

EMMANUEL DUMBU
versus
THE MINISTER OF LOCAL GOVERNMENT
PUBLIC WORKS AND NATIONAL HOUSING

And
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE

And
MUTUBEDE MUDAVANHU

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 13 JULY and 15 DECEMBER 2023

C. Ndlovu, for Applicant
T. Undenge, for 1st & 2nd Respondents
FRT Chakabuda for 3rd Respondent

OPPOSED APPLICATION

ZISENGWE J: The ascension and subsequent appointment of an individual to the relatively lofty position of Chief is seldom smooth-sailing. It is one that is almost always mired in intractable controversy. Part of the problem lies with the heavy reliance of the succession matrix on oral tradition which itself is prone to distortion, embellishment and plain memory lapses on the part of its carriers. In any event lineages are hardly ever linear and straightforward and are susceptible to severe distortions.

In this application, Applicant seeks an order setting aside the appointment of the 3rd respondent as Chief Mugabe of Masvingo province. He charges that his appointment is irregular, illegitimate and unconstitutional. He claims that he is the legitimate heir to the throne. He alleges in this regard that the appointment of 3rd respondent flouted what he termed the collateral system of rotation “among 5 houses each with a right to the throne at any given time these houses are the Dumbu, Chipfunhu, Haruzivishe, Chikanhe (Muzondo) and Mudavanhu

house. According to him the houses take turns in succeeding to the throne starting with the eldest home to the youngest.

He further averred on this regard that the 3rd respondent was irregularly appointed after he had served about 13 years as an acting chief following the demise of one Mute Mudavanhu from the Mudavanhu house. He avers that the incessant complaints raised by the affected people including the applicant over the prolonged tenure of the 3rd respondent as acting chief initially went unheeded but eventually the Provincial Assembly of Chiefs seconded three chiefs from the province (namely Chief Nhema, Chitanga and Serima) to resolve the matter. This culminated in a meeting held in October 2022 held to deliberate on the appointment of substantive Chief Mugabe. Most importantly, he averred that at that August meeting where all 5 homes were represented it was agreed that the Dumbu home to which he belongs was to succeed from the Mudavanhu house and when the latte home was requested to name the person to take up the throne, he was identified as the one and according to him, therefore, he was duly nominated as the heir to the throne.

To his dismay, however, he learnt on 13 February 2023 that the 3rd respondent had been appointed Chief Mugabe. According to applicant this prompted the other homes to register their objection to the appointment of 3rd respondent as Chief Mugabe.

He then sought to investigate the circumstances leading to what he perceives to be an irregular and illegitimate appointment only to discover that the 1st respondent had appointed the 3rd respondent ostensibly on the basis of the proviso to Section 3 (2)(b) of the Traditional Leaders Act, [Chapter 29:17] which proviso provides that if the appropriate persons fail to nominate a candidate for appointment within two years after the office of Chief became vacant, the 1st respondent in consultation with the appropriate persons can appoint any person as chief.

He avers that the aforementioned houses with a stake in the chieftainship was never consulted before such decision was arrived at but more particularly that S283 of the Constitution lays down the procedure for the appointment of chief this procedure according to him involves the Provincial assembly of Chiefs making recommendations to the National council of Chiefs before the Minister responsible for traditional leaders can appoint anyone to the position of Chief. He therefore controls that there being no recommendation by the Provincial Assembly of Chiefs the appointment by the 1st & 2nd respondents were ultra vires the Constitutional provision.

Amongst several other documents attached to the application, the applicant attached a letter dated 6 February 2023 authorised by one P. Rashai of the office of the Attorney General. In that letter, the author expresses the opinion that the previous advice her office had rendered recommending the appointment of the 3rd respondent was wrong as it was erroneously based S3(2) (b) of the Traditional Leaders Act [*Chapter 29:17*] yet that provision had been overtaken by S283(a)(ii) of the Constitution. She concluded her letter by imploring the Minister to advise the President not to appoint the 3rd respondent should that not have been done already.

