

MIKA KATYAVAZUNGU
versus
PETER MUCHABETA
And
DISTRICT DEVELOPMENT CO-ORDINATOR,
GOKWE SOUTH (N.O)
And
MINISTER OF LOCAL GOVERNMENT & PUBLIC WORKS N.O
And
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE (N.O)
And
ZIMBABWE COUNCIL OF CHIEFS

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 2 November 2023 & 9 January 2024

A. Mutatu, for applicant
C. Chuma, for 1st respondent
No appearance for 2nd to 5th Respondents

OPPOSED APPLICATION

ZISENGWE J: The late Chief Nemangwe of Gokwe district of the Midlands province, Peter Muchabeta (the 1st respondent) died on 20 July 2023. He died of natural causes. Before his demise, however, he was locked in this present a legal dispute with the applicant with the latter claiming that he (i.e. 1st respondent) had been improperly and un-procedurally appointed to that position.

The applicant seeks an order setting aside the 1st respondent's recommendation by the relevant statutory functionaries for appointment to that position leading to a fresh selection process for the Nemangwe Chieftainship.

The applicant's main gripe with the process leading up to the appointment of the 1st respondent appears to be that it apparently side-lined him (i.e. applicant) when in his view he was and remains the rightful heir to the throne.

The Parties

The applicant is the son of the late Chief Elijah Masungu Katyavazungu, who preceded the 1st respondent as Chief Nemangwe. The 1st respondent who has since died is the immediate past Chief Nemangwe. The 2nd to 5th respondents are all key government functionaries each with a role to play in the appointment of chiefs in terms of provisos (i) and (ii) to s238 (a) of the Constitution. It reads:

But (i) the appointment, removal and suspension of chiefs must be done by the President on the recommendation of the Provincial assembly of Chiefs and the Minister responsible for traditional leaders and in accordance with the traditional practice 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.

It is common cause that presently the Minister responsible for traditional leaders is the 3rd respondent (i.e. the Minister of Local Government and Public works).

The background

The 1st respondent succeeded the late Elijah Masvingo Katyavazungu who died in 2009. The applicant is the latter's eldest surviving son and was up until the appointment of the 1st respondent acting Chief Nemangwe. The applicant claims that he was nominated to succeed his father as Chief Nemangwe at a meeting held on the 30th of January 2009. He further avers that his nomination was based firstly on him being the eldest surviving son and secondly on the basis of the rotational succession system of the Nemangwe Chieftainship. These houses according to the applicant are the Nemananga and Manjoro houses.

The applicant avers that the succession custom of the Nemangwe clan through the rotational system provides that after the death of an incumbent chief his son is selected and subsequently appointed as substantive chief before it moves to the next house in line. According to him it was on that basis and pursuant to the meeting held on 19 February 2014 that the 2nd respondent recommended his appointment as substantive Chief Nemangwe to the 3rd respondent. He claims, however, that some disgruntled persons sought to scuttle his appointment leading to a

series of meetings aimed at resolving the impasse. To this dismay he received a letter from the 2nd respondent informing him had been appointed Chief Nemangwe on the 29th of March 2023.

In a word, therefore, he asserts to that some Chiefs whom he identified as Chief Ntabeni and chief Nenyunga were instrumental in scuttling his appointment by imposing the 1st respondent as a candidate for the Nemangwe Chieftainship. He therefore claims that the appointment of the 1st respondent was irregular and inconsistent with the customs and traditions of the Nemangwe community and that the 1st respondent was not in line to succeed the late Elijah Katyavazungu. He also avers that there was no selection process undertaken.

In his founding affidavit he gives a rather lengthy and elaborate account on the history of succession to the Nemangwe Chieftainship going back decades culminating in it moving to the Manjoro house after circulating on the Nemananga house 9 times. After believes that he was legitimately entitled to succeed his late father- when ultimately did not happen.

He therefore claims the decision by the 2nd respondent in recommending the 1st respondent for appointment as chief Nemangwe despite him not being nominated by the Nemangwe clan was illegal, irrational and un-procedural as it flouted the relevant provision of the Traditional leaders Act.

Accordingly, he implores the court to invoke its review powers to set aside that recommendation.

