

REPORTABLE (ZLR) 28

GOLDEN MOYO

v

**(1) STEPHEN MKOBA (2) DISTRICT ADMINISTRATOR FOR
LOWER GWERU (3) GOVERNOR OF MIDLANDS PROVINCE (4)
THE MINISTER OF LOCAL GOVERNMENT, RURAL & URBAN
DEVELOPMENT (5) THE PRESIDENT OF THE REPUBLIC OF
ZIMBABWE**

**SUPREME COURT OF ZIMBABWE
MALABA DCJ, GOWORA JA & CHEDA AJA
BULAWAYO, JULY 30, 2012 & AUGUST 7, 2013**

T Mpofu, for the appellant

H Moyo, for the first respondent

MALABA DCJ: This is an appeal against the judgment of the High Court given on 19 January 2012. The High Court discharged a provisional order under HCB 1396/09. It also dismissed an application for review under case No. HCB 1410/09.

The provisional order which had been granted on 10 September 2009 reads:

“TERMS OF FINAL ORDER SOUGHT

1. That the installation ceremony of the first respondent as substantive Chief Bunina set for the 18th September 2009 be and is hereby stayed and/or postponed pending the hearing of an application for review of the decision to appoint the first respondent as Chief Bunina of Lower Gweru.
2. That the applicant shall forthwith file and serve his review application upon the respondents who shall have the right to oppose same in terms of the rules of court.
3. That the costs of this application shall be borne by the respondents’ only if they oppose it.

INTERIM RELIEF GRANTED

4. That the installation ceremony of 1st Respondent as substantive Chief Bunina be and is hereby stayed and/or postponed pending the determination of the review application filed of record.”

The order sought in the review application under case No. HCB 1410/09 reads:

“IT IS ORDERED:

1. That the decision to appoint 1st respondent as substantive Chief Bunina be and is hereby set aside.
2. That the matter be and is hereby remitted to the office of the 2nd respondent who shall reconvene a selection meeting of all interested parties which shall select a candidate for appointment as Chief Bunina in accordance with the customary principles of succession of the Bunina clan.
3. That the costs of this application shall be borne by the Respondents only if they oppose.”

The court *a quo* discharged the provisional order on the return day and dismissed the application for review of the actions of the officials of the Local Government, Rural and Urban Development which formed the basis of the decision by the fifth respondent to appoint the first respondent as substantive Chief Bunina.

The relief sought on appeal is an order setting aside the court *a quo*'s judgment and substituting in its place an order confirming the interim order; and granting the application for review and setting the decision of the fifth respondent aside. The granting of the relief relating to the interim order is no longer possible because the first respondent was installed as substantive Chief Bunina of Lower Gweru on 18 September 2009. He had been appointed on 7 May 2007.

The appellant is the eldest son of Jackson Moyo, the last Chief Bunina of Lower Gweru, who died in June 2003. The late Jackson Moyo had taken over the chieftainship from his late father Mantiya. After the death of Jackson Moyo the appellant was appointed acting Chief Bunina of Lower Gweru in May 2004 until the expiry of his term in May 2006. The first respondent's father was Mkoba. He was one of the sons of Chief Bunina born of a younger wife. The other direct descendants of Chief Bunina are Mpabanga, Dick Ndudzo and Lugwalo. Mpabanga and Mkoba were brothers born of the same mother. They were brothers in one house.

The process of choosing a substantive Chief Bunina started in 2005. The appellant alleged in the answering affidavit in the application to the court *a quo* that the dispute over the chieftainship succession arose because the first respondent objected to his succession to the chieftainship following his father's death. On 19 August 2005 a meeting of all the members of the Bunina family was convened. In attendance were Mr Mukwaira the Deputy Secretary in the fourth respondent's ministry, the Provincial Administrator, the District Administrator for Gweru and the District Administrator for Kwekwe.

