

TENDAI CHITINHE
versus
CORNELIUS CHIVESANI CHENGERA
and
THE DISTRICT ADMINISTRATOR, CHEGUTU
and
THE PROVINCIAL ADMINISTRATOR, MASHONALAND WEST
and
THE MINISTER OF LOCAL, GOVERNMENT, PUBLIC WORKS AND NATIONAL
HOUSING
and
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 23 June 2021 and 8 July 2021

Urgent chamber application

Applicant in person
T. Matiyashe, for the 1st respondent
T. Marira, for the 2nd – 5th respondents

CHIKOWERO J: The Chivero chieftainship dispute has spawned yet another lawsuit.

The applicant and the first respondent are descendants of the founder of the Chivero clan. They are tussling for the office of substantive Chief Chivero.

The second, third and fourth respondents play a facilitatory role in the process leading to the fifth respondent appointing a person as chief.

On 21 May 2020 the fifth respondent appointed the first respondent as substantive Chief Chivero of Chegutu District, Mashonaland West Province, with immediate effect.

On 6 July 2020 the applicant filed a court application against the same respondents, seeking the following reliefs:

- “1. that the appointment of the 1st respondent as substantive Chief Chivero be set aside.
2. that the applicant be declared the substantive Chief Chivero.

3. that the 1st respondent pays the applicant's costs on the legal practitioner and client scale.”

That suit, under case number HC 3413/20, is opposed by all the respondents. The matter has progressed to the stage where the respondents have filed heads of argument. The applicant, a self-actor, has not applied for the setting down of the application on the opposed roll. Neither have the respondents. They are legally represented.

On 29 July 2020 the applicant filed his second lawsuit. He cited the same respondents. The first respondent, represented by counsel, opposed the urgent chamber application, for that is what it is. The case number is HC 4046/20.

On 5 August 2020 the court granted a provisional order in favour of the applicant. The interim relief was that:

- “1. The 1st respondent be and is hereby interdicted from demanding or requiring the village heads under Chief Chivero to pay him US\$60-00 plus a goat or US\$30 as its equivalent.
2. The order shall be served upon the respondents by the Sheriff of Zimbabwe or his lawful deputy or assistant.”

On 9 September 2020 the court granted a final order barring or stopping the first respondent from acting or assuming the duties for Chivero chieftainship pending the finalization of case number HC 3413/20. In addition the court ordered the first respondent, who was in default, to pay the costs of the application.

Both the provisional and final orders were served on the respondents.

On 14 June 2021 the applicant filed the present application. The Registrar placed it before me. Relying on Order 32 Rule 244 of the High Court Rules, 1971, I considered the application forthwith without inviting any of the parties to make representations on whether the application should be treated as urgent. I formed the *prima facie* view that the matter was not urgent. I disposed of the matter accordingly, recording my comments for doing so. Those comments are contained in letter of 15 June 2021 addressed to the applicant by the Registrar.

On 18 June 2020 the matter was back on my desk. Through letter of the same date, addressed to the Registrar, the applicant had exercised his right to be heard on the issue of urgency. I caused the matter to be set down for 22 June 2021 at 11.00am.

However, the matter had to be postponed to 23 June 2021 to afford the applicant an opportunity to peruse and consider the second-fifth respondents' opposing papers. He had refused

to accept service when counsel for the second –fifth respondents had attempted to effect such a few minutes before the hearing. I directed that service be effected in court, which was done, and I then postponed the matter to the following day for hearing.

The applicant’s case is this. He has approached this court on an urgent basis because he has received “news” that the fourth respondent is about to come to Chivero land to install the first respondent as the substantive Chief Chivero. This despite there being an extant order of this court interdicting the first respondent from acting or assuming the duties for Chivero Chieftainship pending the finalization of the court application wherein the first respondent is challenging the appointment of the first respondent as substantive Chief Chivero. When a chief is installed he or she immediately functions as such. The applicant relies on the following incidents. The fifth respondent has availed motor vehicles to fourth respondent for distribution to chiefs around the country. Thus, on 25 May 2021 the fourth respondent gave the first respondent an Isuzu twin cab (the vehicle registration number is not given). To the applicant, this is a clear indication that the fourth respondent is about to covertly install the first respondent as the substantive Chief Chivero. This is fortified by the fourth respondent’s deafening silence, and inaction, to applicant’s written demand, delivered on 2 June 2021, that fourth respondent withdraws the motor vehicle from the first respondent pending finalization of the application challenging first respondent’s appointment as the Chief. The first respondent also possesses the chieftainship regalia. The fourth respondent has also ignored the applicant’s demand for withdrawal of that regalia. On installation day the fourth respondent causes a chief to be officially arrayed in the regalia, badge and crown. That the first respondent already possesses these is an indication of his imminent installation. In any event, the first respondent, on 4 December 2020, addressed a letter to a named Chinese owned Company based in Norton. He used the Chief Chivero date stamp. On 16 December 2020 the first respondent, clad in Chief Chivero’s regalia, appeared at the company’s premises to follow up on the letter. Both the letter and the visit demonstrate that he has acted or assumed the duties of Chief Chivero, despite the fact that there is a court order interdicting him from doing so.