The applicant therefore seeks an order in the following terms:

IT IS ORDERED THAT:

- a) The appointment of the 3rd Respondent as the substantive Chief Mugabe be and is hereby set aside.
- b) The 1st and 2nd Respondents are ordered to appoint the substantive Chief Mugabe in accordance with the provisions of Section 283 of the Constitution of Zimbabwe and the outcome of meeting held on 31st October 2023 at Chikarudzo Business Centre Creche by the Mugabe Clan and representatives from the Provincial Assembly of Chiefs.
- c) The respondents are ordered to pay costs on an attorney-client scale jointly and severally the one paying the other to be absolved.

Whereas the 1st and 3rd respondents filed opposing affidavits wherein they sternly opposed the application, the 2nd respondent ‘a notice of filing’ indicating that it would abide by the decision of the court. It was also stated there as that the 2nd respondent sets upon the recommendation from the relevant persons and therefore was not in a position to answer to the allegations raised by the main protagonists to the matter. The regularity or otherwise of this notice of filing would subsequently become the subject of intense contestation. But more on that later.

The incumbent Minister of Local Government and Public works, July Moyo deposed to an affidavit on behalf of the 1st and 2nd respondents. In it he categorically disputed the applicants’ averments.

In short he denied any impropriety on the process leading up to the appointment of the 3rd respondent to the position of Chief Mugabe. He referred to a series of meetings convened with a view to appointing substantive Chief Mugabe. Although the chronology of the meetings as narrated by the deponent is somewhat unclear one deciphers the following meetings on their chronological order:

The first meeting was held on the 1st of September 2017 wherein one Zacchaeus Mugabe was nominated to ascend to the position of Chief. However Zacchaeus appointment was still-born when Chief Muringa who plays what he referred to as the “*Zibaba*” (loosely translated to ‘overseer’) role disputed his appointment.

A few weeks later, on the 16th of October to be precise another meeting with the same agenda was convened. According to Minister Moyo, on that occasion the five houses pointed out that the other four houses save for the Mudavanhu house, had enjoyed the throne twice each and that therefore it was its (i.e. Mudavanhu’s) turn to ascend to the throne.

He attached minutes of that meeting wherein it was resolved that the Mudavanhu house would retreat and decide which of their number would be selected and put forward for appointment. To that end they were given up to 23 October 2017 to identify that individual whose name would be forwarded to Chief Murinye. Consequently it was on that basis that the name of the 3rd respondent was identified and forwarded to him recommending his appointment. According to him this meeting of the 16th of October 2017 was the last properly minuted meeting whose outcome culminated on the appointment of the 3rd respondent.

As for the meeting of the 31st of October 2022, which the applicant heavily relies upon, it was the 1st respondents’ position that this meeting was disregarded as it was “not properly constituted as there are no minutes and was not reported at any provincial Assembly for recommendation”. According to 1st respondent the culmination of those meetings was a resolution to the effect that the 3rd respondent. Most importantly, however, it was 1st respondent’s position that what stalled the appointment of the 3rd respondent was the impasse between the Provincial Assembly of Chiefs on the one hand and the National Council of Chiefs on the other on who was to be appointed. Faced with that deadlock, 2nd respondent proceeded to appoint the 3rd respondent after paying proper regard to the selection meetings which had been held.

For his part the 3rd respondent defended his appointment. In a word he averred that it was resolved at meeting held on October 2017 that the Mudavanhu house to which he belongs had but her to get the short end of the stick, so to speak on the succession matrix as it had only enjoyed one stint on the throne against 2 or more stints of the other homes.

In his opposing affidavit the 3rd respondent castigated the applicant for deliberately withholding evidence of the meetings which preceded the Chikarudzo meeting and implored the court to dismiss the application on that basis.