The meeting which had been called to discuss and resolve the question of who should succeed the late Jackson Moyo as substantive Chief Bunina was not conclusive. The question which remained unresolved was whether the prevailing customary principles of succession to the chieftainship applicable to the community over which the substantive Chief Bunina would preside were based on patrilineal or collateral succession. The question was not who amongst the Bunina family members was to be elected Chief Bunina.

The meeting was reconvened on 20 October 2005. The Mantiya family, Mpabanga family, Mkoba family, and Lugwalo family all being direct descendants of Chief Bunina were present. A total of twenty two people represented the families. It is alleged that at the meeting Mr Mukwaira said that since the Bunina clan was Rozvi by origin they should choose the substantive chief using the collateral customary principles of succession. He went on to direct the members of the families present to elect the person they wanted to become the substantive Chief Bunina. Members of Mkoba, Mpabanga and Lugwalo families voted for the first respondent. Members of Mpabanga and Mkoba families being descendants of brothers should have been counted as one house if an election was an appropriate method of succeeding to the chieftainship. The first respondent was then recommended to the President for appointment as substantive Chief Bunina. The appellant challenged the decision alleging that he was the rightful heir to the Bunina chieftainship.

The second and third respondents' reports to the fourth respondent confirm that the Bunina customary principles of succession to the chieftainship are patrilineal. A report made by one R Dzingirai of the office of the Provincial Administrator, Midlands, to the Governor of the Midlands Province on 27 October 2005 is to this effect:

“Records in the file indicate that the Ndebele custom is the preferred mode of succession. An undated family tree supports this contention (find attached). Correspondences in the Chieftainship file suggest that Mantiya was the rightful heir as he is the first born by the senior wife Mavu.

However due to his youth he was unable to take up his post, therefore Mpabanga was appointed as regent Chief. Mpabanga only ruled for two years at which time Mkoba was nominated to the same position. When Mantiya was of age, he was unable to regain his chieftainship on the basis that Mkoba was unwilling to relinquish the chieftainship.

Reference is made to the District Commissioner's notes dated 12 June 1972 Ref: Per/4/Mkoba/Bunina Page 3 which states that Mkoba was “... a tough, violent, relentless, self centred despot ... who brooked no opposition, dealt physically violently with anyone who offended or opposed him”. It is argued by the then District Commissioner that Mantiya adhered to the trusty adage that “better a living coward

than a dead Hero”. In his writings the District Commissioner even went further to note, “By appointing Mantiya, we re-affirm the principle repeatedly averred to by the tribal elders, that their custom of succession is patrilineal not collateral. His son Jackson will follow him.

With the above observations, in mind it would be pertinent to point out that the same sentiments emerged at the following selection meeting, the purpose of which was to appoint substantive chief after the death of Mantiya. At a meeting held on the 19th of May 1989, which was chaired by the Acting District Administrator for Gweru Mr Rushwaya, members present “unanimously agreed to follow the Ndebele custom of Chief begets a chief hence Mavu, first wife of Bunina, had borne a chief in Mantiya”. One would assume that the same adage was adopted upon Jackson’s death, with Golden Moyo, his son acting.

At all these previous meetings, what is consistent is the clan’s agreement that the selection system is Ndebele and that Mantiya is the rightful heir of the chieftainship. The two meetings held in August and October 2005 respectively acknowledge that the people of Bunina are of the Rozvi origin, but the mode of succession has always been aligned more to the Ndebele patrilineal system than the Rozvi.”

What is clear from the report which was written seven days after the meeting of 20 August is that the decision of Mr Mukwaira was challenged as not having been based on the prevailing customary principles of succession to the Bunina clan chieftainship as reflected by the official records.

In another report by Mr Mupeta who was the Acting District Administrator for Gweru to the Provincial Administrator, dated 28 October 2005, it was confirmed that the Bunina system of succession to chieftainship was endemically Ndebele, although they were Rozwi. It was only after Mr Mukwaira interfered with the debate and advised that in his opinion if they were Rozvi they should follow the house to house system of succession to chieftainship that the first respondent emerged as a contender to succeed Jackson Moyo as Chief Bunina.

