KUFANDADA DZOBO
versus
MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS
and
THE PRESIDENT OF ZIMBABWE N.O
and
MANICALAND PROVINCIAL ASSESMBLY OF CHIEFS
and
NATIONAL COUNCIL OF CHIEFS
and
CLAYTON MUNYARARI ZIMUNYA

HIGH COURT OF ZIMBABWE
SIZIBA J
MUTARE, 19 March 2025 & 26 March 2025

OPPOSED APPLICATION

Mr *V. Chinzamba*, for the applicant
Mr *P. Garwe* for the first to the fourth respondent
Mrs *M. Mandingwa* for the fifth respondent

SIZIBA J**:**

INTRODUCTION

1. The applicant seeks to review the decision of the first and second respondents in appointing the fifth respondent as substantive chief Zimunya. The grounds of review as articulated by the applicant on the face of the application are as follows:

   (a) The first respondent committed a gross irregularity by recommending the appointment of fifth respondent by the second respondent contrary to the advice of the third and fourth respondents and without the involvement of the Kingmakers.

   (b) The appointment of the fifth respondent as Chief Zimunya was unprocedural, unlawful and not in accordance with the customs and usages of the Zimunya people and consequently void.

(c) The first respondent committed a gross irregularity by failing to timeously forward Applicant's nomination to second respondent for appointment as Substantive Chief Zimunya.

(d) The declaration by the first respondent that only the Muchakaruka family is eligible to ascend to the Zimunya Chieftainship is not supported by history and is not in accordance with the customs and usages of the Zimunya people.

2. The relief sought by the applicant as appears from the face of his application is as follows:

(a) The recommendation of the fifth respondent for appointment as Chief Zimunya by the first respondent to the second respondent be and is hereby declared to be flawed, unlawful and unconstitutional.

(b) The actions of the first respondent in rejecting the advice of the third and fourth respondent and proceeding to initiate his own process of choosing Chief Zimunya without involving the Kingmakers be and are hereby declared to be unprocedural, unlawful and unconstitutional.

(c) The finding by the first respondent that only the Muchakaruka Family was eligible for the Zimunya Chieftainship was not in accordance with the customs and usages of the Zimunya people and consequently wrong and unlawful and is hereby declared to be incorrect.

(d) The Appointment of the fifth respondent as Chief Zimunya was unprocedural, unconstitutional, unlawful and not in accordance with the customs and usages of the Zimunya people and consequently void.

(e) The declaration by the first respondent that only the Muchakaruka family is eligible to ascend to the Zimunya Chieftainship is not supported by history and is not in accordance with the customs and usages of the Zimunya people.

3. The applicant has also claimed costs at a high scale against the respondents.

THE APPLICANT'S CASE

4. The gravamen of the applicant's case is that the first respondent acted unconstitutionally and irregularly in failing to forward his name or recommending him to the second respondent for appointment as Chief Zimunya. According to him, after he had been nominated by the clan and seconded by the third and fourth respondents, he ought to have been appointed Chief Zimunya instead of the fifth respondent.

5. After the death of the late Chinouya Bvirindi who was then Chief Zimunya in 2007, the post of Chief Zimunya fell vacant and his son Kiben Bvirindi acted until the processes which led to the appointment of the fifth respondent as substantive Chief Zimunya by the second respondent on 8 May 2004.

6. According to the applicant, there are three houses or families that are privileged to choose the Chief in the Zimunya clan and these are the Mungwende, the Muchakaruka and the Mwoyounosvotwa. The applicant is from the Mungwende house whereas the fifth respondent is from the Muchakaruka house. The applicant contends that there were twenty-two meetings which were convened by the Kingmakers (Vagadzi) of the clan and these all culminated in his nomination as Chief Zimunya. The applicant's nomination was challenged by the then acting Chief Kiben Bvirindi and the Muchakaruka house. The two major objections were that the applicant's house had committed a sin or crime of murder and they had not yet been cleansed or purged. According to the Muchakaruka house, they were the only ones eligible to the Zimunya chieftainship. The third and fourth respondents upheld applicant's nomination. A research team was tasked by the first respondent which concluded that only the Muchakaruka house was eligible for the chieftainship and the nominations were done

from that house without involvement of the Kingmakers (Vagadzi) of the clan and the fifth respondent was nominated and appointed as Chief.

