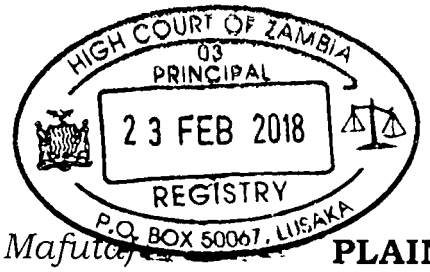
IN THE HIGH COURT FOR ZAMBIA **2017/HP/2069**
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

JOHN MENYANI PHIRI *(Chief Mafuta)* **PLAINTIFF**

(Chief Mafuta)

AND

FREDRICK DAKA *(Paramount Chief Kalonga Gawa Undi)* **DEFENDANT**

CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC

For the Plaintiff: *Mrs. C. N. Kaminsa of Messrs PNP Advocates*

For the Defendant: *Mr. S.S. Zulu, SC of Messers Zulu and Advocates*

RULING

Cases Referred to:

1. *Jamas Milling Company Ltd. v Imex International (Pty) Limited SCZ No. 20 of 2002*

2. *ZAMTEL v Aaron Mweene Mulwanda and Another SCZ No. 7 of 2012*

Legislation Referred to:

1. *The Constitutional Amendment Act No. 2 of 2016*
2. *Chiefs Act Chapter 287 of the Laws of Zambia*
3. *The High Court Rules Chapter 27 of the Laws of Zambia*

This was the Defendant's application for Review of this Court's Order of Interim Injunction granted on 4th January, 2018. The Defendant raised the following grounds for the review:

1. That section 4 (1) of the Chiefs Act which empowered the President to the Republic of Zambia by Statutory Order to withdraw the recognition of a Chief had been struck down by Article 165(2) of the Constitution of Zambia (Amendment) No. 2 of 2016, which provides that Parliament shall not enact legislation which confers on a person or authority the right to recognize or withdraw the recognition of a chief.

2. The Order of Interim Injunction was granted inter alia, on the basis of the Plaintiff's misleading claim that the purported dethronement of the Plaintiff by the Defendant as Chief Mafuta was contrary to section 4 of the Chiefs Act, and thus void ab initio.

3. The Plaintiff obtained the Order of Interim Injunction partly by giving by giving false hearsay evidence to the Court when he

deposed that one of the reasons of his removal as Chief is that there was a fight between him and the Defendant, Paramount Chief Kalonga Gawa Undi, when in fact not.

4. On inter-partes hearing of the application for Order of Interim Injunction, the Plaintiff's Advocates Mrs. C. N. Kaminsa of Messrs PNP Advocates, in her Reply did not dispute the authority of the Defendant as Paramount Chief to dismiss a subordinate Chief but averred that the Plaintiff may not be dethroned other than pursuant to the provisions of the Chiefs Act.

In the Defendant's Skeleton arguments Defence Counsel argued that the Plaintiff's Counsel was misleading this Court by referring to the provisions section 4 of the Chief Act which had been overtaken by Article 165(2) of the Constituted of Zambia. Plaintiff's Counsel obtained this Order of Interim Injunction by misleading the Court as to the present status of the law relating to withdrawal of recognition of a Chief by Statutory Order by the President.

He argued that the Republican President had the authority under the Chiefs Act to withdraw recognition of Chief Mafuta on 13th August, 2017, was not a triable issue in view of the provisions of Article 165(2) of the amended Constitution Zambia.

It followed that the only authority which could remove or dismiss a Chief was the traditional authority of the Paramount Chief. Further, that there was no provision under the Chiefs Act relating to the

disciplinary functions of the Paramount Chief or the procedure which he must follow. He argued that that should be left to custom and tradition.

It was submitted that in opposing the application for injunction he attached a Supreme Court Judgment which ruled that when the President was to withdraw recognition of a Chief, he did not give such chief opportunity to be heard or to be told that an inquiry was being made to remove him.

He submitted that in the circumstances of this case, this Court may find there was sufficient grounds for reviewing its Ruling and reverse the Order of Interim Injunction on the basis that Counsel for the Plaintiff misled the Court on a point of law.

In opposing the application the counsel for the Plaintiff submitted that the Defendant relied on Order XXXIX Rule 1 of the High Court Rules which provides that:

> *"Any Judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and, upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision"*

It was argued that this Court could only review its earlier decision on sufficient grounds. She cited the case of ***Jamas Milling***

Company Ltd. v Imex International (Pty) Limited SCZ No. 20 of 2002 where it was held to the effect that the party seeking the review from the High Court must show that he has discovered fresh material evidence which would have material effect upon the decision of the Court.

It was argued that the Defendant had not laid before this Court what fresh evidence has been discovered which existed at the time of the Court's decisions but had not been discovered. That the arguments advanced by the Defendant did not meet the criteria of reviews of the Court's ruling and cited the cases *of* ***Akashambatwa Mbikusita Lewanika and 4 others v Fredrick Jacob Titus Chiluba SCZ No. 14 of 1998*** where the Supreme Court held that:

> *"Review under Order 39 is a two-stage process. First showing or finding a ground or, grounds considered to be sufficient, which then opens the way to actual review. REVIEW enables the Court to put matter right. The provision for review does not exist to afford a dissatisfied litigant the chance to argue for an alteration to bring about a result considered more acceptable."*

Counsel also cited **Walusiku Lisulo v Patricia Anne Lisulo SCZ No. 21 of 1998** where it was held that *Order 39 Rule 1 of the High Court Rules is not designed for parties to have a second bite. Litigation must come to an end and successful parties must enjoy the fruits of their judgment.*

I have considered the submissions by both parties.

The Supreme Court has ably guided on the strict instances that a Court may review its own Judgment as noted by the cases cited by the Plaintiff's Counsel. I call in aid the case of ***ZAMTEL v Aaron Mweene Mulwanda and Another SCZ No. 7 of 2012*** where Mwanamwambwa, JS delivering the Judgment of the Court referred to the case of ***Jamas Milling Company v Amex International Pty Limited (2002) Z.R. 79*** and held as follows:

> *"In that case we said:-*
>
> *"For review under Order 39, rule 2 of the High Court Rules to be available, the party seeking it must show that he has discovered fresh material evidence, which would have material effect upon the decision of the Court and has been discovered since the decision but could not, with reasonable diligence, have been discovered before.....*
>
> *We also note that there was no fresh material evidence, discovered since the judgment, which would have material effect on the judgment. Review was clearly not available to the respondents. Contrary to the submission by the 1st respondent, review under Order 39, rule 1 of the High Court Rules has very limited scope, as per our decisions in the Jamas, Lisulo, and Lewanika cases, referred to above."*

Similarly in the case before me, I have carefully looked at the submissions and the evidence on record. I agree with the submissions by the Plaintiff's Counsel that there has been no new evidence that has established to warrant this Court review its

ruling. This has been well established by the Supreme Court in the case I have referred to above. This issue relating to the Order of Interim Injunction in my view is *res judicata.* The recourse that was available to the Defendant if not satisfied with this Court's ruling was to appeal to the Superior Court because this is not a fit and proper case to order a review.

I accordingly dismiss this application with costs to the Plaintiff. Leave to appeal is granted.

Delivered under my hand and seal the 23d **day of February, 2018**

Mwila Chitabo, S.C.

JUDGE