NDAVENI WEDZERAI

and

MUSARIWA MUDYANADZO

and

MUDYANADZO CHINGOMBE

and

JOHN MUDYANADZO

and

ABIAS BOTE

and

CHIDOKO CHINGOMBE

and

SHAMU MUDYANADZO

and

CHIPINGE MUDYANADZO

versus

RUTSATE RUTSATE

and

MINISTER OF LOCAL GOVERNMENT,

PUBLIC WORKS AND NATIONAL HOUSING

and

DISTRICT ADMINISTRATOR, GUTU

HIGH COURT OF ZIMBABWE

MATHONSI J

HARARE, 12 October 2012 and 31 October 2012

**Special Plea**

*S. Mushonga*, for the plaintiffs

1st defendant in default

Ms *T. Mashiri*, for the 2nd and 3rd defendants

 MATHONSI J: The 9 plaintiffs are the descendants of Mudyanadzo Chimombe of Gutu who once ruled as Chief Chimombe. The first defendant is the resigning Chief Chimombe he having been appointed by the President of Zimbabwe in terms of the Traditional Leaders Act [*Cap 29:17*].

 The plaintiffs instituted summons action against the first defendant, the second defendant who is the Minister of Local Government Public Works and National Housing and the third defendant, who is the District Administrator for Gutu seeking an order as appears on the following prayer:

 “wherefore the plaintiffs pray that:

7(a) The plaintiffs insist that the appointment of the first defendant as Chief Chimombe was wrong, illegal and against customary practice of the Chimombe family and Karanga Clan.

(b) The Chimombe Chieftainship belongs to the eldest son among the plaintiffs which is the prerogative of the plaintiffs not any other family which is brotherly to the Mudyanadzo family.

(c) The plaintiffs therefore request the Court to give a declaratory order to the effect that;

1. The Chimombe Chieftainship devolves only in the Mudyanadzo family and does not extent (*sic*) to descendants of his brothers as reflected in annexure AA.
2. The first Chief Chimombe was Mudyanadzo Chimombe and not Rutsate-Chimombe
3. The first defendant not being a direct descendant of Mudyanadzo-Chimombe but being an issue of (Mudyanadzo’s) brother is not entitled to the thrown (*sic*) of Chief Chimombe and is thus removed forthwith.
4. The second and third defendants are directed to look for a substantive Chief Chimombe from direct descendants of Mudyanadzo-Chimombe who are the plaintiffs and proceed to appoint a substantive Chief accordingly.

(d) The first defendant is to bear the costs of suit”.

 I have already stated that the first defendant is a sitting chief having been appointed in accordance with the law. The import of the order sought by the plaintiffs is to nullify and set aside his appointment and to direct the second and third defendants to initiate a fresh process of identifying another person for appointment by the President as substantive Chief Chimombe.

 In their declaration, which I must say is far from satisfactory in that it contains a historical background of the story telling how the chieftainship evolved and generally contains evidence of the plaintiffs’ claim, in breach of r 99(c) of the High Court of Zimbabwe Rules1971, the plaintiffs averred that the Chimombe Chieftainship was founded by Mudyanadzo from whom they descend. As Mudyanadzo’s direct descendants it is from among the 9 of them that a substantive chief Chimombe must be appointed and not the first defendant who is the son of Mudyanadzo’s brother, such brothers not being entitled to inherit the chieftainship.

 The second and third defendants filed a special plea to the plaintiffs summons and declaration in the following:-

“TAKE NOTICE that second and third defendants hereby plead specially in bar to plaintiff’s claim on the following grounds:-

1. The relief of a declarator sought by the plaintiff in para(s) (i) and (ii) of his (*sic*) summons (being subpara(s) (c)(i) and (ii) of his declaration) is incompetent in that the declarations sought are on matters purely of fact, whereas this Honourable Court can only declare what the law already provides in relation to existing, future or contingent rights or obligations in terms of the provisions of s 14 of the High Court Act [*Cap7:06*].
2. The relief sought by the plaintiff in para(s) (iii) and (iv) of his (*sic*) summons (being para(s) (c) (iii) and (iv) of his declaration) is not competent as:
	1. this Honourable Court has neither the jurisdiction nor the power to

remove a sitting Chief from his position as this is the sole discretion of the President of the Republic of Zimbabwe in terms of the Traditional Leaders Act [*Cap 29:17*] as read with 31K of the Constitution of Zimbabwe.

* 1. the second and third defendants have no power or authority to appoint

a substantive or any other type of chief, and are under no legal obligation to ‘look for’ a substantive chief Chimombe prior to appointing him.

1. As the relief sought by the plaintiff is not competent the plaintiff’s action should accordingly be dismissed simply on that basis alone with costs”.

This special plea was not set down for hearing in terms of r 38 of the

High Court Rules. However at the pre-trial conference of the parties held on 21 December 2011, the presiding judge directed that the special plea be set down for argument. It is on that basis that the matter was placed before me.

