SILIBAZISO MLOTSHWA

Versus

DISTRICT ADMINISTRATOR, HWANGE N.O

And

SAUNDERS MLOTSHWA

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 21 JUNE 2019 AND 25 JUNE 2020

Opposed Application

Advocate P Dube with T Ndlovu, for the applicant
Miss R Hove, for the 1st respondent
Miss L Mumba, for the 2nd respondent

TAKUVA J: This is a court application for a mandamus seeking to compel the 1st respondent to act according to the law and the Constitution. The application is not about the resolution of a dispute as to who should be appointed as the substantive chief Mvuthu, it is about compelling the 1st respondent as a public official to take action which he is at law obliged to take and issue lawful recommendations in terms of the law and the Constitution In view of the fact that this matter has a history of litigation in the High Court, Supreme Court, and the Constitutional Court, it is imperative to capture the background of the present application so as to locate it in the proper context of the litigation involving the Mvuthu Chieftainship.

Background

Under HC 3449/15, applicant filed action proceedings against four respondents, the present respondents included seeking to challenge and nullify the nomination of 2nd respondent as the substantive Chief Mvuthu. The respondents raised points *in limine* that were upheld by this court per MATHONSI J (as he then was) in his judgment No. HB 161/16.

The applicant is the eldest daughter of the late Chief Nyangayezizwe Mvuthu Mlotshwa who was the substantive Chief of Mvuthu area in Hwange District until his death in 2014. As the last Chief Mvuthu is survived by only three daughters and applicant being

the eldest, she claims to be the next in line of succession to the Mvuthu chieftainship which is lineal (Nguni/Ndebele succession system).

On the 21st of December 2014, the 1st respondent convened a meeting for the nomination of a substantive Chief Mvuthu. On account of her gender, the 1st respondent seconded the 2nd respondent, applicant's uncle for the appointment as the next Chief Mvuthu. Aggrieved by this decision, applicant instituted the above proceedings in the High Court.

Aggrieved by MATHONSI J's decision, applicant appealed to the Supreme Court which held that the summons under case number HC 3449/15 failed to properly bring out the constitutional issue and advised that a constitutional application should be properly filed to determine the constitutionality of the Nguni customary succession principle excluding women from chieftainship on the sole basis of gender.

Applicant then filed an application to the Constitional Court for direct access and the application was heard by the Chief Justice in Chambers. Drawing inspiration from the case of *Moyo v Mkoba* SC 35-13 the Chief Justice opined that since the nomination process was still within the consultative stages, the decision by the 1st respondent can be challenged at law since at that stage the matter would not have moved into the realm of Presidential discretion against which a court cannot interfere. Also noted by the Chief Justice is the provisional order granted by this court under HC 2343/17 interdicting the 1st respondent from forwarding the name of the 2nd respondent to the President of Zimbabwe for confirmation pending the finalization of this matter at the Constitutional Court. Further, the Chief Justice noted that rather than launching a constitutional challenge applicant has an available remedy of mandamus to compel the 1st respondent to make a lawful recommendation to the President.

It is against this background that applicant filed this application. The 1st respondent chose not to oppose this application. However, the 2nd respondent did not share this view as he strenuously opposed it on every conceivable ground. Firstly, he raised a point *in limine* namely that the failure to cite the President and the Minister in their official capacities rendered this application fatally defective as the two offices are interested parties that are crucial in the determination of this matter. On the merits, the 2nd respondent's main argument is that the 1st respondent made lawful recommendations and that the minutes of the nomination proceedings held on 21 December 2015 are not the correct minutes of that meeting. The veracity of the minutes is attacked on the following grounds;

(a) they do not disclose their origin or the person who captured them.

(b) the attendance register is not signed or endorsed by those who attended the meeting and

(c) there is no indication on the minutes that they were adopted by the members present as a reflection of what transpired on the day of the meeting.

Second respondent also argued that the applicant has not established the requirements for the grant of the mandamus.

I perceive the issues for determination to be:-

1. Whether or not the President and relevant Ministry of Rural Development, Preservation and Promotion of Culture and Heritage should have been cited and the effect of their non-citation.
2. Whether the dispute should be resolved by the President.
3. Whether or not the applicant has met the requirements for the grant of a mandamus.
4. Whether or not a mandamus is the appropriate relief in the circumstances.

