MARTIN MASUKA
versus
MAFIONI RIKONDA
and
THE MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS
and
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE
and
MIDLANDS PROVINCIAL ASSEMBLY OF CHIEFS
and
NATIONAL COUNCIL OF CHIEFS
and
DISTRICT DEVELOPMENT CO-ORDINATOR, GOKWE SOUTH DISTRICT

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 14 February 2022 & 25 October 2023

Opposed Application

Applicant in person
Ms *M Dinha,* for the 1st respondent
Mr *C Chibidi,* for the 2nd to 6th respondents

MUSITHU J:

The applicant seeks the review of the decision of the second and third respondents' to nominate, recommend and approve the appointment of the first respondent as Chief Masuka. The draft order accompanying the application reads as follows:

"**IT IS ORDERED THAT**:

1. The appointment of the first respondent, Mafioni Rikonda, by the 3rd Respondent as the substantive Chief Masuka be and is hereby set aside.
2. The matter (dispute) is remitted to the second respondent who is hereby directed:
   (a) to convene a meeting of the provincial assembly of Chiefs responsible for the Masuka 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 Masuka; and

(b) to submit the aforesaid recommendations to the third respondent to enable him to resolve the aforesaid dispute in accordance with the provisions of s 3 of the Traditional Leaders Act [*Chapter 20:17*].

3. The 1st Respondent to pay the Applicant's costs on a legal practitioner-client scale."

The applicant's contention is that the appointment of the first respondent as Chief Masuka in Gokwe South District, in the Midlands Province was not done in terms of the prevailing traditional practices of the Masuka people as he was not from the senior generation of fathers of the Rikonda house. The applicant further contents that the elevation of the first respondent to the chieftainship infringed sections 3(2)(a)(i) and 3(2)(b) of the Traditional Leaders Act[1], in that the said first respondent was not the person nominated by the appropriate persons in the Masuka tribe. The applicant claims that his constitutional rights to nominate a person in the course of the appointment of a substantive chief Masuka were also infringed.

According to the applicant the decision to appoint the first respondent as Chief was illegal and reviewable by the court as it violated s 283 of the Constitution of Zimbabwe. That appointment was not done on the recommendation of the Provincial Assembly of Chiefs through the National Council of Chiefs. It was done on the basis of an illegal recommendation from the Acting Director of Traditional Leaders Support Services, an organ of the second respondent. That recommendation was made through a memorandum of 30 November 2021 from the said entity to the second respondent. The applicant contends that the memorandum was replete with omissions and misrepresentations, which led to the second respondent making an uninformed recommendation for the appointment of the first respondent as chief. He claims that the decision of the Masuka royal congregation, which was made in line with the prevailing succession tradition of the Masuka chieftainship was that the applicant be appointed the substantive chief Masuka.

The applicant traced the history of the Masuka chieftainship to the 1950s, asserting that at some point the chieftainship was downgraded to the position of headman. This was done by the colonial settlers who had invaded their ancestral land in the Bikita area of Masvingo Province. The

[1] [*Chapter 29:17*]

Masuka people were then moved to Gokwe where their chieftainship was to be restored. The applicant claims that the person who was next in line to be chief was one Ndaedzwa Jimu in line with the collateral succession method. Upon the relocation of the Masuka people to Gokwe, Ndaedzwa Jimu was never installed as substantive chief but remained a headman till his death. The Masuka chieftainship was only revived in July 2020. The Council of Chiefs was then ordered to determine which house within the Masuka clan was entitled to the chieftainship.

The applicant claims that the Rikonda family resolved to follow their traditional succession principles which dictated that the eldest surviving person in the Rikonda House automatically assumed the chieftainship. This was the procedure that had always been followed even when Ndaedzwa Jimu became headman. The applicant, as the eldest person in the Rikonda House was supposed to assume the Chieftainship at the expense of the other royal households which are Nemaringa and Gwenjera. According to the applicant, what made the first respondent's position even more untenable was that his own father was still alive. There was no way that he could have been installed in his father's stead.

