

LOVEMORE KADZIMA MUTASA
versus
JAMES KURAUONE MUTASA
and
PROVINCIAL COUNCIL OF CHIEFS
and
NATIONAL COUNCIL OF CHIEFS
and
MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS
and
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE

HIGH COURT OF ZIMBABWE
SIZIBA J
MUTARE, 20 February 2025 & 5 March 2025

CIVIL ACTION – PRELIMINARY POINT

Mr *C.Ndlovu*, for the plaintiff
Mr *H. Tanaya* for the first defendant
Mr *N. Muchinguri* for the 2nd to the 5th defendants

SIZIBA J:

INTRODUCTION

1. This matter involves a chieftainship dispute in the Mutasa clan. The plaintiff seeks to unseat the first defendant who was appointed and installed as Chief Mutasa by the fifth defendant on 23 March 2023 following various processes which were overseen by the second, third and fourth defendants. The plaintiff's prayer both in his summons and declaration is couched as follows:
 - (a) The appointment of the first defendant as substantive Chief Mutasa by the fifth defendant be declared to be unlawful and invalid as it violates the known applicable succession principles of the Mutasa Clan;
 - (b) The appointment of first defendant as Chief Mutasa be set aside and a vacancy for the post of Chief Mutasa be declared and;
 - (c) That the fourth defendant tables before the fifth defendant the report and

recommendations made by the commissions nominating the plaintiff as the preferred candidate to be appointed substantive Chief Mutasa.

- (d) That the fifth defendant be ordered or directed to consider the aforesaid report and appoint the plaintiff as substantive Chief Mutasa.

In the alternative,

- (e) The appointment of the first defendant as substantive Chief Mutasa be and is hereby set aside.

- (f) The matter or dispute is remitted to the fourth defendant who is hereby:-

(i) To convene a meeting of the Provincial Assembly of Chiefs responsible for the Mutasa Community, at the earliest available opportunity, to consider and report back to him with its recommendations on the resolution of the dispute concerning the appointment of a substantive Chief Mutasa.

ii) To submit the aforesaid recommendation to the fifth defendant to enable him to resolve the aforesaid dispute in accordance with the provisions of s 3 of the Traditional Leaders Act [*Chapter 29:17*].

- (g) The defendants to pay the costs of this action.

2. In terms of the court order issued on 14 June 2024 at the pre-trial conference, the following issues were agreed upon as being for determination at the trial:

- 1.1. Whether or not the procedural and substantive relief sought is competent and properly before the court;
- 1.2. If so, whether or not the first defendant's family accepted a headmanship area (tsungu);
- 1.3. If they did, whether or not by such act they gave up their right to chieftaincy; If they did, exact relief to be issued.

3. When the parties appeared before me on the trial date, they confirmed that they were still sticking to the issues as outlined above. It was agreed that written submissions be

filed by counsels so as to deal with a pure issue of law which arises from the first issue and that if this court finds that the matter is properly before it or that the relief sought is competent, then the trial may proceed so as to determine the rest of the issues.

THE PLEADINGS BEFORE THIS COURT

4. The plaintiff's claim is further elaborated in his declaration which was filed together with the summons. The plaintiff alleges that there are seven royal houses that constitutes the Mutasa clan or chieftainship and these are Chimbadzwa, Chirimiriwo, Chakanyuka, Kadzima, Mukonda, Mukukudzi and Pafiwa. The plaintiff hails from the Kadzima house or lineage. The substantive Chief passed on in 2015 and Lovemore Chakanyuka was appointed as acting Chief. There was a chieftainship dispute. The fourth defendant set up two Commissions of Inquiry which both recommended the Kadzima house and in particular the plaintiff as the next in line to be Chief Mutasa. The fourth defendant allegedly rejected the work and recommendations of these two commissions and did not advise the fifth defendant of the outcome of these commissions. He instead set up a third commission which did not invite the plaintiff to make any representations and it capriciously and wrongfully failed to honour the prevailing customary principles of succession to the Mutasa chieftainship. It concluded that they were nine houses consisting of the seven ones above plus two more being the Ndorikanda and Chakambeni houses and hence the first defendant who is from the Ndorikanda house was recommended and appointed as Chief Mutasa. The plaintiff alleged that the recommendations by the third Commission were irregular and inappropriate as the additional two houses were a creation of this commission. It was alleged that the fifth defendant was therefore wrongly advised by the fourth defendant as to who the proper person to be appointed as Chief was. It was also contended that the plaintiff's fair administrative justice to be heard was violated.
5. In his Plea, the fourth defendant averred that when Misheck Pasi Mutasa, the substantive Chief passed on in 2015, consultative meetings were held and these were overseen by the representatives of the Provincial Assembly of Chiefs. In the first consultative meeting, the two houses of Ndorikanda and Chakambeni were overlooked. On the last meeting which was held on 4 October 2019, it was agreed that these two