Most pertinently however the 3rd respondent averred that following a few abortive nomination process the meeting of the 16th of October 2017 which meeting according to him was properly constituted, it was resolved that was to be occupied by someone from Mudavanhu home. He avers that he was subsequently nominated by his home. However, according to him his appointment was frustrated by some members of the National Chiefs Council who sat in the Masvingo Provincial assembly of Chiefs who instead of forwarding his nomination to the appointing authority decided to order another selection process. He maintains that meeting was a nullity as it was unsanctioned. He characterised the Chikarudzo meeting as a quarrel of the NCC with the central government.

He insisted that there was nothing irregular about his appointment as it was done in terms of the traditional leaders Act given that no Act of parliament was yet in place to regulate procedures on the National council of Chiefs and the Provincial Assemblies of Chiefs.

He also questioned Ms Rashai's motives in authoring the letter suggesting as he does that she(i.e. Ms Rashai) was colliding with the applicant as the liming of her letter roughly ...with the application.

The 3rd respondent filed a supporting affidavit by one Trust Chikamhi, a member of the Chikamhi house the letter which as earlier stated is one of the 5 houses of the Mugabe chieftainship. In a word he avers that the 3rd respondents appointment to the position of Chief Mugabe was legitimate and above board. He explained that his appointment was delayed by the intransigence of some of the members of the NCC with their own Untener motives.

He therefore branded the Chikarudzo meeting of, 31st October 2022 as unnecessary, unlawful unsanctioned and unprocedural given that the succession issue has been finally resolved by the October 2017 meeting.

The applicant filed two answering affidavits, one filed on the 16 March 2023 and the other filed about a month later, on the 20th of April 2023 to be exact. The propriety of filing two answering affidavits would be the subject of intense disputation, but more of that later.

In the first answering affidavit the applicant dismissed the minutes of the 16th of October 2017 meeting on several grounds including the allegation that it was not signed nor confirmed by 2 Chiefs who were in attendance and that it was only stamped by the District Administrator over a year later.

He however insisted that the Chikarudzo meeting was sanctioned (as evidenced by the attendance of Chiefs), and above all in terms of the Constitution. He also defended Ms Rashai's letter and averred that her interpretation of the Constitution on this regard was sound. Finally he indicated that the non-opposition of the application by the 2nd respondent is demonstrative of the fact that he does not oppose the application.

In his second answering affidavit, the applicant addresses the 1st respondents opposing affidavit. He reiterated his criticism of the 1st respondent for acting on the basis of the provisions Traditional Leaders Act, as they relate to the appointment of Chiefs when those provisions were inconsistent with the Constitution of Zimbabwe.

He further referred to the meeting of the 11th of February 2022 at Harare hotel when it was stated that the selection of the 3rd respondent was awaited pending the recommendation by the Provincial Assembly. Further he averred that a meeting of the Provincial Assembly did not confirm the 3rd respondent's appointment and ordered that the selection process be re-done which in turn led to the Chikarudzo meeting of 31 October 2022.

He accused the 1st respondent of acting in bad faith because according to him on the one hand he is the one who authorised the meeting of the 31st of October 2022 yet he seeks distance himself from that meeting.

Ultimately however, he insisted that the appointment of the 3rd respondent was never authorised by the Provincial assembly of Chiefs hence his subsequent appointment was not legally valid.

The 3rd respondent raised a slew of preliminary points whose resolution is what this judgment is devoted to. In summary the points in limine are as follows,

- a) Absence of locus standi on the part of the 2nd respondent for failing to file a notice of opposition and opposing affidavits.
- b) That matter is moot given that 3rd respondent has already been appointed.
- c) That the applicant is non-suited for failing to obtain prior leave to sue the 2nd respondent.
- d) Absence of jurisdiction on the part of the High court given that the act of appointing the 3rd respondent as substantive Chief Mugabe, the 2nd respondent executed a constitutional mandate. Therefore, that the High Court's jurisdiction was ousted as only the Constitutional court has the power to entertain the present dispute.

The 1st respondent initially raised a preliminary point alleging that the application was defective for want of the appellant to exhaust internal remedies. However this point *in limine* was soon abandoned.

