

IN THE MATTER OF: SECTION 19 (1) OF THE CONSTITUTIONAL
COURT, ACT NO. 8 OF 2016

AND

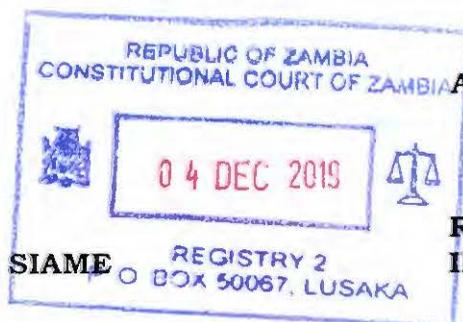
IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLE
165 (1) AND (2) (a) AND (b) AND ARTICLE
167 (b) (i) AND (ii) OF THE CONSTITUTION
OF ZAMBIA

BETWEEN:

BOZY SIMUTANDA

AND

ATTORNEY GENERAL
MATTHEWS KAKUNGU SIAME



RESPONDENT
INTERESTED PARTY

Coram: Mulenga, Mulonda and Musaluke JJC on 16th October, 2019
and on 4th December, 2019

For the Applicant: In-person

For the Respondent: Ms. D. Mulondiwa and Ms. M.
Mulenga of Attorney General's
Chambers

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For the Interested Party: Ms. Z. Maipambe of Messrs Mwenya
Mwitwa Advocates

J U D G M E N T

Mulonda, JC, delivered the Judgment of the Court

Cases referred to:

1. Ted Savaya Muwowo alias Chief Dangolipya Muyombe v Abraham Muwowo (suing in his capacity as chairman of the Uyombe Royal Establishment Committee) SCZ/8/50/2014
2. Bernard Shajilwa and 4 Others v The Attorney General and 3 Others 2018/CC/004

3. **Wilford Funjika v Attorney General (2005) ZR 97**

Legislation referred to:

1. **The Constitution of Zambia, (Amendment) Act No. 2 of 2016**
2. **The Constitutional Court Act, No. 8 of 2016**
3. **The Chiefs Act, Chapter 287 of the Laws of Zambia**

Other works referred to:

1. **Black's Law Dictionary (1968) Revised 4th Ed, St. Paul Minn. West Publishing Co**

By Originating Summons brought under O.IV r.2 (2) and r.4 (5) of the Constitutional Court Rules (CCR) the Applicant, Bozy Simutanda, in his capacity as spokesperson for the Lungu Royal Establishment challenges the selection of Matthews Kakungu Siame, the Interested Party in these proceedings, as Senior Chief Tafuna of the Lungu People.

The gist of the matter is that Article 165 (1) and Article 167 (b) (i) and (ii) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 (hereinafter referred to as the Constitution as amended) have been contravened. The Applicant to this end put up six questions for our consideration, which we have reproduced as outlined in the Originating Summons, namely:

- “(i) Whether or not the Lungu chiefs or Malaila/Tabwa chiefs on 27th April 2006 in the presence of the assistant director chiefs’ affairs made RESOLUTIONS to uphold the 1957 agreement for future succession of the Lungu chiefs as required by Article 165 (1) of the Constitution of Zambia Act.**
- (ii) Whether the 1957 agreement explicitly states that the**

senior chief Tafuna's position is PATRILINEAL or not as required by Article 165 (1) of the Constitution of Zambia Act.

- (iii) Whether or not the Mambwe Chiefs, Lungu chiefs and Malaila/Tabwa chiefs on the 4th March, 1968 agreed that chief Chinakaila is the only authority to appoint Senior Chief Tafuna as required by Article 167 (b) (i) (ii) of the Constitution of Zambia Act.
- (iv) Whether or not the proceedings of the meeting held on 29th August 2018 at Sinamu lodge at Kasama was a conspiracy as required by Article 165 (1) of the Constitution of Zambia Act.
- (v) Whether it was legal or not for the Permanent Secretary for the Chiefs and Traditional Affairs to proceed in the manner he did to recommend Matthews Kakungu Siame as the Senior Chief Tafuna without authority from Senior Chief Chinakaila as required by Article 165 (1) and Article 167 (b) (i) (ii) of the Constitution of Zambia.
- (vi) Why the appointment of Mr. Matthews Kakungu Siame should not be revoked as Senior Chief Tafuna for the Lungu traditional institution to enjoy privileges and benefits as required by Articles 167 (b) (i) (ii) of the Constitution of Zambia Act."

