KHAZAMULA MPAPA
Versus
HANYANI HAISA ZAVA
And
LOVEMORE CHISEMA (N.O)
And
PROVINCIAL ASSEMBLY OF CHIEFS
MASVINGO PROVINCE
And
SENATOR CHIEF CHITANGA (N.O)
And
MINISTER OF LOCAL GOVERNMENT & PUBLIC WORKS
And
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 27 MAY 2024
JUDGMENT DELIVERED ON 26 November 2024

Opposed application

C Kwirira, for the applicant

G T Ndava, for the first respondent

T. Undenge, for the second-sixth respondents

ZISENGWE J: The applicant is aggrieved by the appointment of the first respondent as chief of the Mpapa community. He claims that the process leading to the said appointment was fraught with serious irregularities and that it therefore has to be rescinded to pave way for a proper and legal process for the selection of a new chief. The application is predicated on the following three broad premises. Firstly, that the first respondent was imposed on the Mpapa community without the approval of or consultation with the people concerned. Secondly, (and as a direct result

of the first irregularity) that the appointment of the first respondent as chief of the community was contrary to the culture, customs and traditions of that community, it being averred that first respondent could not ascend to the throne ahead of persons, particularly the applicant, of a senior generation. Thirdly, that the Constitutional imperatives applicable in the appointment of a chief were not complied with.

The applicant therefore seeks an order in the following terms:

1. The appointment of the first respondent as substantive Chief Mpapa be and is hereby set aside.
2. The first respondent be and is hereby interdicted from performing functions of a chief for the Mpapa community of Chikombedzi effective from the date of service of this order.
3. The 5th respondent be and is hereby directed:
   a) To cause convening of meeting of the third respondent within 30 days from date of service of this order upon the fifth respondent, and to make recommendations and submit [the] same to the 5th respondent, with recommendation at the preferred candidate for appointment to the position of substantive chief Mpapa.
   b) To submit such recommendations to the 6th respondent to enable him to appoint substantive chief Mpapa in accordance with the provisions of section 3 of the Traditional Leaders Act *[Chapter 29:17]*.
4. The second respondent be and is hereby ordered to refrain from interfering with nominating appointment or any consultative meetings that shall be conducted by the third respondent in accordance [with] clause 3 (a) [above].
5. Costs of suit shall be borne by first to fifth respondents on [the] attorney –client scale jointly and severally one paying the other to be absolved.

The background

The Mpapa community is situated in the Lowveld district of Chiredzi of Masvingo province. Up until recently when it was elevated to a chieftainship, it was headed by a headman. The first respondent was installed as chief Mpapa in 2022 after having briefly served as the headman of that community from 2020. His appointment as Chief Mpapa came as a consequence of the elevation of the status of that traditional leadership from a "headmanship" to a chieftainship. The second to sixth respondents are all functionaries in the processes associated with the appointment, suspension and of traditional leaders among other functions. They comprise the following, the current chairperson of the Chiredzi District Coordinating Committee (the second respondent) who was cited in his official capacity as such; The Provincial Assembly of chiefs for Masvingo province (third respondent) which is a statutory body established in terms of section 283

of the Constitution of Zimbabwe. Its mandate is set out in that section, namely to oversee the appointment, removal and suspension of traditional leaders. The fourth respondent is its current chairperson. The fifth respondent is the Minister of Local Government and republic works part of whose remit is to recommend the President of Republic (the sixth respondent) the appointment, removal or suspension of any traditional leader. He does so upon the recommendation of the Provincial Council of chiefs.

The present application was preceded by several other applications brought by the applicant all designed to impugn the appointment of the first respondent either as headman or subsequently chief of the Mpapa community. These applications were either withdrawn or overtaken by events.

When stripped to its lowest terms the dispute is basically whether a gross irregularity occurred in the appointment of the first respondent as head of the Mpapa community ahead of the applicant. The applicant avers that there exists an immutable and sacrosanct traditional rule which was flouted with the appointment of the first respondent to the leadership of the community. This rule precludes "sons taking over the throne during the lifetime of any of his fathers".