7. The applicant further contends that there is a pending application under HC 122/23 to compel the second respondent to process his appointment after he was nominated as Chief Zimunya. He also contends that under HCMT91/21, he obtained an order interdicting the meetings to choose another chief before his nomination had been finalized.

8. The applicant contends also that the first respondent has rejected the recommendations of the third and fourth respondents and chosen a Chief without involving the Kingmakers (Vagadzi) of the clan. His case is that the first respondent is obliged to act on the advices of the fourth respondent when he recommends a person for appointment. According to the applicant, the Mungwende house was cleansed by Chief Chinouya Bvirindi but the Muchakaruka house had boycotted the ceremony as they did not recognize his chieftainship.

THE FIFTH RESPONDENT'S CASE

9. The fifth respondent's case is that the applicant is not eligible for the Zimunya Chieftainship because he is a brother to Zimunya and not a Zimunya. He contends that the founder of Chief Zimunya was the late Muchakaruka who, together with Mungwende and Mwoyounosvotwa were sons of the late Mukukudzi who was not a chief. He further contends that applicant's house was not cleansed. His case is that when the applicant was nominated as chief, his house objected to his nomination and there were administrative processes that led to his nomination and appointment. According to him, Muchakaruka did not inherit the chieftainship from his father but he became chief on his own merit in 1857.

THE FIRST TO THE FOURTH RESPONDENT'S CASE

10. These respondents, according to the affidavit deposed to by the Permanent Secretary in the Ministry of Local Government and Public Works, contend that after the complaints

were lodged regarding the applicant's nomination, the second respondent constituted a research team which concluded that Muchakaruka was the founder of the chieftainship and such findings were presented to the third respondent on 3 February 2023 and on 15 June 2023, a selection meeting was held which culminated in the nomination of the fifth respondent. The results of this nomination were not tabled upon the fourth respondent since it stood by its earlier decision to uphold applicant's nomination.

SUBMISSIONS BY COUNSEL

11. Mr *Chinzamba* submitted that he abided by his heads of argument for the applicant on the point *in limine*. The point in *limine* which he had raised was an objection to the first to fourth respondent's opposing affidavit which was deposed to by John Basera in his capacity as the Permanent Secretary in the ministry of Local Government and Public Works. The applicant's position was that such affidavit constituted inadmissible hearsay in respect of all those respondents who were all independent persons with capacity to speak on their own.

12. In his response on the point in *limine*, Mr *Garwe* submitted that the deponent was well able to properly represent all those respondents by virtue of his office as the custodian of the ministry save for the second respondent.

13. In reply, Mr *Chinzamba* submitted that the third and fourth respondents were both creatures of the Constitution with capacity to stand on their own and that they could not be represented without authorization. He also submitted that there was no affidavit from the minister to authorize the deponent to represent him.

14. After hearing these arguments, I reserved judgment on the points in *limine* and invited the parties to address me on the merits.

15. Mr *Chinzamba* submitted again that he would abide by the heads of argument. In emphasis, he submitted that the issue for determination was whether the decision of the first respondent in failing to act on the recommendation of the third and fourth respondents was irregular, unreasonable and unconstitutional. According to him, the

first respondent was bound by the recommendations of these respondents who had upheld the applicant's nomination and he therefore ought to have forwarded the applicant's name to the second respondent for appointment as Chief Zimunya instead of constituting a research team which culminated in the nomination and appointment of the fifth respondent as Chief Zimunya. *Mr Chinzamba* made three important concessions. The first one was that he was not asking this court to decide the question of whether it was the Muchakaruka house alone which was entitled to the chieftainship or the three houses including the Mungwende house and the Mwoyounosvotwa. He also conceded that he was not asking this court to decide whether the Mungwende house had been cleansed from its sins of committing murder to their father or not. He conceded that those were issues where this court should withhold its jurisdiction and defer to the relevant authorities. His submission was that the third and fourth respondents had already pronounced those two issues in favour of the applicant as per the minutes attached to the applicant's founding affidavit. He said that the third and fourth respondents did not sanction the research that was spearheaded by the first respondent. Counsel lamented that the first respondent had then interfered with the process. He conceded that after the applicant had been nominated, there had been an appeal to the third respondent but his submission was that the third respondent and the fourth respondent resolved the challenge in applicant's favour. The third concession that counsel made was that the second respondent was not bound by the third and fourth respondent's recommendations in appointing a Chief. His submission was that the first respondent had acted on his own in sanctioning the research without the instructions of the second respondent. Counsel conceded that there was no single document showing any communications between the first and second respondents regarding nominations of both the applicant and the fifth respondent but he conceded that the first respondent was the intermediary between the third and fourth respondents and the second respondent.