According to the applicant, on 6 October 2020, a duly constituted meeting of the Rikonda house resolved to nominate him as chief. The process was in line with the directions that had been given by the second respondent's District Development Coordinator. That meeting was chaired by one Enock Machiri who is the head of the Rikonda people. The applicant claims that on 3 November 2020, they were informed by the District Administrator that two candidates had been nominated for appointment as chief by the third respondent. The applicant and those supporting his elevation objected through a series of correspondence directed to the District Administrator, the second respondent and the Midlands Provincial Chief's Council.

The purpose of the communication was to inform the second respondent that there was a dispute on the appointment of the substantive chief Masuka that needed to be resolved in terms of s 283(1)(c)(i)(ii)(iii) and (iv) of the Constitution. No response was received. The dispute was therefore not resolved. The applicant only got to know of the appointment of the first respondent as chief through some papers that were attached to the first respondent's notice of opposition in some other matter involving the parties.

The applicant cited the following as reasons that vitiated the appointment of the first respondent as chief: the absence of any recommendation by the Midlands Provincial Assembly of Chiefs to the third respondent to appoint the first respondent as chief; the failure by the second respondent to acknowledge and refer the dispute to the Provincial Assembly of Chiefs for determination in terms of s 283(c) of the Constitution; and the fact that the appointment of the first respondent violated the prevailing customs and traditions of the Masuka community.

First Respondent's Case

The first respondent denied that his appointment was made in contravention of the law. He cited s 283 of the Constitution which essentially provides that the appointment of a chief must be done by the President of Zimbabwe on the recommendations of the Provincial Assembly of Chiefs through the National Council of Chiefs and the Minister responsible for traditional leaders. Such appointment must have been done taking into account the traditional practices and traditions of the communities concerned.

The first respondent claims that the Midlands Provincial Assembly of Chiefs set up a task team comprising Chiefs Nhema, Ruya and Jiri to preside over the nomination of the rightful candidate to be appointed Chief Masuka. A selection meeting was held with the concerned Masuka families on 23 September 2020 at Masuka High School. The rotational/collateral succession custom of the Masuka clan was confirmed at the said meeting. He was unanimously nominated for appointment as Chief at the last selection meeting held on 6 November 2020. He therefore denied that he was not nominated by appropriate persons.

The first respondent further submitted that the prevailing tradition of succession within the Masuka clan was collateral. The chieftainship rotated amongst three eligible houses that is Gwenjera, Nemaringa and Rikonda. According to their family tree, there were three sub-houses which are Machiri, Ndaedzwa and Tozoona. The Machiri and Ndaedzwa sub-houses had already utilised their turn, and the next in line was the Tozoona sub-house. The applicant was from the Ndaedzwa sub-house so he could not have been nominated to be substantive chief Masuka. The first respondent denies that the applicant was ever nominated by the appropriate persons to become the substantive Chief Masuka.

The first respondent also submitted that contrary to the applicant's views, the memorandum of 30 November 2021 actually confirmed that the first respondent was nominated, recommended and appointed substantive Chief Masuka in accordance with the law.

The respondent insisted that he was lawfully appointed in terms of s 3(1) of the Traditional Leaders Act[2]. He also submitted that the procedure set out in s 283 of the Constitution was adhered to as his appointment was made by the third respondent on the recommendation of the Provincial Assembly of Chiefs through the National Council of Chiefs and the second respondent. His appointment was confirmed by a letter of 15 December 2021 from the Acting Chief Director, Traditional Support Services in the second respondent's ministry to the Provincial Development Coordinator for the Midlands Province. Attached to that letter were copies of a Cabinet Minute approved by the third respondent, based on a memorandum from the second respondent recommending such appointment.

The court was urged to dismiss the application with costs on the punitive scale.

Second to sixth Respondents' Case

The second respondent deposed to the opposing affidavit on behalf of the second to sixth respondents. The opposing affidavit raised two points in *limine*: that the application was improperly before the court as there was another similar application pending, which had been filed by the applicant and involving the same parties. That matter had not been withdrawn.

