

MURENGA EDWARD CHIKWAMBA
versus
MATIUS MAHONDE MUKUNGA
and
LAZARUS MUKUNGA
and
MINISTER OF LOCAL GOVERNMENT PUBLIC
WORKS AND URBAN DEVELOPMEENT
and
DISTRICT ADMINISTRATOR SHAMVA

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 17 October 2013

Urgent Application

B. Machengeta, for the applicant
1st respondent in Default
2nd respondent in Person
K.L. Murefu, for the 3rd and 4th respondents

MATHONSI J: In this matter the applicant is an aspiring Chief Madziva of Shamva who has approached the court on an urgent basis seeking the following relief:-

“TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

- (a) Fourth respondent nullify the nomination and recognition of first or second respondents as the Jongwe to succeed the throne of Chief Madziva.
- (b) First, second respondents and the Mukunga House are ineligible to succeed to Chief Madziva throne.
- (c) Fourth respondent recognises the applicant as the Jongwe and recommend to third respondent for appointment Chief Madziva (*sic*).
- (d) First and second respondents pays (*sic*) the costs of suit.

INTERIM RELIEF GRANTED

- (a) That pending the finalisation of proceedings under the cover of Case No. HC 8333/13 the following order is granted:
- (i) That the installation of the first and second respondent as Chief Madziva be put in abeyance.
 - (ii) That the current Acting Chief Madziva (Elijah Gatsi) shall remain on the throne until such time a substantive chief is appointed”.

In his founding affidavit, the applicant alleges that the Madziva Chieftainship became vacant 4 years ago when the last substantive chief Madziva, one Chephas Madziva died. He stated that there are only 2 families which are eligible to ascend the throne, namely the Manyeche and Madzeka families and he, as the eldest in the Madzeka house, should succeed as chief given that the last chief was from the Manyeche family. The clan follows the rotational succession plan between the 2 families.

The applicant stated that in pursuance of that succession formula, he was on 25 August 2012, nominated by the families for appointment as chief Madziva at a meeting held at Madziva Primary School. After the nomination, the fourth respondent advised him to fill in the requisite nomination forms, which he did and in the process submitting all the relevant papers to the fourth respondent. Much later, and to his chagrin, the fourth respondent advised the families that his nomination had been rejected necessitating a fresh nomination process.

He went on to say that the fourth respondent interfered with the process insisting that the chieftainship had to be rotated with other families and dictated that the next chief must come from the Mukunga family which was alien to the succession principles of the clan. As a result, the first respondent was nominated as the next chief, a nomination process which excluded the relevant family members.

This forced the applicant to institute summons action against the respondents in HC 8333/13 seeking an order nullifying that nomination, declaring that Lazarus Mukunga, Matius Mahonde Mukunga and the entire Mukunga house are ineligible to ascend the Madziva throne and that the District Administrator should recommend the applicant for appointment. That matter is yet to be determined.

Notwithstanding the pending litigation, the officials are going ahead with preparations for the installation of the second respondent as substantive chief Madziva and have set 16 or 18 October 2013 as the date for the installation prompting the applicant to make an approach to this court on an urgent basis seeking interim relief stopping the installation.

That there is a simmering chieftainship wrangle is pretty obvious. This has resulted in litigation which is still pending in this court which, hopefully will determine the respective rights of the parties. If a chief is installed now then that would render nugatory the proceedings that have been initiated and reduce the outcome to a *brutum fulmen*. It has not been suggested that there is an urgent need to instal a new chief and that any harm would be occasioned by a stay of that process until the dispute is resolved. In fact, there can be no such urgency given that Elijah Gatsi has enjoyed the honour of acting as chief Madziva since 2008.

In his opposition, the second respondent submitted that there was indeed a nomination of the applicant, which was however opposed on the basis that his family had previously been appointed to rule as chief Madziva. He stated that he was then nominated as he came from a house that had not had a chance to rule. He went on to say that the installation ceremony that had been set for 18 October 2013 has since been moved to 25 October 2013.

Ms *Murefu* for the third and fourth respondents took 2 points *in limine*, firstly challenging the certificate of urgency on the basis that it is signed by a legal practitioner from the law firm representing the applicant. She relied on the case of *Chafanza v Edgars Stores Ltd & Anor* HB 27/05. I am aware of the judgment of CHEDA J in that matter to the effect that the certificate should not be signed by a legal practitioner in the firm representing the applicant. However that judgment has not asserted itself enough to inspire an amendment of r 242 and r 244 which only require the certificate to be made by a legal practitioner. For that reason, that point cannot defeat the application.

Ms *Murefu*, also took the point that the citation of the third respondent is defective in that it is not a legal *persona*. I agree that the proper person to be cited is the Minister of Local Government and not the Ministry. I am however of the view that the defect is merely technical and cannot be fatal to the application. Moreover, this court has the discretion in terms of r 4C to condone a departure from the rules and also to regulate its process. It occurs to me that it would suffice to direct the applicant to amend his papers and cite the Minister.

On the merits of the matter Ms *Murefu* submitted that the second respondent has already been appointed by the appointing authority and that the installation ceremony is merely to congratulate him and nothing more. While this maybe so, it cannot be disputed that the process of nominating a chief is the preserve of the clan which knows its succession principles. Once the clan has nominated the chief the name is forwarded to His Excellency

the President who is the appointing authority. The President is required by s 3 of the Traditional Leaders Act to have regard to the prevailing customary principles of succession of the community, in making an appointment.

In the present case, the applicant has approached the court protesting that those customary principles of succession were flouted and he would like the court to intervene. An installation ceremony is the announcement to the community and indeed the whole world that a new chief has ascended the throne. To my mind it would be wrong to allow the installation to proceed when a matter is pending before the court to determine the propriety of that appointment. This court, as I have said, has a duty to regulate and protect its processes which would be negated by the installation.

For these reasons there is a need to stay the installation ceremony until the dispute is resolved by the court.

Accordingly, I grant the provisional order as amended, the interim relief of which reads:-

Pending the determination of this matter, the applicant is granted the following relief:

- (i) The installation of the first or second respondents as Chief Madziva is hereby stayed until the finalisation of proceedings in HC 8333/13.
- (ii) The applicant is directed to amend his application and properly cite the Minister of Local Government as a party.

*Nyamushaya Kasuso & Rubaya, applicant's legal practitioners
Civil Division of the Attorney General's Office, 3rd & 4th respondents*