houses which had never ascended the throne should do so starting with the Ndorikanda house as it was concluded that these houses were also descendants of the late Tendai Chifambausiku who was the founder of the chieftainship. On 19 October 2019, the plaintiff lodged a letter of complaint disputing the first defendant's chieftainship. The Provincial Assembly of Chiefs considered the plaintiff's objection in its meeting of 8 July 2020 and on 9 to 12 December 2021, the National Council of Chiefs also recommended the first defendant to be appointed Chief Mutasa. The fourth defendant accordingly asserted that the fifth defendant acted in line with s 283 of the Constitution.

6. In his Plea, the first defendant took preliminary points about the improper citation of the second defendant as Provincial 'Council' of Chiefs instead of Provincial 'Assembly' of Chiefs. It was also alleged that there had been no leave to sue the fifth defendant as required by r 12(21) of the High Court Rules, 2021. The first defendant also contended that the plaintiff's case was a disguised late review couched in a declaratory fashion. On the merits, the first defendant also maintained that there were nine houses constituting the Mutasa clan and that he was properly qualified for appointment as Chief Mutasa. Furthermore, first defendant complained that on 17 April 2023, the first defendant had instituted a similar action under HC 151/23 which he later withdrew. Again on 16 May 2023, he brought a review application which he also withdrew. Furthermore, he filed an urgent chamber application to stop first defendant's installation on 5 May 2023 which was struck off the roll for being fatally defective after which he then changed legal practitioners to file the present claim. However, the case now turns on the determination of the issues which the parties agreed to be decisive before this court.

SUBMISSIONS BY COUNSEL

7. Mr *Tanaya* submitted on behalf of the first defendant that this court has no jurisdiction over the issue of whether the first defendant's family accepted a headmanship area

(tsungu) and if so, whether they gave away the chieftainship. Such an issue invites the court to inquire into the chieftaincy succession traditions and customs of the Mutasa people and make a factual, substantive finding that according to certain traditions and customs of the Mutasa clan, a certain house or member of the clan forfeits chieftainship or not. He submitted that this was purely a substantive question which has nothing to do with the procedural irregularities alleged in the first defendant's appointment. The issue is formulated for this court to inquire whether the first defendant is the right person to be appointed as Chief or not. In terms of s 283 of the Constitution of Zimbabwe as read with s 3 of the Traditional Leaders Act [*Chapter 29:17*], the fifth defendant is responsible for the appointment of Chiefs and also for the settlement of any disputes pertaining thereto through the advices of the second and third defendants. Counsel relied on the case of *Marange v Marange and Others* SC 1/21. Counsel therefore submitted that since no allegation of any procedural impropriety is up as an issue for trial, the court should withhold its jurisdiction. Counsel's prayer was that the matter should be struck off the roll with costs on the attorney and client scale.

8. The other preliminary issue that was raised by the first defendant was that the plaintiff's prayer was geared at reviewing the fourth defendant's decision when such a review had not been brought to court within the required eight weeks. The first defendant was appointed Chief on 23 March 2023 whereas the claim by the plaintiff was filed on 21 June 2023 which was well over twelve weeks. It was prayed that for this reason as well, the matter should be struck off the roll with costs at attorney and client scale.
9. On behalf of the second to the fifth defendants, Mr *Muchinguri* submitted that the question of whether the first defendant's family accepted 'tsungu' or not needed no judicial interference. Counsel submitted that the court should exercise deference because the appointment of a Chief is an executive function and the courts cannot interfere unless the fifth defendant has violated the law. His submission was that this court should decline its jurisdiction.

10. Mr *Ndlovu* submitted on behalf of the plaintiff that this court has jurisdiction to entertain and properly adjudicate upon disputes relating to the appointment of Chiefs. Such jurisdiction, it was submitted, was original and inherent in terms of s 13 of the High Court Act [*Chapter 7:06*] as read with s 171 of the Constitution of Zimbabwe. It was submitted that where the legislature sought to limit such jurisdiction, it must do so in exact and explicit terms without any ambiguity. Counsel submitted that s 283 of the Constitution of Zimbabwe and the Traditional Leaders Act do not oust this court's jurisdiction. Counsel relied upon the decisions of the Supreme Court of Zimbabwe in *Rutsate v Wedzerai and Others* SC 45/22 and that of *Marange v Marange and Others* (*supra*). Counsel submitted that the cases of *Kamuchenje and Others v Minister of Local Government and Public Works and Others* HH 443/24 and *Gambakwe and Others v Chimene and Others* HH 465/15 were wrongly decided. Counsel submitted that what is reviewable is not the executive act of the fifth defendant but how the fourth defendant has acted. Counsel prayed that this court should therefore find that it has jurisdiction over the dispute.
11. Replying on the issues of law, Mr *Tanaya* for the first defendant submitted that the plaintiff was approaching the issue of jurisdiction in general terms and outside of the issues agreed upon for trial in this matter. He submitted that there is no issue of review before this court. There is no issue touching on the procedural irregularities to be decided. The issue that is before the court only touches on the substantive question of the succession principles and customs of the Mutasa clan. Counsel therefore submitted that the court should decline jurisdiction.

