this application on an attorney and own client scale.

f) Granting the Applicant such further and or alternative relief as this Honourable Court deems fit.’

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[20] From the allegations made in the founding papers to the review it appeared that the applicant also challenged the authority of the respondents to have subjected him to the complained of proceedings. The original challenge was formulated as follows:

‘I am advised by my legal practitioner, which I verily believe to be true, and submit that the First and Second Respondents’ authority to have tried me as they did is derived from the Community Courts Act, Act 10 of 2003 (‘the Community Courts Act’). I am further advised that no other law permits the First and Second Respondent to hear and determine any civil or criminal matters. Further legal argument in this respect will be advanced at the hearing of this application.’

[21] Subsequently the basis of the challenge to first and second respondents’ authority changed somewhat. In the written heads of argument, submitted on behalf of the applicant, Mr Tjombe, prior to the hearing, now submitted:

‘In any event, the Applicant is not a member of the Hambukushu community, and no other evidence have been produced by the Respondents to indicate how their customs should apply to the Applicant. It is submitted that the onus is on the Respondents to establish the jurisdictional facts upon which they would exercise authority and jurisdiction over the Applicant. The fact that the Applicant operates a business in the area of the Hambukushu is not sufficient to establish that jurisdictional requirement.

Section 14(b) of the Traditional Act states:

“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–

(b) the customary law of a traditional community shall only apply to the members of that traditional community and to any person who is not a member of that traditional community, but who by his or her conduct or consent submits himself or herself to the customary law of that traditional community.”

[22] Mr Ncube on the other hand submitted on behalf of the respondents that ‘applicant had submitted himself to the jurisdiction of the Hambukushu Traditional Authority by concluding a lease for the purposes of operating a tourist lodge with such authority. In this regard it was submitted further:

‘For the Applicant to now claim that he is not subject to the laws of the Hambukushus and is not answerable to the Traditional Authority is a paradox which is not justified by his argument. Land is allocated to the Applicant by the Second Respondent and the Communal Land Board. The Applicant seeks to conveniently use the excuse that he is not a member of the Hambukushu Community when he dealt with the Traditional Authority that plays a pivotal role in the allocation of communal land rights for his lodge.

He cannot wean himself from the customary practices of the Hambukushu Traditional Authority. For the Applicant to base his Application for an interdict to the indecency on proceedings which were conducted in a fair manner in relation to stripping a woman naked is baseless. The Applicant cannot seek to exclude himself from the customs of the Hambukushu Traditional Authority when it was through the customs of that community that he gained the lodges.

It should be re-emphasized that the Applicant labours under the misconception that he is not a member of the community of the Hambukushu’s. This is a great contradiction because the Applicant states in his founding papers that he has resided in the area for 20 years.

In the definition section of the Traditional Authorities Act 25 of 2000 a communal area is defined as: “the geographic area habitually inhabited by a specific traditional authority, excluding any local authority area as defined in section 1 of the Local Authorities Act 23 of 1992”.

Further, a member in relation to a traditional authority means “amongst others a person who by any other circumstance assimilates the culture and traditions of that traditional community and has been accepted by the traditional community as a member thereof”.

According to Wikipedia, assimilation refers to that process in which another ethnic group settles into a new land and thus supports or promotes the customs and attitudes of the

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culture in existence. The Meriam-Webster dictionary defines assimilation as the process by which new facts or a response to new situations is in conformity with what is already available to the community.

It is therefore clear from the circumstances of this case that the Applicant fully acquiesced by conduct to the customs of the community, noting the Traditional Authority in tandem with the communal land board granted him the right to lease communal land.

He also did not object to its jurisdiction when proceedings commenced. The applicant paid a fine and this conduct estops him from denying the version of the court.'

[23] Accordingly - when the matter came up for hearing – the court raised with the parties the question whether or not the issue of whether or not the applicant could be competently tried by a traditional court should not be conveniently determined *in limine* as a finding in favour of the applicant would obviate the need to determine all the other issues raised in this review.

[24] It was in such circumstances that the court ruled that argument was to be limited to this issue.

[25] Mr Ncube in oral argument reiterated that the applicant was assimilated into, and thus was to be regarded as part of the traditional community of the Hambakushu, that he subjected himself to the hearing of the traditional court, to which hearing he went armed with a digital recorder and that he was therefore aware that would be tried. It was also clear, so the argument went further, that he participated in the proceedings whereafter he was advised to pay a fine which he did without protest.

[26] He also placed reliance on that part of the definition of the word 'member' as contained in section 1 of the Traditional Authorities Act 2000 on the strength of

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which he submitted that the applicant had become a member of the Hambakushu traditional community and had thus become subject to the authority and jurisdiction of the traditional court.