Similarly, the 3rd respondent initially moved the court to find that the 1st respondent had no *locus standi* for failing to file a notice of opposition and opposing affidavit. However it soon became apparent that be the 1st respondent had in fact made a chamber application for upliftment of bar operating against him in this regard and to be permitted to file his opposing papers out of time. Ultimately the parties agreed that such condonation be granted with the result that the 1st respondents' opposing papers were now before the court. Resultantly this objection fell away.

Jurisdiction

Although the 3rd respondent attacked this courts' jurisdiction vis-à-vis disputes relating to the appointment of Chiefs from many different angles, this issue has been authoritatively decided by the Supreme Court.

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Marange v Marange & Others SC 1/21

Ultimately on this point, therefore, I find that this court is imbued with the requisite jurisdiction to entertain the dispute and accordingly dismiss this point *in limine*.

Leave to sue 2nd Respondent not sought

Rule 12 (21) of the High Court Rules, 2021 provides as follows;

“No summons or other civil process of the court may be sued out against the President or any of the judges of the High Court without leave of court granted on court application being made for that purpose.”

It is common cause that no such leave was sought and the question is therefore whether that renders the application fatally defective, Whereas the 3rd respondent on the basis of the authorities cited (*President of the Republic of Zimbabwe R.G Mugabe N.O, 11 Others v Morgan Richard Tsvangirai SC 21/17; Vernon Christopher Edward Nicole v Minister of Lands Agriculture & Rural Resettlement & The Honourable Mr justice Hlatshwayo HH 34/2003 & Museredza & 303 Others v Minister of Lands & 10 Others CCZ 01/22*), argued that the failure to obtain leave to sue the 2nd respondent rendered the application defective, the applicant argued contrariwise.

In this regard the applicant averred that the use of the word “*May*” in the provision means the provision is merely permissive and not peremptory. Further the applicant contended that this provision can only be relied upon by the 2nd Respondent and not by a third party.

The rationale behind Rule 12(21) was explained in *The President of Zimbabwe Robert Gabriel Mugabe N.O & Others v Tsvangirai* (in his official capacity as the Prime Minister of the Republic of Zimbabwe and (in his personal capacity) SC 21/17, namely to protect the President but also judges of the High Court from frivorous and vexatious litigation.

The provision therefore serves as a sentry to sieve out frivolous and vexatious litigation against the President. It is not intended to protect third parties such as the 3rd respondent. The fact that the 2nd respondent saw it fit not to invoke this provision to his protection meant that he tacitly waived his rights thereto. The 3rd respondent cannot purport to spring to the 2nd respondents’ and by insisting on strict observance of this rule. This point *in limine* is equally without merit and is hereby dismissed.

The fate of the 2nd respondents “*notice of filing*” Nothing much turns on the inclusion or exclusion of the 2nd respondent’s notice of filing. The 2nd Respondent was non-committal and opted to abide by whatever decision the court pronounced. He did not go so far as supporting the

application which would otherwise have been impermissible see: *Chamisa v Mnangagwa* CCZ 21/19.

The rules do not specifically provide for a procedure to be followed when a respondent elects not to enter the fray, so to speak, and elects to abide by the decision of the court. That lacuna is filled in by practice. It is in fact the form which such practice should take which was debated. During oral submission during the hearing of this matter, it was suggested on behalf of the 3rd respondent that it was incumbent upon the applicant to serve the other parties with correspondence of its intention to simply abide by the court's decision. The applicant on the other hand insisted that a notification of the land it filled sufficed for that purpose.

I do not find anything amiss about the notification by the 2nd respondent to the court and the other parties of its position to abide by the decision of the court. The request for the expungement of the 2nd respondent's notice of filing dated 9 March 2023 is hereby dismissed.

MOOTNESS

Here, the 3rd respondent mounts a double pronged attack on the application. Firstly he avers that having been appointed in terms of Section 283 (a) (i) of the Constitution there is no longer any live dispute between the parties i.e. the matter is moot. Secondly he contends that the applicant having failed in his quest to interdict his installation under case No. UCA 08/23, the applicant cannot purport to have a second bite of the cherry because the court has pronounced itself on the matter.