THE ISSUES FOR DETERMINATION

12. The first crucial issue for determination is whether this court should exercise its jurisdiction in deciding in a trial the issues brought before it for determination being:
- (a) Whether or not the first defendant's family accepted a headmanship area
(tsungu);
 - (b) If they did, whether or not by such act they gave up their right to chieftaincy;
If they did, exact relief to be issued.

13. If this court finds that it has jurisdiction, then the second issue will be to decide whether this is a review matter which was brought out of the stipulated timeline and consequently not properly before the court.

JURISDICTION OF THE HIGH COURT OVER CHIEFTAINSHIP MATTERS

14. 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)*

15. 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.”

16. In *Marange v Marange and Others (supra)*, PATEL JA (as he then was) articulated the position as follows at p 7 of the cyclostyled judgment:

“As I have already stated, s 283 of the Constitution is not a substantive provision that impacts directly on the law governing the appointment and removal of traditional leaders. Rather, it declares what that law should provide in regulating, inter alia, the resolution of chieftainship disputes. Consequently, it cannot be construed, per se, as ousting the jurisdiction of the courts over such disputes.”

17. The learned Justice of Appeal (as he then was) continued at p 8 of the cyclostyled judgment as follows:

*“It follows from the foregoing that the court a quo was correct in adopting the stance that it was invested with the requisite jurisdiction to review the acts and conduct of the Minister, in his capacity as an administrative authority, on the recognised grounds of illegality, irrationality or procedural impropriety. More specifically, what is reviewable is not how the President exercises his discretion but whether those who formulate their advice to him acted on sound principle. See *Rushwayo v Minister of Local Government & Anor* 1987 (1) ZLR 15 (S), at 18F-19B; *Chigarasango v Chigarasango* 2000 (1) ZLR 99 (S); *Moyo v Mkoba & Ors* SC 35/2013; *Munodawafa v Masvingo District Administrator & Ors* HH 571-15. It further follows that the first ground of appeal challenging the assumption of jurisdiction by the court a quo in a chieftainship dispute, as having been ousted by s 283 of the Constitution, is misplaced and cannot be sustained.”*

18. Furthermore at pp 11 to 12 of the same cyclostyled judgment, PATEL JA (as he then was) proceeded to caution as follows:

“What can be gleaned from all of the foregoing is the implied finding that the appellant’s appointment as Chief Marange was not in accordance with the customs and practices of the Marange clan. In this respect, therefore, there is some merit in the appellant’s fourth ground of appeal, to the extent that the court itself was ill-equipped to venture into that particular field. In

effect, the court appears to have overruled the decisions taken by the Minister and the President without having been possessed of the expertise or qualifications necessary to do so.

It is settled law that the courts should not take over the functions of an administrative authority and interfere with its actions or decisions by substituting them or setting them aside. See Affretair (Pvt) Ltd & Anor v M.K. Airline (Pvt) Ltd 1996 (2) ZLR 15 (S), at 21; Zimbabwe School Examinations Council v Mukomeka & Govhati SC10/20, at pp. 17-18. I would extend this broad principle to postulate that, in certain limited circumstances, it might become necessary and appropriate to invoke such judicial restraint, even where the administrative action or decision in question is shown to have been procedurally irregular. This might arise, for instance, where judicial interference would entail serious administrative disruption or result in some grave miscarriage of justice.” (My emphasis)

19. Basing on the Supreme Court decisions in *Marange v Marange and Others* (*supra*) and *Rutsade v Wedzerai and Others* (*supra*), the three Honourable judges of this court in *Kamuchenje and Others v Minister of Local Government and Public Works and Others* (*supra*) therefore came to the conclusion that this court’s jurisdiction on chieftainship disputes should be limited to reviewing the exercise of administrative functions rather than delving into the substantive customary principles of succession to the chieftainship. The court took the view that it would be improper for it to usurp the Constitutional executive function of appointment of chiefs and handling of disputes concerning the customary principles of succession to the chieftainships in violation of the doctrine of separation of powers. The position that where there is no issue brought before this court touching on review of the executive or administrative powers or processes, this court should withhold its jurisdiction, reflects the correct interpretation of the law as to how this court should approach chieftainship disputes. To hold otherwise would be to render nugatory both s 283 of the Constitution of Zimbabwe as well as s 3 of the Traditional Leaders Act [*Chapter 29:17*]. It would also be ignoring the caution sounded by the Supreme Court that this court is ill equipped to delve into the intricacies of the customary or traditional succession principles of chieftainship.