The report records that before meeting members of the Bunina family on 19 August 2005 the officials held a caucus meeting of their own. The report shows that the officials agreed that the patrilineal succession was the prevailing customary principle to be applied. The agreement was not implemented because the first respondent claimed that the family had chosen their own chief. The meeting was then adjourned to 20 October 2005. The report states that at the meeting of 20 October members of the Bunina family indicated that although they were Rozvi by origin they had followed patrilineal customary principles of succession to their chieftainship. It was then that Mr Mukwaira said if they are Rozvi by origin they should follow the house to house system of succession to chieftainship.

Following complaints by the appellant and other members of his family to the fourth respondent through the office of third respondent another meeting of members of the Bunina families was held on 21 June 2006. Although the purpose of the meeting was for the members of the Bunina families to agree on the customary principles of succession no such agreement was reached or sought to be encouraged by the officials present. At the end of the meeting the families were asked to vote for those they wanted to be Chief Bunina. Those who voted for the first respondent did so because he was the oldest surviving grandson of Chief Bunina.

The report states:

“Chief Sogwala and Chief Malisa from the same area who also are Rozvi by origin were at the meeting. They expressed dismay at the development. They encouraged the Bunina families not to change their tradition in order to impose a candidate. They urged the parties not to waive family tradition to facilitate the ascension of an ineligible candidate. The record of the meeting of 21 June 2006 shows that the first respondent was not chosen because he belonged to the house which according to the collateral principle was entitled to succeed to the chieftainship.”

In the memorandum dated 28 August 2006 to the fourth respondent, the Provincial Administrator refers to the election of the first respondent as Chief Bunina on 21 June 2006 and then states that:

“... Though there was no succession among the family members what sufficed was that Stephen Mkoba, was chosen by the majority of the houses. The decision to appoint Stephen Mkoba from the families, though non-procedural and non-congruent with either the bi-lateral or collateral system was welcome by this office in the best interests of the Chieftainship...”

The report on the meeting of 21 June 2006 had stated that:

“Records dating back to 1985 showed deliberations made by the respective families which clearly showed that they were following a Ndebele custom and the Mantiyas were the rightful heirs to the chieftainship (minutes of 4 November 1985). The Mpabanga family asserted that the system of succession was from father to son. Even Stephen Mkoba said that it was from father to son. This was a selection meeting after the death of Mantiya.”

The court *a quo* found that:

“The first respondent’s claim to the chieftainship does not seem to be based on a recognisable Ndebele system of succession, custom or tradition of the clan but merely on some kind of election or poll conducted by Local Government officials.”

The court *a quo* went on to say:

“In the exercise of his powers the President appointed the 1st respondent the substantive Chief Bunina on 7 May 2007. This appointment is in accordance with the Rozvi principles of succession. The President in his wisdom and discretion did not follow the Ndebele system of succession. It is this appointment really that resulted in these two matters.

.....

It is trite that although chiefs are envisaged as hereditary holders of office it is only official recognition by the President that carries with it the title of Chief. In practice the President frequently appoints the person holding traditional title to the chieftainship, but he is not obliged to do so. Section 3(2) of the Act obviously implies that the President “should give due consideration to the customary principles of succession if any applicable to the community over which the Chief is to preside, as investigated by Ministry of Local Government officials in particular the 2nd

respondent. But, once the investigation has been made, the President is free to act as he thinks best in the interests of good governance of the community.”

The question is whether the recommendation of the fourth respondent to the President, to appoint the first respondent as Chief Bunina, was in accordance with the customary principles of succession of the Bunina clan. The first respondent does not find anything amiss in the fact that he was chosen by means of a poll, as candidate for appointment as Chief Bunina. What is very clear from the letter of 28 August 2006 is that the recommended appointment of the first respondent as Chief Bunina was not in accordance with any prevailing customary principles of succession to the chieftainship. It was for the convenience of the administration.