16. Mr *Garwe*'s submission was that according to the minutes of 23 February 2023, the third respondent had resolved that the Muchakaruka house was the only house that was entitled to the chieftainship and on 15 June 2023, it sent a team on the ground to do

nominations which culminated at the nomination of the fifth respondent and his subsequent appointment as Chief Zimunya. Counsel submitted that to that extent, the Constitutional requirements had been followed. He said that s 283(c)(ii) did not require the fourth respondent to be consulted in the resolution of the dispute. He submitted that there had been no irregularity in the process.

17. Mrs *Mandingwa* also abided by her heads of argument. She submitted that the issue for determination was whether the recommendation for the appointment of the fifth respondent can be said to be unconstitutional or irregular. She submitted that the third respondent had discharged its Constitutional mandate in terms of s 286(1)(f) of the Constitution. After the fifth respondent filed an appeal to it, the third respondent did a research and the outcome of that research was that only the Muchakaruka house was entitled to the chieftainship and the second respondent discharged his mandate. She submitted that there was therefore no case for review.

18. In reply, Mr *Chinzamba* submitted that the research was foisted upon the third respondent by the first respondent after they had given their position in favour of the applicant.

DETERMINATION OF APLICANT'S POINT *IN LIMINE*

19. The applicant's point in *limine* does not go to the root of fifth respondent's case. Put differently, even if this court were to uphold the point that there is no valid opposing affidavit by the first to the fourth respondents, still this court has to determine the merits of the case as the procedural propriety of fifth respondent's opposition has not been challenged by the applicant.

20. The law concerning the admission of hearsay evidence in motion proceedings is trite in this jurisdiction. Whosoever deposes to an affidavit on behalf of another person or party must demonstrate his authority or permission to do so in the first place and that he is able to swear to the facts thereof as true. Furthermore, he or she must appraise the court why the litigant has not been able to depose to the affidavit and he or she must

disclose the source of his or her information. See *Baron* v *Baron and Others* HB 92 /21. It is apparent that the deponent to the first to the fourth respondent's affidavit does not meet these requirements. There is only an averment that the facts spelt out are true without any explanation why those parties who have been dragged to court by the applicant cannot depose to affidavits. The source of the information is also not disclosed. There is no power of attorney or resolution from any of those parties represented which authorizes the deponent to depose to those facts on their behalf. The other crucial point is that since it is only one individual who can validly swear or depose to a single affidavit, it is desirable and more appropriate that the heading of every affidavit should also reflect that it is only one deponent who is swearing to those facts even if there may have been several parties in the notice of opposition and which the deponent may be deposing the facts for. An affidavit deposed to by two or more persons is invalid at law since only one person can testify at any given time before a court of law. See *Mpofu and Another Qhakaza Investments (Pvt) Ltd t/a The Baby Shop and Another* HB 103/10, *S* v *Mavhura* HH 676/20. Given such position, an affidavit headed '*first, second, third and fourth respondent's opposing affidavit*' can only be described as clumsy even if only one deponent has made depositions and signed it. The best heading under those circumstances would be the one that reflects the name of the deponent and it is the deponent who will then explain on whose behalf such facts are being sworn to.