Resultantly, the applicant prays that, pending the return date, the following relief be granted, namely:

1. An order interdicting fourth respondent from installing first respondent as Chief Chivero pending the finalization of this matter.

2. That the fourth respondent forthwith retrieves the Isuzu twin cab motor vehicle together with all other items and regalia issued to the first respondent.

I heard argument on the preliminary points as well as on the merits of the application.

The respondents argued that the matter was not urgent. They submitted that the date when the need to act arose was not disclosed. The main interim relief sought was to halt the installation. The applicant did not disclose when, how and from whom he gathered the “news” that the fourth respondent was “planning” to install first respondent as substantive Chief Chivero. The date of the purported installation itself was not disclosed. As far as the application related to an urgent need to stop the installation the matter was not only not urgent but the cause of action itself was not disclosed. The applicant had failed to adduce *prima facie* evidence speaking either to an imminent or even long term plan to install the first respondent as substantive Chief Chivero.

The fourth respondent was not planning to effect the installation. The respondents were waiting for finalisation of the suit challenging the appointment. The outcome would determine the identity of the person to be installed as the substantive Chief.

As for the regalia, the crown and the badge the first respondent has been in possession of the same since his appointment in May 2020. No case was made for the urgent retrieval of the same.

Following exchanges with the court, Mr *Marira* was unable to suggest any reason why the court should not, on an urgent basis, order the immediate repossession of the Isuzu twin cab motor vehicle.

On his part, Mr *Matiyashe* argued that the applicant had not disclosed the date when the need to act arose even in respect of the motor vehicle. There was therefore no basis for arguing that the applicant himself treated the matter as urgent. In any event, the vehicle having been delivered to the first respondent on 25 May 2021, the applicant had already sat on his laurels by the time he filed the present application on 14 May 2021.

On the merits, Mr *Matiyashe* argued that the first respondent was still the substantive Chief Chivero. The orders granted by this court did not nullify his appointment. He was therefore entitled to receive and keep the vehicle pending the outcome of the challenge to his appointment.

It is convenient that I deal with this matter under these sub-headings: the installation; the regalia, badge, crown and the motor vehicle.

THE INSTALLATION

The applicant's case is based on pure speculation and gossip.

He does not state when, how and from whom, the "news came to him that fourth respondent was planning to install first respondent as the substantive Chief Chivero".

He does not attach any correspondence from any of the respondents speaking to the installation of the first respondent.

Neither does he mention the date of the installation itself. Further, there is neither allegation nor proof of anything on the ground, in the Chivero territory itself, suggesting that preparations are in progress for such a momentous occasion as the installation of a substantive chief.

This court cannot speculate that merely because the first respondent is in possession of the Chivero Chieftainship regalia and was recently issued with the Isuzu twin cab motor vehicle then the installation itself is imminent. It seems to me that the applicant himself is completely in the dark in as far as the installation of the substantive Chief Chivero is concerned. The court, having been favoured with no evidence at all on this aspect, is in no better position.

Consequently, this part of the application is not urgent.

THE REGALIA, THE BADGE AND THE CROWN

On 15 June 2021 I had commented as follows:

"...as for retrieval of all other items and regalia issued to first respondent there is no evidence as to when these were issued to first respondent to justify urgent retrieval of same".

In deposing to the opposing affidavit on 15 June 2021 (filed on 16 June 2021) the first respondent said in para 3.1.8:

"It is just surprising how applicant seeks to convince the court that the retrieval of such items and regalia from the first respondent is an urgent issue yet the items were issued two (2) years ago and applicant was well aware of that."

In his answering affidavit the applicant said:

"... the regalia could only have been given to first respondent last July at which time I became aware of it and I filed my challenge on the 6 July 2020.