[27] Mr Tjombe on the other hand countered these arguments by pointing out that the so-called submission to the traditional courts authority had occurred under duress and that applicant had thus not willingly submitted himself to such proceedings. He also did not go knowingly, as he was not informed of what he was to face, and once there, he could not leave, as he took the threats made against him seriously. Mr Tjombe thus made the point that the applicant could never be regarded as having submitted himself to the first and second respondents' jurisdiction feely and voluntarily while under duress. As the applicant had thus not subjected himself out of his own free volition to the authority of the first and second respondent and as he had never become a member of the traditional community of the Hambakushu the proceedings in the traditional court amounted to a nullity which were liable to be set aside in toto.

[28] The issues so raised obviously have to be determined mainly with reference to the provisions of the Traditional Authorities Act, Act 25 of 2000 – (hereinafter referred to as 'the Act').

[29] It appears firstly from the preamble[3] that the Act was also intended to define the powers, duties and functions of traditional authorities and traditional leaders.

[30] These powers and duties are then regulated in section 3 of the Act.

[31] The relevant parts then provide:

[3] It reads: '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.'

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‘3 Powers, duties and functions of traditional authorities and members thereof

(1) Subject to section 16,[4] the functions of a traditional authority, in relation to the traditional community which it leads, shall be to promote peace and welfare amongst the members of that community, supervise and ensure the observance of the customary law of that community by its members, and in particular to-

(a) …

(b) administer and execute the customary law of that traditional community;

(c) … (g)

(h) perform any other function as may be conferred upon it by law or custom.

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

(a) … (d)

(e) to respect the culture, customs and language of any person who resides within the communal area of that traditional authority, but who is not a member of the traditional community which such member leads.

(3) In the performance of its duties and functions under this Act, a traditional authority may-

(a) …

(b) hear and settle disputes between the members of the traditional community in accordance with the customary law of that community; …’.

(my underlining)

[4]16 .A traditional authority shall in the exercise of its powers and the performance of its duties and functions under customary law or as specified in this Act give support to the policies of the Government, regional councils and local authority councils and refrain from any act which undermines the authority of those institutions.

[32] It emerges also that all powers of a traditional authority are to be exercised in respect of the 'members of a traditional community' only. A distinction is also made between such 'members' and 'non-members' of such traditional community, as appears from sub-section 3(2) (e).

[33] The terms 'member' and 'traditional community' are defined in section 1 of the Act as follows:

"member", in relation to-

(a) a traditional community, means a person either or both of whose parents belong to that traditional community, and includes any other person who by marriage to or adoption by a member of that traditional community or by any other circumstance has assimilated the culture and traditions of that traditional community and has been accepted by the traditional community as a member thereof; …

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

[34] It is convenient to commence the analysis of the impact of these definitions on the powers conferred by section 3 with reference to the definition of the word 'traditional community'.

[35] By way of that definition a traditional community is thus comprised of 'indigenous homogeneous, endogamous social 'groups' of persons, which 'groups' in turn are comprised of 'families' derived from exogamous clans which share a

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common ancestry, language, cultural heritage, customs and traditions. *(my emphasis)*

[36] In addition such ‘groups of families’ must recognise a common traditional authority and inhabit a common communal area. Such ‘groups of families’ may also include members of that ‘group’ residing outside the common communal area.

[37] In conjunction with this the legislature has delineated, through definition, who the ‘members’ of the referred to ‘indigenous homogeneous, endogamous social ‘groups of persons’ would be, which ‘groups’, in turn would be comprised of ‘families’ derived from exogamous clans in relation to a traditional community and such ‘families’ members’.

[38] In order to qualify as a ‘member’ of such a ‘group’ comprised of ‘families’ a person would at least have to have one parent belonging to a particular traditional community, which ‘category’ of persons would also include any other person who by marriage to or adoption by a member of that traditional community would have assimilated the culture and traditions of that traditional community and who has been accepted by the traditional community as a ‘member’ thereof, which ‘category’ of persons would also include such persons, who by any other circumstance, would have assimilated the culture and traditions of that traditional community and who have been accepted by the traditional community as a member thereof.

[39] In addition to persons with at least one parent belonging to a particular traditional community it would appear that the legislature has created two further categories of persons as falling within the ambit of this definition.

[40] The first additional category of persons would also include – persons –

a) who, by marriage or adoption, by a member of that traditional community, would have assimilated the culture and traditions of that traditional community

and

b) who have been accepted by the traditional community as a 'member' thereof.