21. Having said that, I must also lament that counsel for the first to the fourth respondent persisted in opposing the applicant's point in *limine* even though he was standing on a clearly non–solid platform. He should have sought condonation because of the importance of this matter. In my view, since most of these affected parties are nominal respondents and government officials who derive no direct benefit from the outcome of this important case and whose position as to what exactly transpired in this disputation is crucial to the court, I am constrained to take the view that it would be in the interests of justice to consider the depositions by the Permanent Secretary of the Ministry of Local Government and Public Works who by virtue of his office is strategically positioned to shed light on the goings on in his ministry which oversees the operations

of the third and fourth respondents and he is a close subordinate of the first respondent. For the same reasons, I also find it proper and helpful to consider Mr *Garwe*'s submissions before this court. For these reasons, I will condone these respondents and dismiss the applicant's point in *limine*.

THE ISSUES FOR DETERMINATION ON THE MERITS

22. The only issues that fall for determination in this matter are whether the recommendation by the first respondent to the second respondent for the appointment of fifth respondent as Chief Zimunya was unconstitutional or irregular.

THE LAW AND ITS APLICATION TO THE CASE

23. The concession by applicant's counsel that this court should not delve into the customary issues of whether or not it is only the Muchakaruka house which is entitled to the chieftainship and also whether it is all the three houses including the Mungwende and Mwoyounosvotwa was properly made. The same goes for the concession that this court should not delve into the issue of whether the Mungwende house was cleansed or not. This position is in line with the now trite position that this court's jurisdiction will be exercised only for review purposes. See *Marange* v *Marange and Others* SC 1/21, *Rutsade* v *Wedzerai and Others* SC 45/22, *Kamuchenje and Others* v *Minister of Local Government and Public Works and Others* HH 443/24 *and Mutasa* v *Mutasa and Others* HMTJ 8/25.

24. The position taken by all counsel that the second respondent is not bound by the recommendations made to him by the third and fourth respondents in appointing a Chief is in accord with the literal construction of both s 283 of the Constitution as well as the substantive provision for the appointment of chiefs which is s 3 of the Traditional Leaders Act [*Chapter 29*:*17*].

25. The law concerning the appointment of Chiefs in Zimbabwe as well as resolution of chieftainship disputes is well articulated in s 283 of the Constitution of Zimbabwe which provides as follows:

*"**283 Appointment and removal of traditional leaders***
An Act of Parliament must provide for the following, in accordance with the prevailing culture, customs, traditions and practices of the communities concerned—
(a) the appointment, suspension, succession and removal of traditional leaders;
(b) the creation and resuscitation of chieftainships; and
(c) the resolution of disputes concerning the appointment, suspension, succession and removal of traditional leaders;
but—
(i) the appointment, removal and suspension of Chiefs must be done by the President on the recommendation of the provincial assembly of Chiefs through the National Council of Chiefs and the Minister responsible for traditional leaders and in accordance with the traditional practices and traditions of the communities concerned;
(ii) disputes concerning the appointment, suspension and removal of traditional leaders must be resolved by the President on the recommendation of the provincial assembly of Chiefs through the Minister responsible for traditional leaders;
(iii) the Act must provide measures to ensure that all these matters are dealt with fairly and without regard to political considerations;
(iv) the Act must provide measures to safeguard the integrity of traditional institutions and their independence from political interference." (My emphasis)

26. The above provisions can be read together with s 3 of the Traditional Leaders Act [*Chapter 29*:*17*] which provides thus:

"***3 Appointment of chiefs***
(1) Subject to subsection (2), the President shall appoint chiefs to preside over communities inhabiting Communal Land and resettlement areas.
(2) In appointing a chief in terms of subsection (1), the President—
(a) shall give due consideration to—
(i) the prevailing customary principles of succession, if any, applicable to the community over which the chief is to preside; and
(ii) the administrative needs of the communities in the area concerned in the interests of good governance; and
(b) wherever practicable, shall appoint a person nominated by the appropriate persons in the community concerned in accordance with the principles referred to in subparagraph (i) of paragraph (a):
Provided that, if the appropriate persons concerned fail to nominate a candidate for appointment as chief within two years after the office of chief became vacant, the Minister, in consultation with the appropriate persons, shall nominate a person for appointment as chief.
(3) Subject to section seven, the President may, where he is of the opinion that good cause exists, remove a chief from office.
(4) Subject to this Act, a chief shall be paid, from moneys appropriated for the purpose by Act of Parliament, such salary, allowances, gratuities and pension as the President may fix from time to time."