20. Applying the law to the case before me, although the plaintiff in his declaration had complained that he had not been invited to make any representations by the third Commission of the fourth defendant and that this particular Commission’s recommendations were highly irregular, such complaint was not pursued as an issue for determination at the trial. The only issues presented to this court for trial as agreed by

the parties at the pre-trial conference and also confirmed to me when counsel appeared before me relate to whether the first defendant's family accepted the headmanship or 'tsungo' and whether such acceptance, if any, disqualified the first defendant's family from ascending the chieftainship throne. The question of whether this court should exercise its jurisdiction in a matter is informed by the issues brought before it for determination as well as the relief sought by a litigant.

21. Looking at the case before me, I agree with Mr *Tanaya* that the plaintiff is approaching the issue of jurisdiction in general terms and outside of the issues agreed upon for determination. In essence, the plaintiff's case assails the decision of the fourth defendant for allegedly ignoring the customary succession principles of the Mutasa clan. He is therefore inviting this court to delve into or inquire into the customary principles of succession in the Mutasa clan. This court is being asked to disqualify or impugn the first defendant's appointment as a Chief for the alleged reason that his family line accepted a 'tsungo' and therefore forfeited the right to chieftainship. This inquiry is totally outside of this court's review powers. There is no issue of review of the defendants' decisions before me on the ordinary recognizable grounds of review at law. The submission by Mr *Muchinguri* that this court should exercise deference and withhold its jurisdiction is correct. Paragraph 22 of the plaintiff's submissions demonstrates how the plaintiff is desperately trapped up in the quicksand of his own cause when he avers as follows:

"The Plaintiff is simply seeking a review of the process that the 2nd to 4th Defendant used to formulate their advice to the President. Further, the Plaintiff is not seeking that the President appoints anyone to be Chief. He is equally not asking the Honourable Court to appoint anyone to be Chief. He simply wants the court to direct the relevant Minister to put in place the process to legitimately appoint a suitable and deserving Chief for his community. That is his right and legitimate expectation."

22. The above averment is a complete denial of the plaintiff's own relief that he is seeking from this court in his summons and declaration. He cannot deny that he has prayed to be appointed as Chief in first defendant's stead. Again, there is no issue before me that requires me to impugn any of the defendants' conduct on any review ground at law and

it is not for me to formulate such an issue when there is none. There is therefore no issue that requires me to exercise my review jurisdiction in this matter. The issue of whether the first defendant's family accepted the '*tsungo*' and got disqualified from ascending the chieftaincy in the Mutasa clan is an issue that the law has reserved for resolution by the fifth respondent acting on the advices of the second and third defendants through the fourth defendant's office. Having decided that I should not exercise my jurisdiction in this matter, it becomes pointless to decide the issue of whether there is a review case that is properly before me or not.

23. The costs are in the discretion of the court. The general rule is that costs follow the successful party. I see no reason to depart from that position in this case. The first defendant has prayed for costs on an attorney and client scale. Although the plaintiff has previously filed some cases and withdrew or lost them on technical grounds, none of such cases ever resolved or settled the issues of law that were presented to this court in this present case. I do not see any reason why the plaintiff should be made to pay costs at a punitive scale. He cannot be punished for holding a different view of the law in a complex and important matter of this nature where even the judges of this court have made different pronouncements in the past. Litigants and legal practitioners alike should not be discouraged from confidently and fearlessly approaching the courts in pursuance of their rights for fear of reprisals by way of punitive costs unless there is bad faith or such other reprehensible conduct on the part of a litigant warranting such course to be taken. I therefore order as follows:

1. The plaintiff's claim is not properly before the court as the issues for determination require this court to inquire into and resolve the customary succession principles of the Mutasa clan hence the court shall withhold its jurisdiction in this matter.
2. The matter is accordingly struck off the roll with costs.

Gonese & Ndlovu, plaintiff's legal practitioners

Tanaya Law Firm, first defendant's legal practitioners

Civil Division of the Attorney General, 2nd to 5th defendants' legal practitioners