

EMMANUEL DUMBU  
versus  
THE MINISTER OF LOCAL GOVERNMENT,  
PUBLIC WORKS & NATIONAL HOUSING  
And  
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE  
And  
MATUBEDE MUDAVANHU

HIGH COURT OF ZIMBABWE  
MAWADZE J  
MASVINGO, 31 March, 3 & 4 April 2023

*C. Ndlovu*, for the applicant  
*T. Undenge*, for the 1<sup>st</sup> & 2<sup>nd</sup> respondent  
*FRT Chakabuda*, for the 3<sup>rd</sup> respondent

### **Urgent Chamber Application**

MAWADZE J: This is an urgent chamber application for an interdict to stop the installation of the 3<sup>rd</sup> respondent as Chief Mugabe of Masvingo by 1<sup>st</sup> and 2<sup>nd</sup> respondent scheduled for 5 April 2023.

It is opposed by the 1<sup>st</sup> and the 3<sup>rd</sup> respondent.

#### **Factual Background**

As can be gleaned from the pleadings filed of record the Chieftainship dispute of the Mugabe clan in Masvingo province has been raging on for a long time since the death of the then substantive Chief Mugabe one Mude Mudavanhu in November 2009.

The 3<sup>rd</sup> respondent was appointed the Acting Chief Mugabe pending the appointment of the substantive Chief since the death of the substantive Chief Mugabe in November 2009. The 3<sup>rd</sup> respondent has been so acting until his appointment as the substantive Chief Mugabe on 23 January

2023 in terms of section 283 (1) (a) of the Constitution of Zimbabwe by the 2<sup>nd</sup> respondent. However, this development has apparently not put the dispute to rest. The applicant is aggrieved.

The applicant has on 20 February 2023 filed a court application in HC CAPP 23/23 seeking an order to set aside the appointment of the 3<sup>rd</sup> respondent by the 2<sup>nd</sup> respondent as the substantive Chief Mugabe and other consequential relief. That application HC CAPP 23/23 is pending before this court and is opposed by the 3<sup>rd</sup> respondent. The 1<sup>st</sup> respondent is presumably also opposed to that court application and is yet to regularise its papers in that regard.

Pending the determination of the court application HC CAPP 23/23 the applicant in *casu* has approached this court through the urgent chamber book seeking interim relief to suspend the installation of the 3<sup>rd</sup> respondent by the 1<sup>st</sup> respondent as Chief Mugabe scheduled for the 5<sup>th</sup> of April 2023. It is that application which is the subject matter of this judgment.

It would appear that there are 5 houses eligible to the Mugabe Chieftainship whose succession is said to be based on a rotational basis of the said 5 houses. The said 5 houses include the Dumbu house to which the applicant belongs, the Mudavanhu house to which the 3<sup>rd</sup> respondent belongs, the Chipfunhu house, the Haruzivishe house and the Chikanhi or Muzondo house. The applicant in the main matter HC CAPP 23/23 claims that the Dumbu house is the next proper house to assume the Chieftainship and that he is the legitimate heir selected to the throne.

#### **The Urgent Chamber application**

In this urgent chamber application, the applicant seeks interim relief couched in the following terms;

#### **“IN TERMS OF INTERIM ORDER**

- i) *The installation ceremony of the 3<sup>rd</sup> respondent as Chief Mugabe on 5<sup>th</sup> April 2023 or any other date be and is hereby suspended until this application is heard (sic).*

The terms of the final order sought are as follows:

#### **“TERMS OF FINAL ORDER SOUGHT**

- i) *The installation ceremony of the 3<sup>rd</sup> respondent be and is hereby suspended until the dispute in HC CAPP 23/23 is finalised.*
- ii) *The 1<sup>st</sup> respondent be and is hereby ordered to pay costs on an attorney client basis.”*

In his founding affidavit the applicant inter *alia* alleges that if the installation ceremony proceeds the outcome of the court application in HC CAPP 23/23 will be a *brutum fulmen*. Further

the applicant cites what he perceives to be peculiar or special reasons *sui generis* to the Mugabe clan on some rituals performed on the appointed Chief during the said installation ceremony which rituals are presumably irreversible and prejudicial to the applicant if he succeeds in the main matter HC CAPP 23/23 (See paragraph 9 (i) and (ii) of the founding affidavit).