27. The present case involves both the question of appointment of a chief as well as resolution of a chieftainship dispute. This therefore triggers the applicability and relevance of s 283(c)(i) and (ii) of the Constitution as well as s 3(1) of the Traditional

Leaders Act. Section 286 (1)(f) of the Constitution which mandates the third respondent to settle chieftainship disputes as well is also relevant. Although the literal reading of s 283 (c)(ii) seems to exclude the fourth respondent in the resolution of chieftainship disputes, where such disputes occur in the context of an appointment of a chief, part (c)(i) of s 283 which requires involvement of the fourth respondent becomes applicable.

28. In this case, it is not in dispute that when the position of Chief Zimunya fell vacant, the applicant was not only nominated but endorsed by the third respondent for recommendation as Chief Zimunya. This aspect comes out clear from the minutes of the meeting held by the third respondent on 3 to 4 July 2020 at Holiday Inn Hotel in Mutare. The fourth respondent also adopted this position. However, the Muchakaruka house and the then acting Chief appealed to the third respondent. After its deliberations on 26 to 28 October 2021 at Manica Sky View Hotel in Mutare, the third respondent still endorsed the applicant's candidature for the chieftainship. After this development, this is where applicant's troubles started and it is very difficult to find out the truth of what then followed.

29. According to the applicant, the first respondent then constituted a research team which concluded that only the Muchakaruka house was eligible for the chieftainship instead of immediately recommending the appointment of the applicant as the Chief. However, according to the fifth respondent, it is the third respondent which did the research in question. According to the Permanent Secretary, when the applicant was nominated, there were complaints made which led to the second respondent constituting a research team which later submitted its findings and which findings were adopted by the third respondent on 23 February 2023.

30. The applicant is skeptical that the research team was constituted or directed by the second respondent. The same kind of skepticism was expressed by the fourth respondent in its minutes of the meeting held on 10 July 2023 at Rainbow Towers in Harare in particular at para 3 where the following sentiments were recorded:

"*Chief Makumbe lamented that the Ministry had sent research teams to revisit the works of the Manicaland Provincial Assembly and the National Council and that he was seeking guidance of the house. Chief Charumbira replied that the actions by the Ministry were unprocedural and unacceptable to the National Council of Chiefs. He then inquired from the Acting Chief Director, Chikovo on what had happened to the issues.*
Mr Chikovo said that the above-mentioned Chieftainships were done including Mutasa, Katerere and Saunyama researches after representations were made to the Minister and the President concerning the recommended candidates. The President had instructed that the Minister meet with all Manicaland Chiefs. The Minister sent research teams to make recommendations to the Provincial Assembly and National Council of Chiefs on Zimunya, Mutambara, Chamutsa Mutasa and Katerere. The research reversed the following chieftainships;
- Zimunya
- Katerere
—Chamutsa
and cleared the Mutasa and Katerere Chieftainships. They then reported to the Manicaland Provincial Assembly who resolved to go back to Zimunya and Mutambara. However, we were surprised that the Chairman for Manicaland was quiring his own recommendation and appealing to the National Council. Chief Charumbira said that he doubts the authenticity of the instruction that the Ministry purports to have been following saying that he knew the President personally and would not do that. He felt that people these days were name dropping the President to suit their unprocedural and personal agendas. He categorically castigated the Ministry for interfering with constitutional processes saying that the actions of the Ministry amount to a nullity at law at the same time adjourning the issue for all Chiefs to comment during provincial reports."

31. It is common cause that the result or outcome of the research was that only the Muchakaruka house was eligible for the chieftainship. It is also common cause that on 23 February 2023 at a meeting held by the third respondent at Manicaland Skyview Hotel in Mutare, the third respondent adopted the position that only the Muchakaruka house was eligible for the chieftainship and that the Mungwende and Mwoyounosvotwa were brothers to Muchakaruka who was the founding Chief Zimunya. The following remarks were recorded under the heading of *Deliberations and Resolutions by PAC*:

"*After some deliberations, the Provincial Assembly of Chiefs resolved to recommend that a team goes back to Zimunya and the selection process be restarted basing on the findings from the research. The team will comprise the following chiefs: Makoni, Hata and Chikukwa.*"

32. It is also common cause that on 15 June 2023, there was a selection meeting in terms of annexure 'I' to the applicant's founding affidavit and this process culminated in the nomination and appointment of the fifth respondent as Chief Zimunya.