There are six families or "houses" which take turns to rule over the community based on what the parties refer to as the collateral system of rotation. These houses are the following:

a) Makopani
b) Zava (also known as the Haisa house)
c) Zambo
d) Ngatsani
e) Rismati (sometimes spelled as Lisimati)
f) Malure

These "houses" are simply families of the sons of each of the founding Chief Mpapa. In its basic form the collateral system of rotation envisages one family member from each of those families, one after the other, taking turns to rule over the community. In its purest form it is cyclical (hence "rotational") in nature as it rotates between the houses, from the first to the sixth (in order of seniority) and back to the first and so on. When an incumbent dies, he is replaced by a member from the next family in line. The applicant is from the Malure house and the first respondent from the Zava/Haisa house.

The following is the agreed regnal list (so to speak) of the Mpapa clan. The founding headman Mpapa was installed and died in the colonial era. He was succeeded by his eldest son Makopani who in turn was succeeded by Zava and the later by Zambo. Ngatsani predeceased Zambo, and therefore after Zabo Risimati took over. Malure predeceased Rasmati and upon the death of Rismati, the headmanship went back to the Makopani family where you Makopani's eldest son Mangove assumed headmanship. When Mangore passed away on in 1979 his younger brother from the same family, Matatise was chosen as the headman. Following his death in 2002, his son Ingwani was selected to be headman acting capacity.

In the interim several consultative meetings, particularly with the office of the District Administrator (Now called the District Coordinator) were held in the community with a view to selecting a substantive headman to succeed the late Matatise. The outcome of those meetings is yet contested as between the applicant and the first respondent, suffice to say that by letter dated 8 August 2020 the first respondent was appointed by the fifth respondent as substantive headman Mpapa. This was much to the consternation of the applicant judging from the series of lawsuits he then mounted albeit unsuccessfully, to challenge that appointment.

Hardly two years into his reign as headman saw the Mpapa community being elevated to a chieftainship. In the wake of this elevation the first respondent was appointed as substantive chief. His appointment took effect from 1 August 2022. It is the propriety of that appointment that constitutes nub of this application.

It is the applicant's position that the appointment was deeply flawed as it was riddled with several glaring irregularities highlighted in the opening paragraph of this judgment.

The application stands sternly opposed by the first and fifth respondents. For his part the first respondent avers that both his appointment as substantive headman Mpapa and his subsequent elevation to the position of Chief Mpapa were done procedurally in that all customary and legal formalities were undertaken and adhered to the letter. He maintains that he was duly selected by those responsible as per the customs and traditional practices of the Mpapa community to ascend to that position.

He further contends that it is not the age of a person from any of the designated houses that is the determinant of eligibility for appointment to the throne, but rather it is the established collateral system to rotation amongst the eligible "houses". According to him, it is the

responsibility of the house whose turn has arrived to provide the next traditional leader drawn from amongst its members to take over the reins of power, which in this case was him.

The application also stands opposed by the fifth respondent. In doing so an opposing affidavit was filed by one Emmanuel Ngwarati who identifies himself therein as the acting permanent Secretary for Local Government and Public Works. The basis for opposing the application was that not only were all the procedural prerequisites attending o the appointment of the incumbent chief followed, but also that the latter was duly nominated by the house whose turn it was to select a suitable person from amongst its members to assume the throne.

The second, third, fourth and sixth respondents did not file any opposing papers.

The points in *limine*.

The applicant, as well as the first respondent and fifth respondents each took points in *limine* some of which were either abandoned or dismissed leaving only one. This relates to the admissibility of the fifth respondent's opposing affidavit. It is the applicant's contention that this affidavit must be expunged from the record because it was deposed to by a person other than the 5th respondent himself and no proof was availed that the deponent was duly authorized to depose to that affidavit on his behalf.

In response it was submitted on behalf of the fifth defendant that the information relayed in the impugned affidavit is within the personal knowledge of the deponent rendering it admissible. Reliance was placed *inter alia* on rule 58 (4) which provided as follows:

> 4. "An affidavit filed with a written application
>
> (a) shall be made by the applicant or respondent, as the case may be, or by a person can swear to the facts or averments set out therein"

Further, it was submitted by Mr Undenge who appeared on behalf of the fifth respondent that the permanent secretary, for all intents and purposes is responsible for the day to day running of the Ministry in question and the issue at hand falls under his purview. Therefore, so the argument goes, the he is in a position to swear positively to facts in question and is therefore clothed with the requisite authority.