Thokozani Khupe & Another v Parliament of Zimbabwe and Others CCZ20/19 at page 7[See *Beatrice Mtetwa* file].

Regarding the first basis of the objection, what the 3rd respondent misses is that what the applicant is challenging is the very appointment of the 3rd respondent to the position of Chief Mugabe. He seeks a declaratory order setting the appointment. It is incomprehensible how this dispute can be said to be moot. A matter can only be said to be moot if an occurrence takes place after the institution of the claim which serves to..... (See *Beatrice Mtetwa* case).

As for the second leg of the mootness argument, the refusal by the court to decline interdicting the installation of the 3rd respondent (which was only a ceremonial rather than juristic act) did not ipso facto mean that the applicant was debarred from approaching the court

impugning the appointment process. An installation was only a process consequent or secondary to the appointment.

The objection to the application ostensibly on the basis of mootness is hereby dismissed.

EXHAUSTION OF ALTERNATIVE REMEDIES

The thrust of 3rd respondents' argument here is that the applicant ought to have engaged the Provincial Assembly of Chiefs and the National Council of Chiefs before instituting legal proceedings against the respondents. Reliance was placed on the following passage from the case of *Milton Munodawafa v DA Masvingo & 4 Others* HH 571/15 where the following was said at page 4 of the cyclostyled judgment:

"As regards to disputes, Section 283 (c) (ii) makes it clear that the president must deal with such dispute and that the recommendation must come to him through the provincial Assembly of Chiefs actively plays a role in the resolution of the dispute in accordance with the traditional practices and traditions of the communities concerned. It is their efforts or recommendations which are then communicated to the Minister who in turn communicates with the President for action.

As regards the appointment, removal and suspension of a chief, as distinct from any dispute, Section 283 (c) (i) stipulates that the President is again the one who must action on the recommendation of the following: the Provincial Assembly of Chiefs through the National Council of Chiefs and the Minister responsible for chiefs. The starting point is therefore at the Provincial level.

Among the duties of the National and Provincial Council of Chiefs as stipulated in Section 286(1) of the New Constitution is "to facilitate the settlement of dispute between and concerning traditional leaders."

The position articulated on behalf of the applicant was that engagements with the Provincial Assembly of Chiefs and the National Council of Chiefs was futile hence he resorted to litigation.

It is a well-established principle that any alternative remedy must be one that provides effective relief See *Girjac Services (Pvt) Ltd v Mudzingwa* 1999 (1) ZLR 243 (S) at 249 C-F where the following was said

"Let me therefore repeat what I stated in Moyo v Gwindigwi NO. & Another 2011 (2) ZLR 368 (H) 371E:

“ In a line of cases, this court has determined that it will be very slow to exercise its general review jurisdiction in a situation where a litigant has not exhausted available domestic remedies before approaching the courts unless good reasons are shown for making an early approach”(emphasis mine).

In my view there is merit in the applicant’s contention that faced with the intractable polarised position between the two key decision making bodies, namely the Provincial Assembly of Chiefs and the National Council of Chiefs, it would have been futile to go back to them for a resolution of this dispute. In fact so intractable was the impasse between these bodies that the appointment of the 3rd respondent was done on some other basis other than by the recommendation of those two bodies. Approaching these same bodies for redress was unlikely to yield any meaningful outcome. It was therefore well –within the applicant’s rights to institute legal proceedings.

The final point *in limine* therefore suffers the same fate as the preceding one and is hereby dismissed.

All the points *in limine* having therefore fallen by the wayside an order directing that the matter proceeds to the merits.

Accordingly it is hereby ordered as follows;

- a) All the points in limine raised by the 3rd respondent are hereby dismissed with costs.
- b) The matter to proceed to the merits of the application and the applicant to cause the matter to be set down for hearing on an appropriate date.

ZISENGWE J.....

*Civil Division of the Attorney General's Office; 1st & 2nd respondent's legal practitioners.
Mashayamombe & Company; 3rd Respondents legal Practitioners.*