33. Given the above findings, it cannot be said that the third and fourth respondents were not involved in the process of the appointment of Chief Zimunya. The fourth respondent endorsed the candidature of the applicant and did not endorse the candidature of the fifth respondent who was nominated and appointed as Chief Zimunya thereafter. The third respondent is the one that adopted the result of the research and spearheaded the nomination of the fifth respondent. I do not see how it can be then said that the requirements of s 283 of the Constitution were not met unless if one wants to argue that the fourth respondent's stance of insisting with applicant's candidature and rejecting the candidature of the fifth respondent was binding upon the second respondent.

34. The nub of applicant's case is that the first respondent is bound by the decision of the fourth respondent and hence he ought not to have recommended the appointment of the fifth respondent in applicant's stead. Such an approach is flawed for many reasons. Firstly, applicant ignores the fact that after he was initially endorsed by the third and fourth respondents, there were complaints or appeals against his nomination which had to be resolved. Secondly, applicant ignores the fact that he does not have any written proof or evidence of what was communicated between the first and second respondents both in respect of his own nomination as well as that of the fifth respondent. Mr, *Chinzamba* conceded that he had no document whatsoever which related to the first respondent's alleged recommendation of the fifth respondent in place of the applicant.

35. What then became clear was that practically and as provided by s 283 (c)(i) and (ii) of the Constitution, the first respondent had acted as a linkage between the third and fourth respondents on the one hand and the second respondent on the other hand. He is legally obliged to act on the instructions of the second respondent to do his biddings

and also to communicate on his behalf with the third and fourth respondents. This is clearly the Ministerial role in terms of the relevant provisions of the law. In that context, one can easily get caught up in speculation as to whether the first respondent is carrying out the instructions of the second respondent or not.

36. This question of whether the first respondent acted on behalf of the second respondent or whether he was on a frolic of his own becomes more complex where there is mistrust of the first respondent's office as in this case but whatever the true position is, this court will not be persuaded into speculation. As a court of law, this court will not buy into the applicant and fourth respondent's speculation so as to make a finding that the first respondent constituted a research team without any instructions from the second respondent. If indeed such was the case, then the second respondent was the right person to be told such complaint or suspicion so as to confirm it or deny it. This is why the Constitution provides that the second respondent should settle chieftainship disputes of this nature. It is clear that this review is based on speculation that the first respondent did not advice the second respondent of applicant's nomination and candidature. There is no evidence of this allegation before this court. There is no question that the second respondent on his part would have been entitled to constitute a research to deal with the complaints regarding applicant's nomination since he had a Constitutional mandate to resolve the dispute. This is why the applicant has tactfully avoided to place any blame upon the second respondent but all the same he has failed to prove that the first respondent acted on his own in violation of the procedure.

37. It is this court's finding that none of the review grounds relied upon by the applicants has been proven. The results of the 2002 Commission of Inquiry as well as the previous Order of this court in 2021 are not binding to the second respondent nor to this court as they predate s 283 of the Constitution and in any event, chieftainship disputes are no longer being primarily resolved by the courts.

38. Having come to the conclusion that it has not been proven by the applicant that the first and second respondents acted in violation of the Constitution and the procedure

regarding the appointment of the incumbent Chief, I am constrained to dismiss this application. Given the importance of the case, I am not persuaded to award any punitive costs but the costs on ordinary scale shall be awarded to the successful party. I therefore order as follows:

(a) The application be and is hereby dismissed with costs.
(b) The applicant shall bear the fifth respondent's costs on the ordinary scale.

Mugadza Chinzamba and Partners, applicant's legal practitioners
Civil Division of the Attorney General ,1st to 4th respondents' legal practitioners
Mhungu and Associates, 5th respondent's legal practitioners