ENGANISAI RIKONDA
and
HILARY BAMBA RIKONDA
and
MAFIONI RIKONDA
and
SAUL MASUKA
and
GINASIO MASUKA
and
TAKARINDWA NDAIDZWA
and
TECKISON NDAIDZWA
versus
MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS AND NATIONAL HOUSING N.O
and
SECRETARY OF LOCAL GOVERNMENT, PUBLIC WORKS AND NATIONAL HOUSING N.O
and
JETHRO MUTENDI

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 8, July 2014

Urgent Chamber Application

T. Madondo, for the applicants
R. Bote, for the 1st & 2nd respondents
3rd respondent: in default

MATHONSI J: When this matter was placed before me, I set it down for hearing today at 2 pm and directed that notice be given to the parties. According to the Sheriff's returns of service, the notices of set down were served upon the respondents yesterday, 7 July 2014. There are also certificates of service prepared by Mr *Madondo* who appeared for the applicants showing that the urgent chamber application was served upon the first and second respondents on 4 July 2014.

Notwithstanding, such service the respondents did not see it fit to appear in court today. Instead Ms *Bote* a Personal Assistant of the legal advisor to the first respondent

appeared before me and indicated that she was only coming to check what was happening because they only received a notice of set down without the application itself. She indicated that her boss, Mrs L Chimoka, was unable to come for that reason.

More importantly Mr *Madondo* produced a supplementary affidavit of the second applicant to the effect that inspite of the application being served on 4 July 2014, the installation of the third respondent as chief went ahead on 7 July 2014. The Herald Newspaper also reported the installation.

I am not aware whether Ms Chimoka is indeed a legal practitioner and if she is whether she was admitted as such by this court. Whatever the case, her conduct of ignoring a court process and then sending her PA to my court is not only contemptuous in the extreme, it is infinitely unacceptable. Legal practitioners practising law, whether in government ministries, in commerce and indeed in private practice are still officers of this court. They are therefore expected to conduct themselves with decorum and accord the court the dignity that it deserves. It is unacceptable that a legal practitioner sends her PA who is not even a legal practitioner, to appear on her behalf. It is the kind of attitude and behaviour that should be investigated by the Law Society of Zimbabwe and appropriate action taken.

It is also disturbing that the respondents elected to disregard court proceedings calling to question the installation of the third respondent as chief and proceeded with it as if nothing had happened. It has been said on times without number that it behoves a party in the position of the respondents to respect the process of the court and refrain from conduct that would render nugatory the process of the court. Perhaps it is for the reasons of such disdain that none of the respondents are in attendance, electing to sacrifice Ms *Bote.*

The seven applicants, although using different surnames, are brothers and descendants of the Masuka dynasty, of Moyo Chirandu totem which originally hails from Bikita in Masvingo Province. They are however now based in Mutendi Village under chief Sayi in Gokwe South where they intend to set up a Masuka chieftainship of their own, and have one of them appointed the new chief Masuka.

From the papers placed before me, it would appear that the third respondent has been appointed chief Mutendi, a prerogative of the President of Zimbabwe in terms of the Traditional Leaders Act [*Cap 29:17*], and his installation as chief was pencilled for 7 July 2014 forcing the applicants to rush to court at the eleventh hour seeking an interdict stopping the installation ceremony. The basis for their intervention is that the area of jurisdiction of the

new chief, being Ward 8, Gokwe South, is an area the applicants had earmarked for the establishment or restoration of the Masuka chieftainship.

Historically, according to documents relied upon by the applicants, their great grand-father Masuka was originally a sub chief who was elevated to chief Masuka. The last substantive chief Masuka was Bobo who died in 1947. The chieftainship was then reduced to headman-ship under chief Mazungunye of Bikita. Much later, the Masuka clan relocated to where it is currently based in Gokwe where it retained its headman-ship under chief Sayi, a situation which obtains until now.

The applicants have made overtures to the government of Zimbabwe agitating for the upgrading of the Masuka headman-ship to chieftainship and although it has been quite sometime since their approaches to the government commenced, the letters attached to the application show that discussions were taking placed as far back as October 2001, nothing has come out of that. What is apparent is that whether it's a restoration or upgrading of the chieftainship, it has not been acceded to by the government.

That notwithstanding, the applicants are of the view that because the third respondent has now been appointed chief of the area they are coveting and is set to be installed, the installation should be stopped and the respondents should be interdicted from undertaking that exercise. This is because the Masuka family has "a clear right of both having the Masuka chieftainship restored by the Zimbabwe government (first and second respondents) and having one of the Masuka sons appointed as Chief Masuka."

I am unable to discern any such clear right. The requirements for an interim interdict are:

1) A *prima facie* right to the relief claimed, even though open to some doubt;
2) A well-grounded apprehension of irreparable harm if the interim relief is not granted and the applicant ultimately succeeds in establishing that right;
3) A balance of convenience in favour of granting the interim relief; and
4) The absence of any other satisfactory remedy.

Where the applicant seeks a permanent interdict, the applicant must show more than just a *prima facie* right, it must establish a clear right; *Washmate Motors Centre (Pvt) Ltd* v *City of Harare* HH32/13; *Bozimo Trade Developments Co (Pvt) Ltd* v *First Merchant Bank of Zimbabwe & Ors* 2000 (1) ZLR 1 (H) E-G; *Infinity Asset Management Ltd* v *Totenville Investments (Pvt) Ltd & Ors* HH483/13.

I am of the view that the application fails on the very first hurdle making it unnecessary to inquire into the other requirements of an interdict. I have already said that the existence of a right, whether clear or *prima facie* has not been demonstrated. The process of appointing a chief is clearly set out in s 3 of the Traditional Leaders Act [*Cap 29:17*]. It provides:

> "3. Appointment of Chief
> (1) Subject to subsection (2), the President shall appoint chiefs to preside over communities inhabiting communal 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
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> (b) wherever practicable, shall appoint a person nominated by the appropriate persons in the community concerned in accordance with the principles referred to in subpara (1) of para(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) ----------
> (4) ----------."

The Act governs the appointment of a person to a particular chieftainship. In exercising the powers vested in him by the Act, the President has an absolute discretion, unfettered by any statutory shackles other than the duty to give due consideration to the customary principles of succession, if any, applicable to the community over which the chief is to preside. It is only the President who can decide who is to be appointed chief: *Moyo* v *Mkoba & Ors* SC35/13.

The courts cannot suggest to the President who should be appointed and the manner in which he has exercised his discretion is not subject to judicial review unless he has exercised it outside the law. The applicants have not even begun to suggest any impropriety in that process, neither have they suggested that the third respondent was appointed outside the law.

All they have done is refer to some relic of colonial history, being a Masuka Chieftainship which was banished by the colonial administration several decades before independence and downgraded to a headmanship which they still retain to this present day. It

is a chieftainship which owed its existence to another province of this country, Masvingo, and not Gokwe South where they now lay a claim.

They have tried desperately to lobby the government to breathe life into that defunct chieftainship without success. Now they want the court to venture into territory reserved for the executive and to come to their rescue where they do not have an inkling of a right. This court is unable to do that.

The applicants are within their rights in trying to re-establish their long lost chieftainship, but that does not translate into a legal right that can be enforced in a court of law. It certainly does not entitle them to interdict a government appointment which has been done in accordance with the clear provisions of the law.

In the result, the application is hereby dismissed with costs.

Jarvis. Palframan Legal Practitioners, applicants' legal practitioners
Attorney General's Office, 1st & 2nd respondents' legal practitioners