Quite clearly, the first respondent has had the regalia for at most a year, he is misinforming the Honourable Court hoping to profit from such misinformation. First respondent has approached this Honourable Court with dirty hands.

The deponent has missed the point. The point I have made is that the first respondent has acted in defying the court order using the regalia which seem to have increased his insatiable desire to

posture himself as the Chief. Thus the regalia have been abused by the first respondent, they must be retrieved from him.

The issue of urgency is clearly on the installation. The vehicle and regalia are ancillary issues attendant thereto.” (Underlining is mine)

The applicant admits that as way back as 6 July 2020 (when he filed the court application challenging the first respondent’s appointment as the substantive Chief) he knew that the latter possessed the regalia. Yet he did not file an urgent chamber application, then, for an order for retrieval of the same. He restricted himself to filing an ordinary court application challenging the appointment and seeking a declaratur that he was the substantive Chief Chivero. That is almost a year ago.

Thereafter, on 29 July 2020, he filed an urgent chamber application seeking to bar the first respondent from convening a gathering of the village heads under the jurisdiction of Chief Chivero. The court, after perusing the papers and hearing submissions, amended the draft order and granted appropriate interim relief. It interdicted the first respondent from demanding or requiring the village heads under Chief Chivero to pay him US\$60 plus a goat or US\$30 as its equivalent. This order was granted on 5 August 2020. The applicant despite appreciating as way back as 29 July 2020 and 5 August 2020 that the first respondent possessed the regalia, badge and crown, never prayed, then, for urgent retrieval of the same.

On 9 September 2020, which was the return date, the court was simply asked to bar or stop the first respondent from acting or assuming the duties for Chivero Chieftainship pending the finalisation of the court application challenging the appointment.

In December 2020 the applicant became aware that on 4 December 2020 and 16 December 2020 the first respondent, as Chief Chivero, had, respectively, written to a Chinese company and appeared at the company’s premises in Norton clad in the regalia in question. The applicant chose to file a police report alleging that the first respondent had acted in contempt of the court by defying the order of 9 September 2020. He filed the report at Norton police station. The matter is set down for 7 July 2021. No one disclosed whether this is a trial date.

What is significant is this. The applicant has known for a very long time that the first respondent is in possession of the Chivero Chieftainship regalia, badge and crown. In fact it was at the hearing itself that the applicant made it manifest that the “other items” referred to in the draft order are the badge and the crown. The applicant did not seek that the regalia, badge and crown be

retrieved on the previous occasions that he has approached this court for redress. In December 2020 he deliberately chose to file a police report against the first respondent arising out of the use of the regalia, badge and crown. It was only on 14 June 2021 that he decided to make an urgent case out of the first respondent's possession and use of the regalia, badge and the crown. In all these circumstances, I have no difficulty in finding, as I do, that this part of the application is likewise not urgent.

THE ISUZU TWIN CAB MOTOR VEHICLE

I am satisfied that this part of the application is urgent. It was on 25 May 2021 that the fourth respondent delivered the vehicle to the first respondent. It is correct that the applicant did not disclose the date when he became aware of this fact. But that is immaterial. It could only have been between 25 May 2021 and 1 June 2021. On the latter date the applicant wrote to the fourth respondent demanding immediate repossession of the motor vehicle. He delivered the letter on 2 June 2021. He copied that correspondence to the fifth respondent, the fourth respondent's deputy, the Minister of State for Mashonaland West Province, the Director Traditional Services and the President of the Chief's Council.

The fourth respondent did not respond. Neither did he repossess the vehicle. This compelled the applicant to approach this court on an urgent basis. I am satisfied that although I have found against him, on urgency, on the issues of the installation, the regalia, badge and crown these findings do not affect his case in respect of the motor vehicle.

The applicant has given an explanation on why he did not file an urgent chamber application before 14 June 2021. He attached copy of the letter of 1 June 2021. The letter bears date-stamps of 2 June 2021 reflecting that it was delivered to the fourth respondent's Ministry, to the fourth respondent himself, to his deputy and to the Parliament of Zimbabwe.

Given that applicant had to afford the fourth respondent a reasonable period after 2 June 2021 within which to either repossess the vehicle or reply, I am satisfied that the matter was still urgent when the applicant filed the present application on 14 June 2021. See *Telecel Zimbabwe (Pvt) Ltd v Postal & Telecommunications Regulatory Authority of Zimbabwe and Ors* 2015(1) ZLR 651(H).