By an application to raise preliminary issues under O.14A and O.33 r.3 of the Rules of the Supreme Court of England, 1965 (1999 Edition), dated 18th February, 2019 the Respondent raised two preliminary issues, namely, that the Originating Summons did not disclose a sustainable cause of action against the Respondent and that the Applicant, Bozy Simutanda, had no *locus standii*. Following the hearing of the motion, this Court ruled that all the questions, save question (v), did not raise constitutional issues fit for determination by this Court and were

accordingly expunged from the record. Secondly, that in view of section 11 (2) of the Constitutional Court Act (CCA), the Applicant had *locus standii*.

That said, this judgment relates to the surviving question, namely question (v).

"Whether it was legal or not for the Permanent Secretary for the Chiefs and Traditional Affairs to proceed in the manner he did to recommend Matthews Kakungu Siame as the Senior Chief Tafuna without authority from Senior Chief Chinakaila as required by Article 165 (1) and Article 167 (b) (i) (ii) of the Constitution of Zambia."

The Originating Summons is supported by an affidavit deposed to by the Applicant and dated 22nd January, 2019. The affidavit deposes that the Constitution as amended leaves all matters of chieftaincy succession to the concerned chiefs and tribal elders. That the Chairperson of the Lungu Royal Establishment, Chief Chinakila, on 13th November, 2013 appointed Mr. Rapheal Tafuna Sikazwe as Senior Chief Tafuna and that the appointment was ratified by the Government. It was further deposed that in a letter dated 18th December, 2018 and marked as exhibit "BS 3", Mr. Micheal B. Pwete, the Permanent Secretary in the Ministry of Chiefs and Traditional Affairs, illegally recommended the installation of Mr. Matthews Kakungu Siame as Senior Chief Tafuna.

Submitting orally, the Applicant referred this Court to a letter at page 39 of the record in which he stated that the Permanent Secretary of Chiefs and Traditional Affairs contravened Article 165 of the Constitution as amended when he made recommendations contrary to the culture and customs of the Lungu speaking people. The Applicant further reiterated his position that the Respondent acted in breach of Articles 165 and 167 of the Constitution as amended. The Applicant prayed that the application be dismissed as it lacked merit.

In opposing the matter, the Respondent relied on an affidavit in opposition and skeleton arguments both filed into Court on 22nd August, 2019. The affidavit in opposition was deposed to by Cade Chikombo, a Committee Clerk in the House of Chiefs. It was stated that sometime in July, 2016 the House of Chiefs constituted a committee of chiefs to address the Tafuna chiefdom dispute and that a report was subsequently adopted which led to the representatives of the Lungu tribe forming an electoral college to select a new Senior Chief Tafuna on 29th August, 2018.

It was deposed that Mr. Matthews Kakungu Siame was selected as the new Senior Chief Tafuna by the electoral college and that

verification documents exhibited and marked as "CC 1" were sent to the Permanent Secretary, who then added Mr. Siame to the payroll for payment of subsidies. It was further deposed that Government officials did not form part of the electoral college but were merely observers of the electoral process and that the Permanent Secretary did not recommend the installation of a chief but facilitated his placement on the payroll in accordance with the law.

In written submissions, the Respondent argued that it was the mandate of the House of Chiefs to determine matters relating to customary law and make recommendations to local authorities and the Government. It was contended that the House of Chiefs was within its constitutional powers when it constituted a committee to determine the succession dispute in the Tafuna chiefdom. It was emphasized that neither the Permanent Secretary for Chiefs and Traditional Affairs nor any Government agent recommended Mr. Siame as Senior Chief Tafuna. It was added that there was a statutory obligation under section 8 of the Chiefs Act to ensure that a chief was paid a subsidy to enable him to maintain the status of his office and to discharge the traditional functions of his office. It was therefore submitted that

the Permanent Secretary for Chiefs and Traditional Affairs merely exercised his statutory duty when he placed Mr. Matthews Kakungu Siame on the payroll following the recommendations from the House of Chiefs.

In oral submissions, counsel for the Respondent reiterated their earlier position and emphasised that the Government did not participate in the selection of Senior Chief Tafuna, but only placed the newly installed chief on the payroll after receiving documentation of such installation.

The Interested Party, Mr. Matthew Kakungu Siame, relied on his affidavit in opposition dated 15th July, 2019 together with skeleton arguments dated 9th August, 2019. He deposed that following the murder of Senior Chief Tafuna Chizimu Chifunda, of the Lungu people of Mpulungu District, the House of Chiefs appointed a committee of chiefs to look into the succession dispute. That the said committee wrote to the Permanent Secretary on 30th January, 2018 with the findings and recommendations of their report on the succession dispute. Mr. Siame also deposed that following the said recommendations, an electoral college was constituted which subsequently selected him as Senior Chief Tafuna at a meeting that was attended by

Government officials in their capacity as observers.