The relief he seeks is captured in the draft order attached to the application which reads,

IT IS ORDERED THAT:

- (i) The application for review be and is hereby granted.
- (ii) The decision by the 2nd and 3rd respondent in recommending the 1st respondent as a candidate for appointment as Chief Nemangwe to the 4th Respondent be and is hereby set aside.
- (iii) The 3rd respondent be and is hereby directed to act in terms of the law, at the earliest available opportunity in ensuring that the Chieftainship dispute is resolved and a rightful candidate is recommended to the 4th Respondent for appointment to the Nemangwe Chieftainship.

- (iv) The respondent bear costs of sour jointly and severally one paying the others to be absolved.

Before his death, the 1st respondent deposed to and filed an opposing affidavit disputing all the applicant's material averments. In it he averred that the appointment of applicant as Chief Nemangwe was only on an interim basis following the demise of his (i.e. applicant's) father. According to him applicant's incumbency was only meant to subsist for the two-year mourning period after which a fresh selection process for the substantive Chief Nemangwe was to be undertaken, which according to him is precisely what transpired.

He gave his own narration of the events which played out from 2012, which events I need not enumerate here as what is at stake presently is the propriety of the continuation of the current application in the wake of the demise of the 1st respondent.

Be that as it may, the chronology of events as recounted by the 1st respondent starkly contrasts that of the applicant. It however suffices to say that the 1st respondent refuted the applicant's contention that when an incumbent Chief dies, his son would automatically be set to succeed him and insisted that a fresh selection process would be undertaking with the eligible houses in contention.

He also averred that the applicant's family left the country for Zambia before Zimbabwe's independence and that therefore they could not possibly have enjoyed the throne during their hiatus to Zambia.

Most importantly however, he denied that the recommendation for his appointment was irregular. He claimed in this regard that he was nominated for the contested position on meetings held on 21 January 2013 and the other held in August 2017 the latter which culminated in his appointment. He therefore urged the court to dismiss the application for lack of merit. The rest of the respondents did not file any opposing papers.

The applicant filed an answering affidavit basically disputing the chronology of events as narrated by the 1st respondent in his opposing affidavit.

The 1st respondent, however, as earlier stated passed away on 13 July 2023 before oral arguments were heard in court. The matter was nonetheless set down for hearing on which

occasion counsel for 1st respondent urged the court to find that the matter was now moot in light of the demise of the 1st respondent.

Per contra, applicants' counsel persisted with the application and invited the court to find that the matter was not moot as what was impugned by the applicant was not the appointment of the 1st respondent as chief *per se* but the recommendation leading to that appointment. It was further submitted that should the appointment not be set aside, then the 1st respondent's son as per tradition would immediately ascend to the throne at his expense.

Further the applicant insists that the death of a party does not automatically extinguish proceedings that are currently under way. For that proposition he relies on rule 32(7) of the High Court rules, 2021 which provides that:

“no proceedings shall terminate solely as a result of the death marriage or other change of status of any person, unless the proceedings are thereby extinguished”

Whether the matter is moot

In *Ndewere v President of Zimbabwe N.O. & 4 Ors SC 57/22*, the Supreme court had occasion to re-state the applicable test for mootness. It said:

“The issue was comprehensively dealt with by the Constitutional Court in *Thokozani Khupe & Anor v Parliament of Zimbabwe & Ors CCZ 20/19* at p 7, where it held as follows:

“A court may decline to exercise its jurisdiction over a matter because of the occurrence of events outside the record which terminate the controversy. The position of the law is that if the dispute becomes academic by reason of changed circumstances the Court's jurisdiction ceases and the case becomes moot... The question of mootness is an important issue that the Court must take into account when faced with a dispute between parties. It is incumbent upon the Court to determine whether an application before it still presents a live dispute as between the parties. The question of mootness of a dispute has featured repeatedly in this and other jurisdictions. The position of the law is that a court hearing a matter will not readily accept an invitation to adjudicate on issues which are of 'such a nature that the decision sought will have no practical effect or result'”.