Where a person other than the one identified as a respondent, purports to file an affidavit on behalf of the latter, two pre-requisites have to be satisfied, firstly that he or she has the requisite authority to depose to the affidavit and secondly that the facts he deposes to are in his personal knowledge and he therefore can swear thereto.

In *Andrew Maringa v Winray Estate (Private) Limited & Ors* HH 550-17, CHATUKUTA J (as she was was) had this to say;

> "The answer to the question as to who can depose to an affidavit is found in *r* 227(4) of the High Court Rules. The rule provides that only a person who is privy to facts relevant to the application may depose to an affidavit. A permanent secretary is the head of the ministry. He/she would be the custodian of the ministry's documents and ordinarily privy to the day to day running of the ministry. (See *Elias Zanondoga Mapendere & 2 Ors* v *Minister of Justice, Legal and Parliamentary Affairs & 3 Ors* HH 420-17). "

In *casu* I believe both requirements are satisfied. It is common cause that the deponent is the Acting Permanent Secretary for Local Government and Public Works. It is highly improbable that he was on a frolic of his own when he deposed to that affidavit. I therefore find this point in *limine* lacking in merit and accordingly I dismiss it.

On the merits

The applicant's case

As earlier stated, the applicant's case can be distilled to three interrelated arguments. These are: a) that first respondent was imposed upon the Mpapa community without the requisite consultations and approval of the relevant members of that community, ("the consultation argument"), b) that the appointment of the first respondent as headman (and subsequently chief) of the Mpapa community was contrary its customs and traditions ("the traditions and customs argument"), and c) that the requirements for the appointment of a chief as set out in section 283 of the Constitution were not followed in the appointment of the first respondent, ("the Constitutional argument").

The "consultation" argument

Under this heading, the applicant avers that the process of the appointment of the first respondent as first as headman and later as chief took place in opaque circumstances and was shrouded in secrecy. He therefore claims that the first respondent's appointment is illegitimate as

the latter was imposed upon the Mpapa community. He places most of the blame for this on the second respondent. The result according to him was a domino effect wherein an improper recommendation was made to the fifth respondent who in turn wrongfully appointed the first respondent as headman Mpapa.

He complains in this regard that no meeting of elders was convened wherein it was resolved to have first respondent appointed to the position of headman. He avers that as a matter of fact, it was him who was recommended for the position by the members of the community.

Failure to consult with chief Sengwe (under whose leadership the Mpapa headmanship, as it then was, fell) according to him constituted a further significant irregularity which had the effect of the fifth respondent acting on unsound advice. He pointed to the absence of the name of Chief Sengwe from the list attendees of the meetings relied upon by first respondent as evidence of his non-participation in the process.

He condemned the meeting held on 2019 for various reasons, not least on the basis that that meeting the persons who are not part of the legitimate Mpapa houses participated in those meetings.

The end result, was that when the time came to appoint a chief for the community, the fifth respondent made an improper recommendation to the President (the sixth respondent)

The traditions and customs argument

The main thrust of his argument under this head is that the appointment of the first respondent as headman and subsequently as chief amounted to a distortion of the caveat or limitation which applies to collateral system of rotation. He calls it a "sub-principle". According to him, in terms of this sub-principle namely 'a candidate cannot assume leadership of the community during the life time of any of his 'fathers'. Therefore, the first respondent as grandson of the late headman Mpapa was disqualified from taking over the throne ahead of his paternal uncles (notably the applicant) who are "senior" to him in the "pecking order" of the community. Accordingly, the applicant argues that the Haisa house would only have taken over the reins of power should it have had a candidate of such a higher generation candidate. He thoroughly criticized the second respondent for failing to have regard of this custom or tradition.

Applicant further assets that the elders of the Mpapa community held a series of meetings in 2009 where it was resolved that the Malure family who had not enjoyed the coveted headman position on account of Malure predeceasing Risimati. According to him, it was additionally resolved that he can the eldest surviving son born by the immediate sons of Mpapa (i.e., paternal grandson) was to take over.