Section 3 of the Traditional Leaders Act [*Cap. 29:17*](“the Act”) provides that:

- “(1) Subject to subsection (2), the President shall appoint chiefs to preside over communities inhabiting Communal Land and resettlement areas.
- (2) In appointing a chief in terms of subsection (1), the President-
 - (a) Shall give due consideration to –
 - (i) The prevailing customary principles of succession, if any, applicable to the community over which the chief is to preside; and
 - (ii) The administrative needs of the communities in the area concerned in the interests of good governance.”

The appellant contends that the court *a quo* misdirected itself in concluding that the President’s discretion in the appointment of a chief is unfettered. The court *a quo* said:

“...section 3 of the Act provides the President with unfettered discretion in the appointment of a Chief ... this exercise of executive powers by the President cannot be reviewed.”

The appellant takes issue with the holding by the court *a quo* that s 3(2) of the Act only requires that there be an investigation into the prevailing customary principles of succession applicable to the community over which the chief is to preside. The court held that the investigation has no bearing on how the President should exercise his powers. The appellant argues that the exercise of discretion in appointing a chief by the President, is impeachable where it is based on incorrect, irrelevant or improper considerations.

The first respondent argued that the President:

1. Has no obligation to necessarily appoint as chief a person holding traditional title to the chieftainship.
2. His discretion in the appointment of a chief is unfettered.
3. The exercise of his powers is not impeachable in any circumstances.
4. The appointment of a chief is an exercise of Presidential powers which cannot be reviewed by the courts.
5. He is not obliged to follow the recommendations of the second respondent in terms of the Act.

The Constitution of Zimbabwe provides for the extent to which the President's executive powers are justiciable. Section 31K provides:

“Extent to which exercise of President’s functions justiciable

- (1) Where the President is required or permitted by this Constitution or any other law to act on his own deliberate judgment, a court shall not, in any case, inquire into any of the following questions or matters-
 - (a) Whether any advice or recommendation was tendered to the President or acted on by him; or
 - (b) whether any consultation took place in connection with the performance of the act; or
 - (c) the nature of any advice or recommendation tendered to the President; or
 - (d) the manner in which the President has exercised his discretion.

- (2) Where the President is required or permitted by this Constitution or any other law to act on the advice or recommendation of or after consultation with any person or authority, a court shall not, in any case, inquire into either of the following questions or matters-
- (a) the nature of any advice or recommendation tendered to the President;
or
 - (b) the manner in which the President has exercised his discretion.”

Only the President has the power to appoint a Chief. It is correct to say that chiefs are Government officials who hold office during pleasure and contingent upon good behaviour. The appointment of chiefs has since 1927 been controlled by statute. In deciding to appoint a particular person as the Chief to preside over a community, the President acts on his own deliberate judgment. In other words he is not obliged to appoint that person. In those matters in respect of which the President is empowered to act in his own discretion, the manner in which he exercises that discretion is not subject to judicial review unless he has exercised his discretion outside the law, that is, where the President has in the exercise of his discretion, made an error of law. *Chipfuvamiti v Nyajina & Anor* 1992(2) ZLR 148(H).

The court *a quo* accepted that in terms of s 3(2) of the Act an inquiry is required to be carried out on the prevailing customary principles of succession applicable to the community over which the person to be appointed chief is to preside. The court went on to find that once the recommendation was made, the President was free to act as he thought fit. The court cannot inquire into the question whether recommendation was made to the President to appoint the first respondent as Chief Bunina and whether he acted on such advice.

Having accepted that s 3(2) of the Act required that an inquiry be conducted by the officials of the Ministry of Local Government, Rural and Urban Development to

ascertain the prevailing customary principles of succession applicable to the community the court ought to have inquired into the question whether those investigations produced the information on the matters to which the President is required to give due consideration.