*Mr Undenge* for both the 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent indicated during the hearing that 2<sup>nd</sup> responded [being the President of the Republic of Zimbabwe] has no submissions to make in this urgent chamber application and will simply abide by whatever decision this court would make. Further, *Mr Undenge* had no points in *limine* to make on behalf on the 1<sup>st</sup> respondent but opposed the application on the merits on behalf of the 1<sup>st</sup> respondent.

*Mr Chakabuda* for the 3<sup>rd</sup> respondent strenuously opposed this application as per the notice of opposition filed of record. Further, he raised a number of points in *limine*.

At the commencement of the hearing of this urgent chamber application all counsel agreed that in order to curtail the proceedings submissions would be made both in respect of the points in *limine* and the merits of the matter after which the court will render judgement. I now turn to the points in *limine* taken by *Mr Chakabuda* for the 3<sup>rd</sup> respondent.

### **Points in limine**

#### **a) Absence of leave to sue the 2<sup>nd</sup> respondent**

*Mr Chakabuda* contends that this urgent chamber application is fatally defective for want of compliance with Rule 12 (21) of the High Court Rules 2021 which provides as follows:

*“(21) No summons or other civil process of the court may be sued out against the President or any of the judges of the High Court without the leave of the court granted on court application being made for that purpose.”*

See also *Mugabe NO and others v Tsangirayi SC 21/17*.

*Mr Chakabuda* further submitted that no such leave to sue was even sought in the main court application HC CAPP 23/23 which would then render that court application a nullity and upon which this urgent chamber application is predicated. In essence therefore *Mr Chakabuda* for the 3<sup>rd</sup> respondent submits that there is no proper application before this court. On the other hand, *Mr Ndlovu* for the applicant is of different view and placed reliance on the State Liabilities Act [Chapter 8:14] (sections (3) and section 7).

I am not persuaded by the position taken by *Mr Chakabuda* for a number of reasons.

Firstly, it is surprising that the 3<sup>rd</sup> respondent is crying more than the bereaved as it were. *Mr Undenge* for the 2<sup>nd</sup> respondent to which such leave to sue applies or may be required indicated that 2<sup>nd</sup> respondent is not claiming the need for such leave but would simply keep his peace.

Secondly even assuming such leave is mandatory despite the use of the word “may” in the said Rule to my mind it would be untenable to always obtain such leave in urgent chamber applications especially where the President is cited in his official capacity.

Thirdly as per Rule 7 (9) of the High Court Rules 2021 this court is clothed with discretion to condone the departure from the Rules in the interests of justice. In *casu* it would be remiss for this court to simply close the door to the applicant for this reason alone. Further, if such leave was to be sought no reasonable court in my view would objectively decline to grant it. As for the main matter HC CAPP 23/23 that is food to be digested by the court seized with that court application as that application strictly is not before this court. I am therefore inclined to dismiss this point in *limine*.

**b) That the Interim Relief Sought is Defective**

The point taken in this regard is that the purported interim relief sought is final in nature and also that it is premised on a defective main application.

Indeed, it is trite that in an urgent chamber application the remedy provided for is the granting of interim relief by way of a provisional order. The final order is sought on the return date and can only be granted otherwise with the consent of the parties involved. The rationale for this is well articulated in the case of *Kuvarega v Registrar General & Ors 1998 (1) ZLR 188* at 193 A-B. At this stage the applicant has to prove a *prima facie* case and may not obtain final relief on that basis.

A proper reading of the applicant’s case in *casu* is that the applicant seeks to suspend the installation ceremony of the 3<sup>rd</sup> respondent pending the return date. I however find this course of action problematic for other reasons but this is beside the point. In relation to the point in *limine* taken in this regard one may indeed concede that the interim relief is drafted in a perfunctory manner. Be that as it may I am not persuaded that it is fatal to the applicant’s case. The interim relief sought can be amended by simply prefixing the provisional order by the use of the following words;

*“Pending the determination of this matter the applicant is granted the following interim relief-----”*

In my respectful view such an issue of clumsy drafting should not detain this court and would not be fatal to the applicant’s case.