 Ms *Mashiri* for the second and third defendants submitted that the declaratory order sought by the plaintiffs is incompetent as what is sought to be declared are matters of fact and not existing future and contingent rights. On the issue of removal of a sitting chief she took the view that this court has no jurisdiction to do so, as the first respondent was appointed by the President, who incidentally was not cited in these proceedings, in terms of s 3 of the Traditional Leaders Act in the exercise of a discretion which this court cannot inquire into regard being had to s 31K of the Constitution. She drew attention to s 14 of the High Court Act [*Cap 7:06*] which provides:-

“The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination”.

 Mr *Mushonga* for the plaintiffs submitted that the plaintiffs are not seek a declaratory order, despite the fact that the prayer in the declaration specifically refers to it, but a review. His argument is captured succinctly in his heads of argument, para 2:

“2.1 The plaintiffs are not asking for a declaratory (*sic*) in these

 proceedings at all. What the plaintiffs are seeking is a REVIEW in

terms of common law powers of the High Court as envisaged in s 27 of the High Court Act as read with common law rules of judicial

 review.

2.2 The President appoints a chief not acting on his own discretion because if he acts or exercise his discretion on his own opinion it is not subject to judicial review unless he has exercised his discretion outside the law or made an order of law.

2.3 The President acts on the advise (*sic*) of the Minister. The court can review the Minister’s advise (*sic*) on the grounds of illegality, irrationality and procedural impropriety”.

The foregoing submissions leave the plaintiffs’ case worse off than it

was before the heads of argument were submitted. Section 27 of the High Court Act, sets out the grounds upon which the Court may review proceedings or decisions. To those grounds should also be added the common law grounds alluded to by Mr *Mushonga*.

 If what the plaintiffs are seeking is a review, then this brings into the foe the provisions of Order 33 of the High Court of Zimbabwe Rules, Rule 256, which is of peremptory application provides:-

“Save where any law otherwise provides, any proceedings to bring under review the decision or proceedings of any inferior court or of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions, shall be by way of court application directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected”.

 These proceedings clearly do not comply with that rule. In fact they fall foul of the entire Order 33. For the plaintiffs to take that route in attempting to defend their action is to consign the claim to the dust bin forever.

 The President has already appointed the first defendant as substantive chief Chimombe. In doing so, he acted in terms of s 3 of the Traditional Leaders Act [*Cap 29:17*] which states:-

 “3. Appointment of Chief

1. Subject to subs (2) the President shall appoint chiefs to preside over communities inhabiting communal land and resettlement areas.

2. In appointing a chief in terms of subs (i), the President –

1. shall give due consideration to –
2. the prevailing customary principles of succession, if any, applicable to the community over which the chief is to preside; and
3. the administrative needs of the communities in the area concerned in the interests of good governance, and
4. 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) Subject to section seven, the President may, where he is of the opinion that good cause exists, remove a chief from office.

(4) ………..”

It cannot be disputed that a chief is appointed by the President and in

doing so the President has regards to the prevailing customary principles of succession. In practice what happens is that the process of nominating a candidate for appointment is the responsibility of the clan. Section 3 does not envisage a situation where government officials take over the process and “look for” a chief from the community. *Mbedzi* v M*bedzi Ors* HB 145/11 at p 5, *Machaka* v *Minister of Local Government, Urban and Rural Development and Ors* HH 37/12 at p 1.

 For that reason, directing the Minister and the District Administrator to look for a chief would violate the provisions of the Act dealing with appointment of chief. More significantly, that would usurp the authority of the President to appoint and remove a chief.

 What really puts the plaintiffs’ case to the sword is that the President has already appointed a chief presumably following the procedure laid down in s 3 of the Traditional Leaders Act. The plaintiffs now want this court to set aside that appointment and reopen the process of nomination, this time to the exclusion of other members of the clan, except themselves.

 The plaintiffs have not impugned the process of nomination and appointment. This court cannot set aside the decision of the President and substitute its own decision except by way of review. The insurmountable difficulty the plaintiffs face is that this is not a review application and the President has not been cited in these proceedings. It is therefore as incompetent to set aside his decision it is to direct the second and third defendants to “look for” a chief when one is already in place and when neither the second nor the third respondents have a duty to perform that exercise.

 I therefore come to the inescapable conclusion that the order that the plaintiffs seek is indeed incompetent. A plea in bar raises a defence which either postpones or destroys the operation of a cause of action. The one that has been raised by the second and third defendants destroys the plaintiffs’ cause of action. See Herbestein and Van Winsen, The Civil Practice of the Superior Courts in South Africa, 3rd Ed, Juta & Co Ltd p 323.

 The effect of upholding the plea in bar against the plaintiffs’ action in its present form is to completely quash the action as it cannot be sustained at all.

 In the result, I make the following order, that:-

1. The special plea in bar be and is hereby upheld.
2. The plaintiffs’ claim be and is hereby dismissed with costs.

*Mushonga, Mutsvairo & Associates*, plaintiffs’ legal practitioners

*Kantor & Immerman*, 1st defendant’s legal practitioners

*Civil Division of AG’s Office,* 2nd & 3rd defendants legal practitioners