The President is required to act on his own deliberate judgment after he has information relating to the prevailing customary principles of succession applicable to the community to which he must give due consideration. Whether the information placed before the President relates to the matters to which, he is required to give due consideration is a justiciable question. This means that this is not one of those matters contemplated by s 31K of the Constitution which are not justiciable.

The validity of the exercise of the power to appoint a chief is made to be subject to due consideration having been given to the prevailing customary principles of succession to the chieftainship applicable to the community over which the chief is to preside. An appointment of a chief not preceded by a demonstrable compliance by the President with the obligation to give due consideration to the prevailing customary principles of succession to the chieftainship would be null and void.

In *Rushwaya v Minister of Local Government* 1987(1) ZLR 15 it was held at 18H that:

“Notwithstanding s 66(3) of the Constitution, the High Court can review advice given to the President by the responsible Minister in relation to the appointment of a chief in terms of the Chiefs and Headmen Act, 1982. The grounds on which such advice can be reviewed are illegality, irrationality and procedural impropriety.”

Section 66(3) of the Constitution is now s 31K, which spells out the scope or limit of the executive function the exercise of which is not justiciable. It is accepted that the

Minister's recommendation forms the basis of the President's decision as it should be based on information relating to matters to which he is required to give due consideration before acting on his own deliberate judgment.

In *PF ZAPU v Minister of Justice, Legal & Parliamentary Affairs* 1985(1)

ZLR 305 it is stated in the headnote that:

“The exercise of an executive prerogative is not necessarily an act the question of the validity of which is beyond jurisdiction of the court. The term act of State should only be applied to those acts in respect of which the courts' jurisdiction is ousted. All other executive acts, whether within the prerogative or not, are subject to review on the usual grounds.”

At p 313G-H DUMBUTSHENA CJ stated the general principle in these word:

“In my view an act of State is an act of the executive in those areas of executive prerogative which oust the jurisdiction of the courts. But such executive prerogatives are now very few and far between because whenever the exercise of executive prerogative affects the private rights, interests and legitimate expectations of the subjects or citizens the jurisdiction of the courts is not ousted. The private rights, interests and legitimate expectations of the citizens subject to judicial review acts of the executive which would otherwise oust the jurisdiction of the courts.”

The Act governs the appointment of a person to a particular chieftainship and the recognition and establishment or abolition of any particular chieftainship. Under the statute the functions are vested in the President. In exercising these powers the President has an absolute discretion, unfettered by any statutory shackles other than the duty to give due consideration to the customary principles of succession if any, applicable to the community over which such chief is to preside. It is only the President who can determine who shall be appointed as chief. The court has no power to investigate, determine or even recommend to the President who should be appointed as the chief in the area.

The same principle of law by which the President is vested with absolute discretion in the exercise of the powers of appointing chiefs was recognised in *Ruzane v Paradzai & Anor* 1991(1) ZLR 273(SC) where at pages 280H-281A MANYARARA JA observed that “the clear meaning of the provision is that the President is required to give due consideration to the customary principles of succession”, not to follow them in making his choice.

In *Chagaresango v Chagaresango & Ors* 2001 (1) ZLR 99 (S) it is stated in the headnote:

“... While ordinarily it is not competent for a court to investigate how the President has exercised his discretion, it may investigate whether the relevant Minister and his officials, in formulating their advice to the President, acted on sound principle. Where it was shown that the appointment of a chief deviated from the ordinary customs and traditions of the clan in question, and that the Minister had not given due consideration to the customary principles of succession before making his recommendation to the President, the court can make the declaration to the effect that the customary principles of succession to the particular chieftainship were not given due consideration.”

See also *Rushwaya's case* supra at pp 154-160 and 18F-19B.

In *CCSU v Minister of the Civil Service* [1984] 3 All ER 935 (HL) LORD DIPLOCK, at 950j-951d, put and described the three grounds of judicial review as follows:

“The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’.