**c) The Defective Certificate of Urgency**

There is a plethora of cases on what constitutes a proper certificate of urgency. *See UZ-UCSF Collaborative Research Programme v Husaiwevhu* HH 260/14; *General Transport & Engineering (Pvt) Ltd & Others v Zimbabwe Banking Corporation (Pvt) Ltd* 1998 (2) ZLR 301 (H); *Chidawu & Others v Shah & Others* 2013 (1) ZLR 360 (S).

The principle in those case authorities is that a legal practitioner certifying a matter as urgent must at least state that in his or her opinion such a matter is urgent. Such a value judgment can only be made after applying one’s mind to the facts at hand and not just as a routine procedure foisted by the Rules of the court. Indeed, the final decision as to whether a matter is urgent or not rests with the presiding judge. The point is therefore made that the key word on the validity of a certificate of urgency is that the legal practitioner who certifies it as urgent has clearly applied his or her mind to the facts and the circumstances of the dispute at hand. It is therefore improper for such a legal practitioner to engage in a process of the art of copy and paste as it were by merely regurgitating the contents of the founding affidavit.

*Mr Chirairo* who signed the certificate of urgency in this matter is clearly guilty of the above stated infractions. A reading of the certificate of urgency shows that he did not apply his mind as to the urgency or otherwise of the matter. In paragraph 2 (a) of the certificate of urgency *Mr Chirairo* simply states the dispute in the main matter HC CAPP 23/23 would be *brutum fulmen*. There is no attempt to demonstrate how that is so or why he came to that conclusion. He simply repeats contents of the founding affidavit.

In paragraph 2 (b) of the certificate of urgency *Mr Chirairo* again regurgitates paragraphs 9 (i) and (ii) of the founding affidavit. There is again lack of his own assessment of issues at hand.

The concerns raised by *Mr Chakabuda* for the 3<sup>rd</sup> responded cannot be said to be without foundation or sound basis. I am however inclined to indulge *Mr Ndlovu* for the applicant despite this badly drafted certificate of urgency because I am of the view that the interests of justice are

better served by addressing my mind to the main issue which concerns the parties, being the installation ceremony pencilled for the 5<sup>th</sup> of April 2023, a fact which is not in issue.

**d) Lack of Urgency**

What constitutes urgency in a case of this nature is my view is now a well beaten path. The *locus classicus* is the case of *Kuvarega v Registrar General & Anor supra*. See also *Madzivanzira v Dexprint Investments (Pvt) Ltd & Anor 2022 (2) ZLR 316* per NDOU J; *Document Support Centre v Mapuvire & Ors 2007 (2) ZLR 13 (H)* per MAKARAU J (as she then was); *Gifford v Mazarire & Ors 2007 (2) ZLR 131* as per KUDYA J (as he then was).

In the matter of *Denenga & Anor v Ecobank (Pvt) Ltd & 2 Ors HH 117/14* I tried in my small way to capture the common thread running through all these cases. Simply put a matter is urgent if;

- i) It cannot wait the observance of the normal procedural and time frames set by the rules of the court in ordinary applications as to do so would render nugatory the relief sought; The said installation ceremony is scheduled for 5 April 2023. This means that if the applicant waits for the normal procedures and time frames as prescribed by the Rules of the court the relief sought would indeed be rendered nugatory as the event would be held before the matter is heard.
- ii) Whether the applicant treated the matter as urgent by acting timeously and if there is a delay good and sufficient reason for that delay is given; It has not been disputed that the applicant became aware of the appointment of the 3<sup>rd</sup> respondent as substantive Chief Mugabe in February 2023 (see paragraph 7 (a) of the founding affidavit). The applicant then lodged the court application HC CAPP 23/23 on 20 February 2023 challenging that appointment and has since filed heads of argument in that main matter.

Again, it has not been disputed that on 27 March 2023 the applicant became aware of the impending installation ceremony of the 3<sup>rd</sup> respondent as Chief Mugabe scheduled for 5 April 2023. The applicant proceeded to file this urgent chamber application on 30 March 2023. It is therefore clear that the applicant has acted with due diligence to assert his perceived rights.