He asserts that in 2009, the elders of the Mpapa community recommended his appointment as headman Mpapa and that no other meetings were held which supposedly recommended the first respondent for the position. He also points out that if the first respondent was identified as the successor to the throne, then section 8 (4) of the Traditional Leaders Act need not have been invoked.

The Constitutional argument

The applicant avers that there was no strict adherence to the requirements of section 283 of the Constitution before the first respondent was appointed substantive Chief Mpapa. He claims that the third and fourth respondents were not involved in the selection process of the first respondent and secondly that the Provincial council of chiefs abdicated on its role to conduct consultative meetings with the community on the clan's traditions.

He further points out that the absence of a recommendation of the Provincial council of Chiefs which is a precondition for one to be appointed chief rendered the entire process a nullity.

He professed ignorance of any recommendations made by the third respondent in liaison which the fifth respondent as required by section 283 of the Constitution. Related to this, is his argument that his representations challenging the appointment of the first respondent were never taken into account and that no explanation was proffered therefor. The applicant therefore contends that his right to administrative justice and to equal protection of the law as contemplated in section 3 of the Administrative Justice Act, Chapter, 10:28 and section 68 of the Constitution, respectively were unjustly undermined.

The first respondent's case

The first respondent denies any impropriety whatsoever in the processes leading to his appointment initially as headman and subsequently as chief Mpapa. He asserts that there was strict

compliance into all the legal dictates and that his appointment was in tandem with the customs and traditions of the Mpapa community.

He completely refutes the allegation that there was no prior consultation with the Mpapa people. He avers that as a matter of fact, several meetings were held on the question of succession, the culmination of which was a resolution that it was the turn of the Haisa house to provide a successor. This was based on the very collateral system of rotation. Reference was made to relevant excerpts of the meeting of August 2009, the sum total of which was that based on the family tree and on the collateral system it was the turn of the Haisa/Zava house to which he belongs, to take over the leadership of that community. He attached both an attendance list and minutes of the meeting to his opposing affidavit.

He also referred to the meeting of 15 February 2019, a copy of whose minutes he annexed to his affidavit as testament of the transparency of the process. Central to his rebuttal of applicant's allegations of the murkiness of the circumstances of his appointment were the remarks by the second respondent captured on the said minutes. Those remarks were to the effect that the role of his (i.e., second respondent's) role was to facilitate the selection process and to listen to the submission of the community concerned. Further that its role who not to handpick a headman but to religiously receive all submissions and to ensure that the prevailing customary law principles of succession were adhered to "before proceeding to lay down the relevant successor model per tradition and custom.

Further, he avers that Chief Sengwe under whose chieftainship the Mpapa headmanship fell, attended the consultative meetings merely as observer. He also relies on a letter dated 10 March 2019 authored by chief Sengwe and directed to the 2nd respondent as confirmation not only of the fact that he (i.e., Chief Sengwe) was consulted and was indeed involved in the succession processes but also that it was the turn of the Haisa house to provide someone to ascend to the position.

Regarding the alleged distortion of the collateral system of rotation, while concurring with the applicant on the overall structure of the Mpapa headmanship (now chieftainship), the houses that comprises it, and the collateral of system for succession to the throne he nonetheless differs with him on a number of key issues.

First and perhaps most important, he avers that the age of a descendant is not necessarily the determinant of the identity of a successor to the throne. According to him, it is the product of the collateral system of rotation which does. Further, according to him it is the seniority of the house whose turn has come to provide a member for ascension to the throne and not the seniority of a particular individual.

He further states that the Mpapa Community is well aware of his appointment. He however points out that he was appointed at the height of the COVID19 pandemic induced national lock down. The latter prohibited large gatherings.

The respondent also avers that section 8 (4) of the Traditional Leaders Act, *[Chapter 29:17]* was invoked after a period in excess of two years had elapsed without a substantive headman being appointment owing to the incessant succession squabbles.

Section 8 (4) of the Traditional Leaders Act, [Chapter 29:17] provides as follows:

"(4) Where, after the two years referred to in subsection (3), no acceptable nomination has been made, the Minister may, in consultation with the district administrator of the area concerned, appoint a person from the clan as headman."