By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By ‘irrationality’ I mean what can by now be succinctly referred to as ‘Wednesbury unreasonableness’ (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at

it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.

I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.”

It is clear that what is reviewable is not the executive act of the President. The court cannot inquire into the fact that the President decided in the exercise of his discretion to appoint the first respondent instead of any one else as Chief Bunina. The court cannot inquire into what information was taken into account by the President in making his decision and whether the decision was justifiable on the information.

The court *a quo* failed to appreciate the effect of the position take by the officials in the fourth respondent’s ministry that although the recommendation to appoint the first respondent as Chief Bunina was “non-procedural and non-congruent” with either the patrilineal or collateral customary principles of succession it was considered to be in the best interests of the chieftainship.

The recommendation was not based on a finding, as implied by the court *a quo*, that the customary principle of collateral succession was found to be the prevailing customary principle of succession to the chieftainship applicable to the community over which Chief Bunina presided. The learned judge misdirected himself when he held that the appointment of the first respondent as Chief Bunina was in accordance with the Rozvi customary principles of succession.

The effect of the finding of the fact of the recommendation made to the President not having been based on any prevailing customary principle of succession is that the President did not have before him facts on the prevailing customary principles of succession to which he was required to give due consideration before making the appointment of first respondent as substantive Chief Bunina.

The method of choosing the person to be appointed substantive Chief Bunina was the one by which members of some of the houses of the descendants of Chief Bunina voted for their preferred candidate. The elective method of choosing a person to become a chief is not necessarily consistent with customary principles of succession to chieftainship.

The court *a quo* said that the fourth respondent acted in terms of the proviso to s 3(2)(b) of the Act, which reads:

“Provided that, if the appropriate persons concerned fail to nominate a candidate for appointment as chief within two years after the office of chief became vacant, the Minister, in consultation with the appropriate persons, shall nominate a person for appointment as chief.”

There is nothing in the record of proceedings to support the submission that the fourth respondent acted in terms of the proviso. Section 3(2) (b) of the Act only comes into effect where there has been failure to nominate a candidate in accordance with the prevailing customary principles of succession applicable to the community over which the chief is to preside. The circumstances envisaged under the proviso as the precondition for its application did not arise in this case.

The recommendation to the President was contrary to the evidence that the prevailing customary principles of succession to the chieftainship were patrilineal. The

officials of the Ministry of Local Government, Rural and Urban Development did not base their recommendation on the evidence. They decided that because the clan was Rozvi by origin they had to apply the collateral principles of succession to the chieftainship. That decision was contrary to the evidence to the effect that succession to the chieftainship after the death of the original Chief Bunina was based on the patrilineal principles of succession because there were no brothers who would have contested the right to succeed him in terms of the collateral principles of succession. The development was important to consider because it is according to the customary principle of collateral succession that a son should not succeed his father as chief.

The problem with this case is that whilst the first respondent claimed that the collateral principles of succession were applicable he was not himself appointed in terms of those principles. He was chosen on the basis of a vote by members of the other three families. He must have known that on the house to house customary principles of succession he had no claim to the chieftainship. The Mkoba house would have had its turn if the primacy of rotational succession was observed. The houses that would have been entitled to succeed to the chieftainship were those of the descendants of Lugwalo, Dick Ndudzo and Mpabanga. Those who voted for him did so out of deference because he was the oldest of the surviving descendant grandsons of Chief Bunina. No evidence was led of the fact that it was a customary principle of succession to the chieftainship that the oldest surviving descendant of Chief Bunina has a right to succeed to the chieftainship even if his house is not next in the line of succession.

The appointment was not supported by the community over which the chief was to preside. The evidence showed that whilst the Bunina family may have migrated from

Matojeni Area and were Rozvi by origin they settled in an area inhabited by a community which is predominantly Ndebele. Over many years they practised the customary principles of succession to the patrilineal chieftainship in line with the customs of the community over which they presided. If that practice had changed the officials of the Ministry of Local Government, Rural and Urban Development should have gathered sufficient evidence of the fact of that change from the community. Instead of gathering the evidence they imposed their own views on which customary principles of succession should be applied.