Mr. Siame further deposed that he had never been recommended or appointed by any Government official. He deposed that although the acting Permanent Secretary for Northern Province and other senior Government officials were present during the selection process, they did not participate in his selection as Senior Chief Tafuna. The minutes of the formation of the electoral college and the selection of Senior Chief Tafuna were exhibited and marked as "MKS 2". It was added that as a result of these proceedings, Mr. Siame as the acting chief/caretaker chief had been estopped from enjoying his constitutional privileges and benefits since April, 2019.

By way of written submissions, the Interested Party reiterated the facts deposed to in his affidavit. It was submitted that the Government owed a duty to every Zambian citizen to ensure national unity, peace and security in order to foster development in all parts of the country including Mpulungu District. It was submitted that the House of Chiefs acted within their constitutional mandate under Article 169 (1), (5) (f) and (g) of the Constitution as amended when they advised the Government in

tradition and customary matters.

That the Interested Party, being duly appointed as Senior Chief Tafuna, was entitled to full payment of his monthly subsidy from the date of his installation until the end of his tenure in accordance with Article 167 (b) (i) and (ii) of the Constitution as amended. It was added that the Permanent Secretary for Chiefs and Traditional Affairs did not therefore breach the said Article when he placed the Interested Party on the payroll. We were referred to the case of **Ted Savaya Muwowo alias Chief Dangolipya Muyombe v Abraham Muwowo (suing in his capacity as Chairman of the Uyombe Royal Establishment Committee)**¹ in which the Supreme Court held as follows:

“Succession in a chieftom is by way of established traditions and customs and not personal views or wishes of particular individuals...we wish to add that where the tradition and customs of a group of people has a process that is to be followed for the selection of a chief, that tradition and custom ought to be followed.”

We were also referred to the case of **Bernard Shajilwa and 4 Others v The Attorney General and 3 Others**² in which we interpreted the provisions of Article 165 of the Constitution as amended.

Article 266 of the Constitution as amended was cited as regards the definition of a chief to mean a person bestowed as chief and

who derived allegiance from the fact of birth or descent, in accordance with the customs, traditions, usage or consent of the people in a chieftaincy. In this regard, it was argued that the Interested Party having been selected as Senior Chief Tafuna satisfied the definition of a chief and was therefore entitled to the benefits under Article 167 (b) (i) and (ii) of the Constitution as amended. It was stated that the Respondent's actions of placing the Interested Party on the payroll could not be said to have interfered with the autonomy of the Lungu chieftaincy or tradition. We were urged to find in favour of the Interested Party and to find that the Respondent did not breach Article 165 (1) and 167 (b) (i) and (ii) of the Constitution as amended.

Counsel for the Interested Party orally argued that the letter referred to by the Applicant at page 39 of the record could not be interpreted to mean that the Permanent Secretary recommended the Interested Party as Senior Chief Tafuna. It was prayed that this matter be dismissed as the Respondent did not contravene Article 165 of the Constitution as amended. Costs were also prayed for.

In reply, the Applicant filed an affidavit and skeleton arguments both dated 29th August, 2019. It was deposed that the

Respondent's affidavit in opposition was unreliable as it was sworn by the Committee Clerk of the House of Chiefs who was not a party to these proceedings and that it ought to have been sworn by the Permanent Secretary for Chiefs and Traditional Affairs or the Respondent. As a result, it was deposed that the Respondent's affidavit in opposition went against the rules of the Constitutional Court. The rest of the affidavit in reply referred to matters that this Court already determined to be outside of its jurisdiction, therefore we shall not refer to them any further.

To support the reply, written submission were filed into Court. Emphasis was placed on the provisions of Articles 169 (1) and 177 (5) of the Constitution as amended as read together with section 8 of the Chiefs Act. It was submitted that following the recommendation of Rapheal Tafuna Sikazwe to the local authority as Senior Chief Tafuna, the Council Secretary of the Mpulungu District Council wrote to the Provincial Chiefs and Traditional Affairs Officer in Kasama on his selection as Senior Chief Tafuna. It was added that on 30th August, 2018 the Provincial Chiefs and Traditional Affairs Officer wrote to the Permanent Secretary in the Ministry of Chiefs and Traditional Affairs with information of a chieftaincy dispute. That despite

being informed of the dispute, the Permanent Secretary proceeded to request the provincial administration of Northern Province to ensure that the Interested Party commenced the performance of royal duties.