- iii) Whether there is no other remedy and or the relief sought is interim in nature and proper at law;

It is on this hurdle where the applicant is found wanting. The relief sought by the applicant is to simply suspend or interdict an installation ceremony. The basis for that is captured in paragraphs 9 (i) and 9 (ii) on the founding affidavit which is worth repeating and it reads as follows;

*“I verily believe that there are special reasons for stopping the installation ceremony. The reasons make this matter extremely urgent.*

- i) *The appointment of the 3<sup>rd</sup> respondent was merely an appointment on paper. It was not based on the customs of the Mugabe clan (sic).*
- ii) *What is of utmost importance is the installation ceremony. Certain traditional process and rites must be observed. Special and sacred oils will be smeared on the 3<sup>rd</sup> respondent. Such processes will make him more powerful and special than any other descendant of the Mugabe clan. There can only be one such type of living person in the clan and that person can only be replaced after his death. In the premises if the court rules in my favour, the same rituals and traditional processes will be conducted on me. It follows that there will be two people with the same powers and that is not part of our culture and tradition. Its taboo. The traditional processes done on the 3<sup>rd</sup> respondent will not be undone and he will retain his powers. The 1<sup>st</sup> respondent should bear in mind that there is a world between the installation of a Chief and President of the country. I will not be the cut above the rest. I am at loss as to why the 1<sup>st</sup> respondent is now fast-tracking Mugabe Chieftainship. He should wait for the outcome of the matter. 3<sup>rd</sup> respondent will not suffer prejudice since he has been acting Chief (sic).”*

The above averments by the applicant are clearly not of any legal nature. They seek to take this court into the misty realms of superstition and the spiritual world, an area this court cannot proclaim to have knowledge of. The court is then being asked to then grant an interdict, a common law concept on such basis. I do not believe that the case of *Murenga Edward Chikwamba v Matius Mahonde Mukunga & Ors* HH 366/13 which *Mr Ndlovu* tenaciously clung to in a bid to persuade this court that this matter is urgent is predicated on such superstitious beliefs.

In my respectful view an installation ceremony is not a juristic act per ser. To my mind it is a celebration irrespective of the said rituals. The legal position is clear. The 3<sup>rd</sup> respondent is now the substantive Chief Mugabe as per section 283 of the Constitution. That appointment is

extant. That legal position would not change whether an installation ceremony is held or not. He remains the substantive Chief Mugabe until a competent court orders otherwise or he is lawfully removed. The applicant's beliefs in some supernatural rituals and the consequences thereof are not a matter of the law and cannot be of any consequence in the urgency of the matter and the relief of an interim interdict.

It is incorrect that at law the applicant has no other remedy. As I said maybe spiritually, he does not have such a remedy. However, I would not be dragged into that superfluous debate. The simple position is that even if the installation ceremony is held and the applicant succeeds in the main matter HC CAPP 23/23 the 3<sup>rd</sup> respondent would cease to be the substantive Chief Mugabe at law irrespective of whatever rituals were performed or copious quantities of so-called sacred oils smeared on him. That is the position of the law, period.

The applicant's founding affidavit has not made a case for the interim relief sought. It dwells more on the supernatural and applicant's own perceptions rather than the position of the law. For the applicant the horse has already bolted as it were. It is the success in the main matter HC CAPP 23/23 which can only alter that position and not an installation ceremony. As is always said a case stands or falls on the basis on the following affidavit.

**Disposition**

It is my respectful view that the applicant has failed to establish the urgency in this matter. It is not correct that the applicant has no other remedy. The impending installation ceremony being a non-juristic act is inconsequential at law. In the result I am not enjoined to even deal with the merits of the matter in the absence of urgency.

Accordingly, it is ordered as follows;

- a) The application is not urgent.
- b) The application be and is hereby removed from the urgent roll.
- c) The 3<sup>rd</sup> respondent is ordered to pay applicant and 1<sup>st</sup> respondent's costs.

MAWADZE J

*Ndlovu & Hwacha*, applicant's legal practitioners

*Civil Division of the Attorney General's Office*, 1<sup>s</sup> & 2<sup>nd</sup> respondent's legal practitioners

*Mashayamombe & Company*, 3<sup>rd</sup> respondent's legal practitioners