The above principle was followed in *MDC & Ors v Mashavira & Ors SC 56/20* at p 33 where it was stated:

“...a court may decline to exercise its jurisdiction over a matter because of the occurrence of events outside the record which terminate the controversy between

the parties. ... [I]f the dispute becomes academic by reason of changed circumstances, the case becomes moot and the jurisdiction of the court is no longer sustainable”

An application of the above principle to the facts of the present case firstly requires an examination of the true nature of the dispute between the main protagonists who are the applicant and the 1st respondent. This will help to determine whether the matter is now moot as contended by counsel for the 1st respondent or the matter should be continued notwithstanding the death of the 1st respondent. In this regard a perusal of the documents filed by the applicant *vis-à-vis* those filed by the 1st respondent reveals that what is fiercely disputed as between them is the regularity or otherwise of the appointment of the latter to the position of Chief Nemangwe. Both parties traced back not only the history of the meetings culminating on the one hand of the ascension of the 1st respondent to the throne and the failure of the applicant to do so but also the history of the previous holders to the throne.

It is therefore highly misleading on the part of the applicant to suggest, as he does, that the dispute is other than the question of the very appointment of the 1st respondent to the position of Chief Nemangwe. One cannot talk of the setting aside the recommendation for the appointment of the 1st respondent as chief and the holding of a fresh selection process without the attendant removal of the incumbent. The two are inextricably intertwined. The setting aside of such a recommendation inevitably entails the removal of the 1st respondent. An attempt to distinguish between the two is to dwell on semantics. Logically therefore once the person whose removal is sought has died the issue of his removal is overtaken by that event.

It is axiomatic that with the demise of the 1st respondent, a new selection process based on the traditions and customs of the Nemangwe clan will have to be done. This much is clear from the contents of the applicants very own affidavits. It will unlikely be a process that would review the ascension of the 1st respondent to the throne. Even if it did, any past mistake or mistakes would very well be taken into account in that new selection process. It is a futile exercise to

The applicant unwittingly contradicts himself by averring on the one hand that the succession Nemangwe throne unquestionably devolves from father to son, yet in the same breath he lists countless meetings all of which were held with one sole purpose in mind; namely the

selection of a new chief. The very fact that innumerable meetings were held, some successful, some abortive and yet some disputed is testament to the fact that succession is not as linear as he wants everyone to believe. It is an intricate process requiring the input of many persons and institutions.

Furthermore, the fact that several important functionaries are involved as provided in proviso (i) to S283 which functionaries include the 2nd to 5th respondents in general and the 3rd and 5th respondents in particular *ipso facto* shows that the succession matrix is far from the linear progression he suggests.

All that is being conveyed here is that should the applicant still contend that is the rightful heir to the now vacant throne, his name should find itself in the hat of aspiring chiefs (so to speak) or contenders to the throne. The issue of the ascension of the 1st respondent to the throne has now been overtaken by his (i.e. 1st respondent) very death.

If applicant's contention is to be taken to its logical conclusion then it would imply that one purport to challenge succession of each preceding Chief to the throne dating back to the very inception of that chieftainship, which of course is untenable.

Furthermore, whether a civil suit against a party can be carried forward notwithstanding the death of that party depends on whether the rights at stake are rights in *rem* or rights in *personam*. In his supplementary heads of argument, the applicant concedes that the appointment of Chief is of a personal nature. That is indeed so. A perusal of all the provisions relating to the position of chief reveals not only that the appointment of Chief is personal but also that the rights, duties, obligations and benefits that accrue to that person by virtue of that position are personal. See for example ss281, 282 and 284 of the Constitution and s5 of the Traditional Leaders Act [Chapter 29:17].

The death of the 1st respondent therefore effectively extinguished any dispute as between him and the applicant regarding the former's appointment. Investigating the correctness of the recommendations leading to 1st respondent's appointment would be merely an academic pursuit. Given that the applicant can still partake on the selection process should he be eligible, such an investigation will yield nothing of practical significance. Might I add that his eligibility to participate on the inevitable new selection process is not solely dependent on his status as the son of the late Elijah Katyavazungu but on his basis *inter alia* as a member of one of the eligible houses

to the throne, the customs and traditions of the Nemangwe clan and other applicable selection criteria.

Consequently therefore, this is one of the exceptions to rule 32(7) of the High Court rules wherein the death of a party (in this one the 1st respondent) effectively extinguishes the dispute.

Accordingly, the following order is hereby made:

IT IS HEREBY ORDERED THAT:

The matter is moot and the application is hereby dismissed with costs.

ZISENGWE J.

Mutatu and Partners; Applicants Legal Practitioners.

Chuma, Gurajena and Partners; 1st respondents Legal Practitioners.