In *Telecel Zimbabwe (Pvt) Ltd v Postal & Telecommunications Regulatory Authority of Zimbabwe & Ors (supra)* MATHONSI J (as he then was) said at 7658G-659A:

“In my view, there is no merit whatsoever in that point *in limine*. I find myself having to repeat what I stated in *Prosecutor- General v Busangabanye & Anor* HH 427/15 at p3:

“In my view this issue of self-created urgency has been blown out of proportion, surely a delay of 22 days cannot be said to be inordinate as to constitute self-created urgency. Quite often in recent history we are subjected to endless points *in limine* centered on urgency which should not be made at all. Courts appreciate that litigants do not eat, move and have their being in filing court process. There are other issues they attend to and where they have managed to bring their matters within a reasonable time they should be accorded audience. It is not good to expect a litigant to drop everything and rush to court even when the subject matter is clearly not a holocaust.”

These sentiments apply to the present matter with equal force.

On the merits, I consider that the applicant has established a *prima facie* right, though open to doubt. He has a stake in the Chivero Chieftainship. He has already challenged the fifth respondent’s appointment of first respondent as substantive Chief Chivero. He is attacking the procedure adopted, and is contending that there was non-observance of the customs and traditions of the Chivero clan in selecting the first respondent as the candidate who was recommended to the fifth respondent for appointment as substantive Chief Chivero. This is a solid basis for setting aside the appointment, should he be able to sustain it. See *Marange v Marange & Minister of Rural Development, Promotion & Preservation of National Culture & Heritage & the President of the Republic of Zimbabwe* SC 1/21.

The applicant himself had, in June 2020, been selected as a candidate for recommendation to the fifth for appointment as the substantive Chief Chivero. He had already been recommended for that appointment by the second and third respondents.

I am fully aware that I am not deciding the court application wherein the applicant is challenging the first respondent’s appointment as substantive Chief Chivero. But I must recognize the pendency of that suit and the applicant’s right to challenge the appointment, which he has already exercised, in deciding whether he is *prima facie* entitled to the Isuzu twin cab motor vehicle and hence to its preservation. Not to be overlooked is the fact that this court has on two previous occasions ruled in his favour on issues to do with first respondent’s performance of the duties of Chief Chivero. Despite the fact that the first respondent’s appointment as the substantive Chief

Chivero has not been set aside, this court has interdicted him from functioning as the chief. That order is extant.

There is a well-grounded apprehension of irreparable injury on the part of the applicant if first respondent retains the vehicle. Such retention exposes the vehicle to ordinary wear and tear, as well as the risk of accident-damage. The substantive Chief Chivero is entitled to a brand new Isuzu twin cab, not to a second hand vehicle. While the wheels of justice are turning, it is prejudicial to the applicant that this vehicle be used.

I am satisfied that there is no ordinary remedy that can secure the vehicle as well as preserve the integrity of these proceedings, pending the return date, than an order requiring the fourth respondent to repossess the motor vehicle.

In exercising my discretion, I have weighed the prejudice to the applicant if the interim relief is withheld against the prejudice to the first respondent if it is granted. I have not been asked to order that first respondent delivers the motor vehicle to the applicant. This means the granting of the interim relief will not place the applicant at an advantage over the first respondent. The first respondent has already been interdicted from performing the duties of Chief Chivero. His appointment is the subject matter of pending litigation. He will still get the vehicle should he succeed in getting the order discharged on the return date and, failing that, if the applicant loses his bid to have the appointment set aside. In the interim, it is more convenient to grant an order requiring the fourth respondent to repossess the motor vehicle.

INTERIM RELIEF GRANTED.

Pending the return date the applicant is granted the following relief:

1. The first respondent shall within twelve hours of the granting of this order deliver to the fourth respondent the Isuzu twin cab which the latter issued to the former on 25 May 2021.
2. In the event of the first respondent failing to do so the fourth respondent shall within the next 12 hours repossess the Isuzu twin cab motor vehicle from the first respondent.
3. In the event of the first and fourth respondents failing to comply with paras 1 and 2 of this order the Sheriff of Zimbabwe or his deputy or assistant shall repossess

the Isuzu twin cab motor vehicle from the first respondent or wherever it may be and deliver the same to the fourth respondent for safekeeping.

4. The fourth respondent shall keep the motor vehicle until such time as there has been a final determination or final order in terms of this application.

Matiyashe Law Chambers, 1st respondent's legal practitioners
Civil Division of the Attorney-General's Office, 2nd-5th respondent's legal practitioners