[41] The second additional category of persons contemplated by the definition is comprised of persons –

a) who, by any other circumstance, would have assimilated the culture and traditions of that traditional community

and

b) who have been accepted by the traditional community as a 'member' thereof.

[42] It is common cause that the applicant is of Scottish descent. He did thus not originally belong to the indigenous homogeneous, endogamous social 'groups' of persons, which 'groups' in turn are comprised of 'families' derived from exogamous clans which share the common ancestry, language, cultural heritage, customs and traditions of the Hambakushu. There is also no evidence that he has at least one parent belonging to the Hambakushu community or that he ever became part of the Hambakushu community by marriage or adoption, as a result of which marriage or adoption he assimilated the culture and traditions of the Hambakushu. Applicant thus cannot fall into these categories.

[43] It is obvious that the applicant can possibly only fall into the second additional category by virtue of 'any other circumstance', as argued by Mr Ncube.

[44] In my view however Mr Tjombe is correct in his submission that the mere fact – that the applicant has been operating a lodge in the area for some 20 years and which he occupies by virtue of a lease, which he has concluded with the second respondent – is not sufficient – on its own - to prove that the applicant has assimilated the culture and traditions of the Hambakushu community. There is simply no other fact or circumstance on record which proves, or from which the inference can be drawn that the applicant has assimilated the culture and traditions of the Hambakushu traditional community in any manner whatsoever. On the contrary, he does not even understand and thus does not speak the Hambakushu language.

[45] Even if I were wrong in coming to this conclusion Mr Ncube's argument in any event also falls short on the second leg, namely, in regard to the further requirement, that the applicant also has to be shown to have been accepted by the Hambakushu traditional community as a member thereof. Also in this regard not a single shred of evidence was tendered.

[46] It must therefore be concluded on the facts that the applicant cannot be regarded as a member[5] of the Hambakushu traditional community[6] and as being a person in respect of which the powers and functions as set out in section 3 of the Traditional Authorities Act 2000 could have been exercised.

[47] The respondents thus had no authority and jurisdiction in terms of that Act to subject the applicant to a hearing before a traditional court.

[5] As defined
[6] As defined

[48] Although this aspect was not raised or argued – the only question which remains is whether the respondents - by virtue of their customary law - would have had the authority and jurisdiction to subject and try the applicant in their traditional court?

[49] The short answer to this question is supplied by the definition of "customary law" - as also contained in section 1 of the Act - which defines 'customary law' to mean *'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*.' *(my underlining)*

[50] The Traditional Authorities Act 2000 is clearly such 'other written law applicable in Namibia'. Its terms - as I have endeavoured to demonstrate above - limit the authority and jurisdiction of traditional courts to the 'members' of a 'traditional community', as defined. Any 'customary law' conferring such authority and jurisdiction *vis a vis* 'non-members' of a traditional community would thus be in conflict with the 'written law', and thus cannot prevail.

[51] In my view the dispute in this matter had to be pursued and ventilated in the civil and/or criminal courts of the State as contemplated in Chapter 9 the Namibian Constitution.

[52] It follows that the complained of proceedings are a nullity and fall to be set aside *in toto*.

[53] In view of these findings the need to decide whether or not applicant subjected himself to the proceedings before the traditional court freely and voluntarily

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or under duress falls away as it is obvious that one cannot subject oneself to something which amounts to a nullity.

[54] Given the circumstances sketched above - and despite the protestations of innocence – which are to the greatest extent neutralized by virtue of the factors set out in paragraph [12] supra, I also believe that the conduct of at least the first to third respondents is deserving of censure as a result of which I am also prepared to grant the costs order as prayed for.

[55] The application is granted in the following terms:

1. The decision of the First and Second Respondents to subject the Applicant to a trial or hearing in the Hambukushu Customary Court is declared to be null and void and is hereby reviewed and set aside.

2. The proceedings of the Hambukushu traditional court of 20 February 2010 in respect of the purported trial or hearing of the Applicant, is declared to be null and void and is hereby reviewed and set aside.

3. The First and Second Respondents are ordered to repay to Applicant the amount of N$60,000.00 on or before 30 October 2012 together with interest at the rate of 20% per annum from 2 March 2010 to date or payment.

4. The First and Second Respondents are ordered to return to the Applicant the Applicant's digital reorder as confiscated on 20 February 2010 on or before 30 October 2012.

5. The First to Third Respondents are to pay the costs of this application on an attorney and own client scale.

H GEIER

Judge

APPEARANCES

APPLICANT:	N. TJOMBE Tjombe-Elago Law Firm Inc, Windhoek.
RESPONDENTS:	J. NCUBE Government Attorneys, Windhoek