It was reiterated that the Respondent contravened Article 165 (1) of the Constitution as amended because the Permanent Secretary of Chiefs and Traditional Affairs was not allowed to advise the provincial administration of Northern Province to superintend over customary issues. In this regard, emphasis was placed on the supremacy of the Constitution and the case of **Wilford Funjika v Attorney General**³ was cited in which the Supreme Court resounded the provisions of Article 1 (1), (2) and (3) of the Constitution as amended. It was submitted that the Respondent acted in contravention of the Constitution and it was therefore prayed that this Court find the Respondent liable as such.

We have considered the evidence and arguments by the parties. What we consider as falling for our determination is whether the action by the Respondent of placing the Interested Party on the payroll amounted to a recommendation in breach of Article 165 (1) and 167 (b) (i) and (ii) of the Constitution as amended. Our

starting point will be to look at the law relating to the issue before us. Article 165 of the Constitution as amended provides:

- “165. (1) The institution of chieftaincy and traditional institutions are guaranteed and shall exist in accordance with the culture, customs and traditions of the people to whom they apply.**
- (2) Parliament shall not enact legislation which –**
- (a) confers on a person or authority the right to recognise or withdraw the recognition of a chief; or**
- (b) derogates from the honour and dignity of the institution of chieftaincy.” (Emphasis added)**

Article 167 provides:

- “167.A chief –**
- (a) may own property in a personal capacity; and**
- (b) shall enjoy privileges and benefits –**
- (i) bestowed on the office of chief by or under culture, custom and tradition; and**
- (ii) attached to the office of chief, as prescribed.”**

Article 169 (1) and (5) (c), (d) and (f) provide:

- “169. (1) There is established a House of Chiefs.**
- (5) The functions of the House of Chiefs are to –**
- (c) initiate, discuss and decide on matters relating to customary law and practice;**
- (d) initiate, discuss and make recommendations to a local authority regarding the welfare of communities in a local authority;**
- (f) advise the Government on traditional and customary matters...”**

Article 266 defines a chief as follows:

“chief” means a person bestowed as chief and who derives allegiance from the fact of birth or descent, in accordance with the customs, traditions, usage or consent of the people in a chiefdom;”

Sections 8 and 14 of the Chiefs Act provide as follows:

“8. There shall be paid to every Chief and Deputy Chief, for the purpose of enabling him to maintain the status of his office and to discharge the traditional functions of his office under African customary law in a fit and proper manner, such subsidies as the President may determine.”

“14. All subsidies, salaries and allowances payable under this Act shall be paid out of moneys appropriated by Parliament for the purpose.”

From our reading of Article 165, the recognition of a chief requires the performance of some formal act which serves to recognize or confirm the status of a chief. Further, the same Article prohibits Parliament from enacting legislation on the recognition or withdrawal of recognition of a chief. This follows a background where previously, legislation provided for the recognition or withdrawal of recognition of chiefs through a statutory instrument. Therefore, recognition depended on the President and could be withheld. The issue is whether the placing of the Interested Party on the payroll amounts to a recommendation in breach of Article 165 of the Constitution as amended.

In the case of **Bernard Shajilwa and 4 Others v The Attorney General and 3 Others**², this Court interpreted the provisions of Article 165 at J63 as follows:

“After all due consideration it is our finding that on the evidence before us, the placement of the 2nd Respondent on the payroll

does not in and of itself constitute recognition envisaged by Article 165 of the Constitution as amended. Such an interpretation is not tenable. In our considered view, to say so would mean that from the time Article 165 came into force, it became illegal to pay the chief's subsidy or perform other purely administrative processes relating to a chief.

Therefore the 3rd and 4th Respondent's action in placing the 2nd Respondent on the payroll were within the law and do not contravene Article 165 of the Constitution as amended."

Our perusal of the record clearly shows that the selection of the Interested Party as Senior Chief Tafuna was communicated to the Government through letters dated 30th August, 2018 and 18th December, 2018, which subsequently led to his placement on the Government payroll to receive subsidies as Chief. The record also shows that the Committee of Chiefs appointed to look into the Tafuna succession dispute submitted a report to the House of Chiefs and subsequently to the Ministry of Chiefs and Traditional Affairs through the office of the Permanent Secretary outlining their findings and recommendations. In a letter dated 30th August, 2018 and addressed to the Permanent Secretary of Chiefs and Traditional Affairs, the minutes of the formation of the electoral college of Senior Chief Tafuna and his selection were attached and read as follows (page 300, lines 9 to 11 of the record):

"It was at that stage that all the members of the electoral college unanimously agreed to the selection of Mathew Kakungu as their heir to the throne of Senior Chief Tafuna and congratulated him

on his selection.”