A thorough investigation of the matter was of paramount importance because the last substantive Chief Bunina had succeeded to the chieftainship on the basis of the patrilineal principles of succession. The evidence on record shows that the first respondent approved in 1985 of Jackson succeeding to the chieftainship following the death of his father Mantiya on the basis of the customary principles of patrilineal succession. He must have accepted that Mkoba had held the office as a regent Chief Bunina because Mantiya was a minor. The act by the President was initiated by a recommendation not based on facts or findings arrived at by a process prescribed by law. The court *a quo* did not address this question of compliance by the officials concerned with the due process. Where the law requires that a particular thing be done in a particular way and something else is done there is not only a procedural impropriety the resultant decision is irrational.

The President was made to act on what the officials decided was the customary principles of succession to the Bunina clan chieftainship without reference to evidence including the official records. He was made to appoint a person as a chief who was not chosen by his own people in terms of the very customary principles of succession the officials had sought to impose on the community. The first respondent was elected by

members of the Bunina family who were at the meeting of 26 June 2006 because he was the oldest surviving grandson of the Chief Bununa. He was not chosen because he was the eldest son in the house which was entitled to succeed to the chieftainship according to the customary principles of collateral succession.

The President did not act on the basis of what was considered by the community to be the prevailing customary principle of succession as required by law. In other words what was placed before the President to enable him to exercise his own judgment in reaching the decision to appoint the chief was not what the statute required to be placed before him. The power vested in the President did not extend to taking into account unlawful matters. It is a question of the limit of the power as opposed to the manner of its exercise. See *Dhlamini v Carter* 1968(2) SA 445(RAD) at 453D-F.

For the President to give due consideration to the matters specified in s 3 (2) of the Act before he can act on his deliberate judgment to appoint a chief he must have relevant facts which have a bearing on those matters. *Mosome v Makapan N.O. & Anor* 1986(2) SA 44. 'Due' consideration means 'proper' consideration. By making the validity of the exercise by the President of the power to appoint a chief depended upon compliance with the requirements of subs (2) of section three the Act underlines the importance of having to give the due consideration to the prevailing customary principles of succession in the appointment of a chief.

The memorandum of 28 August 2006 and the finding of the court *a quo* show that the question as to the prevailing customary principles of succession to the Bunina chieftainship remains unresolved. The question was not thoroughly and objectively

investigated by the officials of the fourth respondent's Ministry. The prevailing customary principles of succession applicable to the community over which the chief was to preside had to be established before the President exercised his powers under s 3(1) of the Act. The other matters the President is enjoined by s 3 (2) (ii) of the Act to take into account can only be considered where there is "due consideration" of the prevailing customary principles of succession to a chieftainship. There cannot be "due consideration" of something which has not been established as a fact.

Accordingly, the appeal is allowed with costs. The costs are to be paid by the first and fourth respondents jointly and severally, the one paying the other to be absolved.

The judgment of the court *a quo* is set aside and the following is substituted instead that:

- (1) It is hereby declared that the customary principles of succession to the Bunina chieftainship were not ascertained and given due consideration in the appointment of the first respondent as Chief Bunina of Lower Gweru.
- (2) The fourth respondent, forthwith make a recommendation to the President for the removal of the first respondent from the chieftainship of the Bunina clan.
- (3) The second, third and fourth respondents cause a meeting of all interested parties to investigate and deliberate on the prevailing customary principles of succession to the Bunina chieftainship for due consideration by the President in the appointment of a substantive Chief Bunina.
- (4) The respondents are to pay the costs of the application; jointly and severally, the one paying the others to be absolved.

GOWORA JA: I agree

CHEDA AJA: I agree

Coghlan & Welsh, appellant's legal practitioners

Joel Pincus & Wolhuter, first respondent's legal practitioners