With regard to whether the dictates of the Constitution were followed, he maintains that they were. He states that the fifth respondent's recommendation for his appointment was made after taking into account the report from the second, third and fourth respondents who approved his elevation to the position of chief. This was based on the headman selection process. He stressed that his elevation from headman to chief was concomitant to the upgrading of the Mpapa headmanship to a chieftainship. The corollary being that a fresh selection process was not necessary.

He is also adamant that the fifth respondent acted upon correct and lawful advice. He referred to specifically to the recommendation by the second respondent which recommendation according to him necessarily passed through various offices before reaching the fifth respondent.

Although he did not say so in as many words, the first respondent avers that the applicant's attitude is actuated by malice because he failed to land the coveted position.

He further points out that applicant's alleged lack of knowledge of the process leading to his elevation as chief are feigned. He refers in part to the various court cases which preceded the current one. He avers that the applicant lost his court challenges to his selection appointment and incumbency in the Magistrates court. He claims that the applicant failed to appeal against these decisions and therefore that this current application is nothing more futile forum shopping exercise.

Finally, the first respondent avers that the allegation by the applicant that his right to protection of the law was truncated is hard to sustain given the various cases he (i.e., applicant which he itemised) has lost in his quest to wrest the traditional leadership in question from him. He therefore urged the court to dismiss the application as nothing more than a sustained quest to harass him and to abuse court process.

The fifth respondent's position.

The fifth respondent denies any impropriety in the process leading to the appointment of the first respondent to the firstly to the position of headman it being in the context of this case, the precursor to his appointment as chief. He explains that the collateral system of rotation entails a rotation amongst the six eligible houses and not necessarily of surviving individuals. According to him it is the prerogative of the house whose turn has arrived to provide a candidate for the position of headman.

As with the first respondent, the fifth respondent equally refutes the allegation that Chief Sengwe was not involved in the selection process. He avers that Chief Sengwe wrote a letter supporting the candidature of the first respondent. He also disputes the allegation that the appointment of first respondent was shrouded in secrecy. He states that several meetings were held between 2006 to date which meetings were facilitated by his ministry. He accuses the applicant of malice and being hell bent on disturbing the first respondent's smooth discharge of duties.

The issues.

The broad issues for determination are these:

a) Whether the appointment of the first respondent as headman Mpapa was irregular.
b) Whether the appointment of the first respondent as Chief Mpapa was irregular.
c) Whether the applicants' complaints went unheeded, if so, the effect thereof.

The overarching consideration in the appointment of traditional leaders is that such appointment must comply with the law and acoord with the culture, customs and traditions of the community in question. See *Chief Mototlegi & Anor* v *President of Bophuthatswana & Anor* 192(2) SA 480 & *Masuka* v *Rikonda & Ors* HH578-23.

Where the appointing authority (the Minister in the case of a headman and or in the case of a chief, the President) acts on wrong advice or it is based on a wrong principle, then the advice that informed the appointment can be reviewed. The grounds on which such advice can be reviewed being illegality, irrationality and procedural impropriety. See *Rushwaya* v *Minister of Local Government* 1987(1) ZLR 15 at 18(H); *Marange* v *Marange & Ors* SC1/21 & *Moyo* v Mk*oba & Ors* 2013 (2) ZLR 137 (S) at 139.

In particular in *Moyo* v *Mkoba & Ors* (supra), the following appears in the headnote:

> "Held, further, that the effect of the recommendation of the minister to the President, having been based on an incorrect principle of customary succession means that the President did not have the correct facts upon which he was required to give consideration before making the appointment as to the substantive chief. It was not what the Act required to be put before him."

It is on the basis of the above principles that of the above principles that the propriety of the appointment of the first respondent will be determined.

Whether appointment of the first respondent as Headman Mpapa was irregular

Under this head there are three related questions. These are, whether the appointment of the first respondent as Headman Mpapa was vitiated by the absence of the requisite consultations with the Mpapa community, whether the first respondents was disqualified to assume the role of headman on because he is generationally junior to the applicant and thirdly whether the applicant was chosen by the community as headman ahead of the first respondent.