It is clear from the above that the Permanent Secretary of Chiefs and Traditional Affairs was merely informed of who was selected as Senior Chief Tafuna. We find that following the above recommendation, the Respondent proceeded to place the Interested Party on the payroll, in line with the provisions of Article 167 of the Constitution as amended and the provisions of sections 8 and 14 of the Chiefs Act. It was on that basis that the Respondent proceeded to place the Interested Party on the payroll.

It is also evident from the record that none of the Government officials that were present during the selection process of Senior Chief Tafuna participated or formed part of the electoral college; they were invited as observers to ensure law and order during the meeting at which the selection was done. The Applicant argued that the action by the Permanent Secretary of Chiefs and Traditional Affairs, Mr. Michael B. Pwete, to request the Permanent Secretary for provincial administration in Northern Province to ‘superintend’ over customary issues was a breach of Article 165 (1) of the Constitution as amended. From our perusal, the record of proceedings at page 39 shows a letter dated 18th

December, 2018 which was authored by the Permanent Secretary of Chiefs and Traditional Affairs and addressed to the Permanent Secretary for provincial administration in Northern Province. A reading of the last three paragraphs of the letter is as follows:

“However, it has come to the attention of this Ministry that the authorities in Mpulungu District especially the Town Council has allegedly refused to acknowledge that there is a new Senior Chief. The Council has continued paying monthly wages to the three (3) retainers whose employment has since been terminated by the new Chief. The Council has also allegedly refused to put the new retainers recruited by the new Senior Chief on the payroll.

Further, it has been reported that Mr Cosmas Sikazwe Tafuna has allegedly refused to vacate his acting appointment as Deputy Senior Chief Tafuna which he should have done upon selection and installation of the new Senior Chief.

By reason of the foregoing, I hereby request your office to superintend over the above issues so that the new Senior Chief can smoothly commence the performance of his royal duties.”
(Emphasis ours)

According to **Black’s Law Dictionary (1968) Revised 4th Ed**, at page 1606, to superintend means to have charge and direction of, to oversee the details, to take care of with authority, etc. We are of the view that the request made by the Permanent Secretary was one of an administrative nature within the Ministry of Chiefs and Traditional Affairs to normalise the payment of subsidies and monthly wages on the payroll, and not one that made any recommendation as to who the Senior Chief shall be. It was the correct step to take under the law and was not an act of

recommendation or recognition of Senior Chief Tafuna.

The Applicant in his affidavit in reply dated 29th August, 2019 raised an issue in which he stated that the Respondent's affidavit was unreliable as it was sworn by the Committee Clerk of the House of Chiefs, who was not a party to these proceedings. He further deposed that the correct party who should have sworn the affidavit was the Permanent Secretary of Chiefs and Traditional Affairs.

We wish to state that the rules of evidence allow a party to call in aid any witness who that party feels will benefit their case. Such witness ought to be a relevant witness, one of facts and one who is credible. The Rules of the Constitutional Court in O.VI are instructive on admissibility and contents of an affidavit. O.VI r.10 reads as follows:

- “10. An affidavit shall not be admitted which is proved to have been sworn by a person before –**
- (a) the person on whose behalf the same is offered;**
 - (b) the person's advocate; or**
 - (c) a partner or clerk of the person's advocate.”**

Further, O.VI r.13 reads as follows:

“13. An affidavit shall contain only a statement of facts and circumstances to which the witness deposes, based on the witness's own personal knowledge or from information which the witness believes to be true.” (Emphasis added)

Our perusal of the Respondent's affidavit in opposition reveals

that it was sworn by the Committee Clerk in the House of Chiefs, Mr. Cade Chikombo. The evidence deposed to was factual in nature and spoke to matters that he perceived when he participated in the deliberations of the House of Chiefs. Mr. Chikombo was thus a competent witness to give evidence in this regard.

In summation, we have found that the action by the Respondent of placing the Interested Party on the payroll was within the law and was not a contravention of Articles 165 and 167 of the Constitution as amended. We find no merit in this matter and dismiss it.

Each party to bear their own costs.



M.S. Mulenga

CONSTITUTIONAL COURT JUDGE



P. Mulonda

CONSTITUTIONAL COURT JUDGE



M. Musaluke

CONSTITUTIONAL COURT JUDGE