The second point was that the applicant had not approached the Provincial Assembly for the resolution of the dispute. Reference was made to s 283(ii) of the Constitution as the law that gave the Provincial Assembly the power to make recommendations to the President on resolution of disputes pertaining to the appointment of a chief. The applicant could only approach the court after first referring the dispute to the Provincial Assembly. The second respondent was only there to submit recommendations for the appointment of a chief after the relevant families had, in accordance with their tradition and customs, nominated someone for appointment as chief. No complaint was pending before the Provincial Assembly concerning the appointment of the first respondent as chief.

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The second respondent averred that the established succession tradition for the Masuka Chieftainship was a rotation of the houses and their sub-houses namely Gwenjera, Nemaringa and Rikonda. A meeting supervised by a Midlands Taskforce of Chiefs had established that the Gwenjera and Nemaringa houses had had their turns. The Rikonda house had the turn to ascend to the throne. A meeting chaired by the District Development Co-ordinator established that the Rikonda House had three sub-houses namely Machiri, Ndaedzwa and Tozoona. The Machiri and Ndaedzwa subhouses had had their turns, and accordingly the Tozoona sub-house was next to provide a candidate. It nominated the first respondent, clearing the way for his appointment as the substantive chief. The applicant was from the Ndaedzwa sub-house and therefore did not qualify.

It was averred that the practice of appointing a chief based on seniority as advocated by the applicant was the opposite of the rotation system. That practice was not applicable to the Masuka Chieftainship. History had demonstrated that the main houses and the sub-houses took turns to assume the throne in a descending manner. The custom and tradition proffered by the applicant was therefore contrary to the Masuka tradition. That principle of rotation entailed that the appropriate candidate from the eligible house could be way younger than the other members of the clan, whose turn would not have arrived.

The Answering Affidavit

The applicant responded to the first respondent's opposition as follows. He insisted that the appointment of the first respondent was done as a result of misrepresentations. Due process was not followed. He further averred that the three chiefs, namely Nhema, Ruya and Jiri were only mandated to identify the house which was eligible for the chieftainship amongst the Gwenjera, Nemaringa and Rikonda households. The sixth respondent later advised that the Rikonda house was the one eligible for nomination. This communication was made through a call to the applicant. A meeting of the Rikonda house was subsequently held on 30 September 2020. It was chaired by Enock Machiri Rikonda, being the senior member of the house. The applicant claims that he was unanimously nominated as the rightful heir to the chieftainship. On 6 October 2020, his name was submitted to the District Administrator as the sole candidate to the chieftainship.

The applicant submitted that the rotation system was restricted to the three houses, namely, Gwenjera, Rikonda and Nemaringa. The eldest person from these three houses was eligible for the chieftainship. In this case the rightful heir was Enock Machiri Rikonda.

In his reply to the second to sixth respondent's opposition, the applicant first raised the point in *limine* that the second to sixth respondents were barred for having filed their opposing affidavits out of time. Having been served with the application for review on 20 January 2022, the respondents were expected to file their opposing affidavits by not later than 4 February 2022. These were only filed on 6 April 2022, some 40 days out of time. The notice of opposition had to be expunged from the record.

Further it was also averred that there were no supporting affidavits from the third to six respondents. The second respondent had no locus to speak on behalf of these respondents.

In his response to the preliminary point that another similar matter was pending before this court, the applicant averred that the matter was struck off the roll in HC 610/22, (judgment HH 97/22). As regards the point that the application was premature since domestic remedies were not exhausted, his reply was that the present application sought to impeach processes that were already completed. The alleged internal remedies were the reason why this application had been launched. The Midlands Provincial Chiefs had already participated in the process and recommended the appointment of the first respondent when a dispute had been referred to it. It defied logic to refer a matter to a body which had already made a decision and chose to abide by its decision. The dispute was communicated to the fourth respondent by the sixth respondent, but it was never resolved resulting in the unprocedural appointment.

The applicant further argued that the minutes attached by the second respondent showed that a dispute was actually submitted to the Provincial Chiefs Assembly after the family failed to agree on a candidate. The response was the appointment of the first respondent as the substantive chief.

As regards the merits, the applicant maintained his position as set out in the founding affidavit.