The question of the appointment of the first respondent as headman needs not detain anyone for two main reasons. Firstly, the applicant's attempts to overturn the appointment of the first respondent in the Magistrates Court were unsuccessful or stillborn. They were stillborn in the sense that they were not followed through by the applicant. It is improper to re-introduce the same subject matter via this application.

Secondly, and perhaps more importantly this particular issue has been overtaken by events. The traditional leadership of the Mpapa community no longer exists in that form or status, it is now a chieftainship. The process of the appointment of chief is different and distinct from that of the appointment of headman. It is futile to revisit the events of year 2020 when the first respondent was appointed as substantive Headman Mpapa ostensibly with a view to undoing what was done then.

The processes that were followed then, however are only be relevant to the extent that they may have impacted on the subsequent appointment of the first respondent to the position of substantive chief Mpapa. It is on that basis that I make the observations below.

The question of consultations with the Mpapa Community.

The series of meetings that were held to choose a substantive Headman Mpapa makes the lack of consultation argument advanced by the applicant hard to sustain. That these meetings were held with one thing in mind only, namely to decide which house was to produce the next Headman Mpapa such finds support from the fifth respondent. The applicant may have been dissatisfied with the outcome of the meetings or the composition of the attendees, but that is a far cry from suggesting a wholesale abandonment of the need to consult. It is not difficult to understand why applicant would have preferred a different composition of attendees and a different outcome, but that is hardly the question. Tellingly, the applicant was present in the said meetings. He cannot purport the impugn the occurrence of the very meetings of which has part.

In meetings of this nature where attendees habour diverse vested interests, consensus is hardly likely the outcome. This however does not detract from the fact consultative meetings were as a matter of fact held.

In the same vein, the documentary evidence shows on a balance of probabilities that Chief Sengwe's input was obtained. The letter by Chief Sengwe which both the first and fifth respondents refer to is relevant. In that letter Chief Sengwe clearly lent support to the appointment of the first respondent as substantive headman. The absence of a supporting affidavit by him towards first respondent's cause in this application does not in the least diminish the value his support to the appointment of first respondent as headman.

On the whole, therefore there is ample evidence that consultations with the local community was done. The corollary being, of course, is that first respondent was not handpicked and foisted upon the Mpapa community as their headman by the second respondent as alleged.

Whether the appointment of the first respondent as substantive Headman Mpapa flouted the caveat to the collateral system of rotation

Acceptance that consultations were made with community and that the Chief who superintended this community supported the candidature of the first respondent renders *fait accompli* the question of the "sub-principle relied upon by the applicant. A contrary finding would be a non-sequitur. Further, the applicant presented no precedent from this very community of the application of this sub-principle. The parties are in agreement that the rotation is only in its second cycle and no precedent was provided where an otherwise eligible candidate was disqualified on account of this sub-principle.

Whether the appointment of the first respondent as substantive Chief Mpapa flouted the Constitution.

The blue print for the process of appointment (and removal) of chiefs is set out in section 283 (1) of the constitution 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;"

Section 283 of the Constitution is not the code that governs the appointment (or removal of traditional leaders) it is merely a blue print for such a code. This regard the following was said. In this regard the following was said in *Marange v Marange* (supra)

> "Following exchanges with the Court, it was accepted by both counsel that s 283 of the Constitution does not constitute the actual code that governs the appointment and removal of chiefs or the resolution of disputes in that connection. What s 283 does is to enunciate the template to be applied in the formulation and implementation of that code. It is also common cause that the Traditional Leaders Act, duly modified so as to fully conform with the Constitution, provides the requisite legislative framework contemplated by s 283 of the Constitution"

It is common cause that to date no statute as envisaged by section 283 of the Constitution has been promulgated and therefore in terms of para 10 of sixth schedule of the constitution, resort is had to the continuation of in force of all existing laws. These laws are to be construed in conformity with the Constitution. See *Marange v Marange* (supra) where the following said:

> "Thus, even without having been exactly aligned to the Constitution, the Act makes it clear that it is the President who is vested with the power to appoint and remove 7 Judgment No. SC 1/21 Civil Appeal No. SC 693/17 chiefs from office and that he must do so in accordance with the prevailing customary principles of succession, following nominations by the local community and/or the responsible Minister. To a significant extent, therefore, the provisions of the Act that I have alluded to are perfectly capable of being applied in accordance with the requirements of s 283 of the Constitution. I am amply fortified in adopting this approach by having regard to para 10 of the Sixth Schedule to the Constitution, which dictates the continuation in force of all existing laws to be construed in conformity with the Constitution."