Submissions

At the commencement of the oral submissions Mr *Chibidi* for the second to sixth respondents applied for the removal of the bar in respect of the late filing of the notices of opposition and heads of argument. He submitted that the opposing papers had erroneously been referred to the Administrative Court, since the heading to the applicant's own papers referred to that court. The heads of argument had not been filed timeously because the said respondents were waiting for the applicant's legal practitioners to file theirs first. The applicant was abandoned by his legal practitioners and his own heads of argument were filed after the said respondents had filed theirs. The bar operating against the said respondents as a result of the late filing of the notice of opposition and heads of argument was removed with the consent of the applicant.

Whether the second respondent could oppose the application on behalf of the 3rd to 6th respondents

The applicant averred that the third to sixth respondents were not properly before the court because they did not oppose the application or file any supporting affidavits to support the second respondent's deposition.

In reply, Mr *Chibidi* argued on the authority of r 58(4) of the High Court rules that second respondent was better placed to depose to the opposing affidavit on behalf of all the respondents, being the authority responsible for the administration of the process involving the appointment of chiefs.

Rule 58(4)(a) states that an affidavit shall be made by a respondent or a person who can swear to the facts or averments set out therein. In his deposition, the second respondent made it clear that he was also responding on behalf of the third to sixth respondents. The process for the appointment of a chief is initiated by the office of the second respondents. It is the officials of the second respondent that supervise the process leading to the appointment of a chief. In appointing a chief, the third respondent acts on the recommendations of the second respondent. The second respondent is therefore best placed to deal with any disputes involving the appointment of a chief. It was for that reason that I dismissed the applicant's objection.

The second to sixth respondents had preliminaries of their own. The first one pertaining to the application not being properly before the court was abandoned at the hearing. The other similar application that the respondents claimed to have been pending had since been withdrawn.

Whether the court has jurisdiction to determine the application at this stage

The issue is whether the applicant approached the court prematurely before exhausting the domestic remedies that are inbuilt in the law. The applicant denied that he jumped the gun so to speak. He submitted that the correct procedure was not followed because of corruption. He had also written several letters to officials of the second respondent but these were never responded or acknowledged. According to the applicant it was the second respondent who ought to have referred the dispute to the Provincial Assembly of Chiefs for resolution. In their brief response, counsel for the respondents submitted that the letters of complaints were all written before the first respondent was appointed Chief. The applicant ought to have raised a complaint in terms of the law even after the appointment of the chief.

The appointment of chiefs, their removal and the resolution of disputes pertaining to such matters is regulated by s 283 of the Constitution as read with s 3 of the Traditional Leaders Act[3]. It is critical to reproduce the relevant sections of the two legal instruments hereunder. Section 283 of the Constitution states 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;

[3] [*Chapter 29:17*]

(iv) the Act must provide measures to safeguard the integrity of traditional institutions and their independence from political interference."

The Traditional Leaders Act provides in s 3 as follows:

"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.……."

What is clear from the foregoing is that the appointment of a chief is informed by local customary practices of succession in any community. The second respondent only supervises the process through the local district and provincial structures before making a recommendation for the appointment of the nominated candidate. Further, from a reading of s 283 (c)(ii) of the Constitution, disputes concerning the appointment of a chief must be resolved by the third respondent following recommendations of the Provincial Assembly of Chiefs through the second respondent.

Where a dispute arises as in *casu*, it must be referred to the Provincial Assembly of Chiefs at the first instance. Disputes may arise at the nomination or selection stage or after the actual appointment of the chief by the third respondent. The resolution of the dispute remains reposed in the Provincial Assembly of Chiefs which makes recommendations to the Minister who in turn conveys the recommendations to the President. The Provincial Assembly of Chiefs is the structure closely connected to events as they occur at the community level.

From a reading of the papers before the court, the applicant raised grievances in connection with the nomination or selection of the first respondent as chief. This was before his eventual

appointment as chief on 6 December 2021. Letters were written to the Chairperson of the Midlands Provincial Chief's Assembly, the Director of Traditional Leadership and Support Services in the second respondent's ministry, the provincial development coordinator for Midlands Province, the permanent secretary in the second respondent's ministry and the second respondent. All the correspondence does not appear to have been responded to by any of the addressees. The appointment of the first respondent as chief was made regardless of these representations and one can only assume that the relevant structures were aware of these in the meetings that ultimately led to the nomination of the first respondent and his appointment.

Representations were also made directly to the third respondent following the appointment of the first respondent as chief in December 2021. Attached to the applicant's answering affidavit is a letter from the Acting District Development Coordinator for Gokwe South District inviting the Masuka Family to a meeting of the Masuka Chieftainship on 7 January 2022. The agenda of the meeting was not stated, and it is also not clear whether the meeting was eventually held. The applicant was not helpful in this regard.

Unfortunately for the applicant, all the evidence in aid of his complaint herein was only attached to the answering affidavit and not the founding affidavit. It is trite that an application stands or falls on the founding affidavit. The evidence was only attached to the answering affidavit as a reaction to averments made in the opposing affidavit. The applicant's undoing is that he tried to build his case in the answering affidavit. The present application was only filed on 19 January 2022, when the first respondent's appointment had already been approved with effect from 6 December 2021. That communication was made through a letter of 15 December 2021 from the Acting Chief Director for Traditional Leadership Support Services in the second respondent's ministry, to the Provincial Development Coordinator, Midlands Province.

From a reading of section 3(2)(b) of the Traditional Leaders Act as read together with s 283(a) of the Constitution, the third respondent appoints as chief, a person nominated by the appropriate persons in the community in accordance with the prevailing customary principles of succession. The correspondence attached to the applicant's answering affidavit was concerned with the nomination of the first respondent as the identified candidate for appointment as chief

ahead of the applicant. The third respondents only appoints someone who has been nominated. From my reading of the law, the nomination and the appointment of a chief are two different process. The third respondent, as the appointing authority is only involved in the later process. However, when a dispute arises following the appointment of a chief, that dispute must be resolved by the third respondent, after recommendations by the provincial assembly of chiefs through the second respondent. The applicant cannot approach the court on the basis of complaints that were made in the process of challenging the nomination of the first respondent.

As I have already noted, from a perusal of the record, two letters, one of 27 December 2021 and another of 30 December 2021 were written directly to the third respondent after the appointment of the first respondent as chief. None of these letters were copied to the provincial assembly of chiefs or other officials involved in the nomination and appointment processes. The letters were in vernacular and were only translated by the Principal Court Interpreter at the High Court in Harare on 14 March 2022, presumably for litigation purposes. There is nothing before me confirming that the said letters even found their way to the third respondent's offices. Previously, the applicant was communicating through his legal practitioners. However these two letters originated from the Masuka Family and the Rikonda House.

Disputes concerning the appointment of a chief are undoubtedly too technical for a non-legal mind to handle alone. By the time this matter was argued, the applicant no longer had the benefit of legal representation. It would have been obvious to a trained legal mind that once the third respondent had appointed a chief, any challenge to such appointment needed to be dealt with, at the first instance, by the provincial assembly of chiefs who were expected to make recommendations to the third respondent through the second respondent. The use of the words "must be resolved" in paragraph (ii) of s 283(c) suggests an absence of discretion.

I therefore find merit in the respondents' preliminary objection. The applicant must avail himself of the remedies provided under s 283 of the Constitution before approaching this court on review.

Costs

The general rule is that costs follow the event. I have already stated that this is the kind of a matter that was too technical for an unrepresented litigant like the applicant. He had difficulties in understanding the significance of the preliminary point and to address the court in rebuttal. Be that as it may, the case raised important legal issues concerning the nomination and appointment of chiefs. In the exercise of my discretion, I find it befitting to order that each party bears its own costs of suit.

DISPOSITION

Accordingly it is ordered as follows:

1. The application is hereby struck off the roll.
2. Each party shall bear its own costs of suit.

Dinha & Associates, first respondent's legal practitioners
Civil Division of the Attorney General's Office, second to sixth respondents' legal practitioners.