The net effect therefore is that Chiefs are currently appointed in terms of s3 of the Traditional leaders Act. It reads:

> **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."

The question which immediately springs to mind is what happens in a situation, as here, where a headmanship is elevated to a chieftainship? Does the incumbent headman get automatically elevated to chief or a fresh process must ensue. Whereas the applicant subscribes to the latter school, the first respondent associates himself with the former.

In my opinion, once the propriety of the incumbency is accepted, no fresh process needs to be undertaken. It would be illogical, it is submitted, that one is accepted as a rightful headman but becomes an illegitimate chief when the headmanship is elevated to a chieftainship. The fact remains that the person concerned is the traditional leader of the community in question. His fate is inextricably tied to the hierarchical station of the throne.

Just to put matters into perspective, if one were to accept the applicants' position that a fresh process must ensue and for instance a different person is appointed, what would happen should the throne be downgraded or demoted back to headmanship? Would the original head bounce back to reclaim the position he lost on account of the upgrading. Such a situation would yield untenable results.

As seen from the foregoing discourse, I was unable to find ay procedural irregularity in the appointment of the first respondent as chief Mpapa. His appointment came as a natural consequence of his earlier appointment as headman Mpapa. There was therefore neither a gross irregularity in his appointment nor a violation of the procedures set out for such appointment.

In every selection process whether sophisticated or crude and rudimentary, there is bound to be dissenting voices against the selection of the ultimate victor. There is seldom unanimity there will be supporters and detractors alike for both the victorious and the vanquished.

While it is true that the applicant is entitled to administrative processes that are just and transparent and whereas he is entitled an equal protection of the law as provided for in the constitution, there is in my view no evidence that he was denied any of these.

The processes which culminated in the elevation of the first respondent were subjected to public scrutiny in the sense that several meetings were held wherein he was selected as the appointment candidate, initially as headman and subsequently as the chief of the Mpapa people of Chiredzi.

The applicant claims to have been the preferred candidate by the Mpapa people to take over as headman Mpapa and that he is the preferred candidate for chieftainship. Apart from a few supporting affidavits attached the present application, the applicant does precious little to justify that assertion.

The fact that a few people from the community have come forward ostensibly in support of his candidature does not translate to him being such the overall preferred candidate.

Since section 8 (2) of the Traditional Leaders Act requires that the person to be so appointed as headman be nominated by the chief of the area in question, one would have therefore expected applicant's candidature to be endorsed by Chief Sengwe. To the contrary, as stated herein before, it was the first respondent whose candidature was endorsed by Chief Sengwe.

Further, the applicant has not availed any minutes held in the community wherein he was identified as the rightful heir to either the headmanship of the Mpapa community, as it then was, or its chieftainship after its elevation that status.

The relief sought in paragraphs 2, 3, and 4 of the applicant's draft order were consequential upon the granting of the order sought in paragraph 1. Therefore, the latter having been dismissed, the former cannot be activated. The result is that the application fails in toto.

Costs

The general rule is that the substantially successful party (which the 1st respondent has been) is entitled to his or her costs. There is no good reason to deviate from that position. However, there is no justification in awarding costs on the Attorney and client scale as sought by the first

respondent. The application was neither *mala fide* nor reckless nor was it meant to harass the first respondent. The appellant, it appears, seems genuinely aggrieved by the process culminating in the appointment of the first respondent to the position of chief. Costs on the ordinary scale are appropriate.

Accordingly, the application is hereby dismissed in its entirety with costs.

Kwirira & Magwaliba legal practitioners; applicant's legal practitioners
Mangwana & Partners; respondents' legal practitioners
Office of the Attorney General; fifth respondents' legal practitioners