I now deal with the issues *seriatum.*

Point In Limine

The 2nd respondent's point *in limine* has no merit for the following reasons: Firstly, the present application is a mandamus application specifically against the 1st respondent. The nature of the application is simply to compel the 1st respondent to act lawfully. A mandamus is against a specific public official. The President of Zimbabwe and the Minister of Rural Development Preservation and Promotion of Culture and Heritage have no interest in this application.

In *Moyo v Mkoba* (supra), the Supreme Court confirmed the principle that the actions of a District Administrator are subject to judicial review as they do not fall under executive discretion. *In casu*, it is critical to note that the 1st respondent has not forwarded anyone's name for appointment by the President. Therefore, the matter is not before the President or Minister and the President and Minister do not play any role in the meetings regarding the selection of a possible appointee to chieftainship.

The approach that it is the specific public official who should be cited in a mandamus application and not the government officials has been adopted by the South African Supreme Court in the case of *MEC, Department of Welfare v Kate* (2006) 2, AU8A 455 (SCA). The court had this to say;

> "It goes without saying that a public functionary who fails to fulfill an obligation that is imposed upon him or her by law is open to proceedings for a mandamus compelling him or her to do so. That remedy is against the functionary upon whom the statute imposes the obligation and not against the provincial government. If Jayiya has been construed as meaning that the remedy lies against the political head of the government department as suggested by the court below, then, that construction, is clearly not correct." (my emphasis)

Secondly, and in any event, the non joinder of a party does not defeat a litigant's cause of action. Rule 87 (1) of the High Court Rules 1971 is apposite in this respect. It provides as follows:-

> "(1) No cause or matter shall be defeated by reason of the mis-joinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

At the heart of the matter before me is a mandamus against the 1st respondent who is a public official, to act lawfully in coming up with a recommendation to be forwarded to the President. It is not a dispute regarding the appointment of the 2nd respondent. What is significant to note is that the 2nd respondent has not been appointed and his name has not even been forwarded to the President for appointment. I find therefore that there was no need to cite the President or the Minister. The non citation of the two is proper at law. As such, the point *in limine* has no merit and is hereby dismissed.

ESSENTIALS OF A MANDAMUS

The 2nd respondent has strenuously opposed the applicant's averment that this is an application for a mandamus. It is therefore necessary to define the nature of this application. That the common law remedy of mandamus seeking to compel a public official to act lawfully in the fulfillment of a statutory duty is part of our law is established. In *Qhubekani Dube and Others v Constitutional Select Committee* HB 43/10, the court defined a mandamus as, "a legal remedy which is aimed at compelling an administrative organ to perform a prescribed statutory duty..... It is trite that an interdict and a mandamus are two sides of the

same coin, unauthorized action is prevented by means of an interdict and compliance with a statutory duty is enforced by means of mandamus – *Continental Land Goed (EDMS) BPK v Bethelrand* 1977 (3) SA 168 (1) at 169 G. There is no difference in principle between the enforcement of a statutory prohibition by way of an interdict and the enforcement of a statutory duty by way of a mandamus.

Compliance with a statutory duty is enforced by means of a mandamus. Mandamus is available to serve two purposes i.e (a) to compel the performance of a specific statutory duty; and (b) to remedy the effects of unlawful action already taken. The mandamus will only be granted where the public authority is under a clear duty to perform the act ordered. Where the public authority has a discretion in the matter, the order will only extend to directing the authority to comply with its duty of deciding the matter properly – *Minister of Law and Order (Bophithatswana) v Maubane* 1981 (3) 8A453 (A); *Mall v Civil Commissioner of Paarl* (1897) 14 SC 463 and *Britten v Pope* 1916 AD 150. Mandatory interdicts are by their very nature urgent."

In *Alliance Cash & Carry (Pty) Ltd v Commissioner South African Revenue Service* 2002 (1) 8A 789 (TPD) at 795 – 1 –J, the court stated that:-

> "It must be borne in mind that the appellant in this matter applies for mandamus, i.e mandatory interdict. The applicant must therefore establish a clear right, an injury actually committed or reasonably apprehended and the absence of a similar protection by any other ordinary remedy *Setlogelo v Setlogelo* 1914 AD 221 at 227)"

In casu, the applicant states in her founding affidavit that this is an application for a mandamus seeking to compel the 1st respondent as a public official to take action which he is at law obliged to take and issue lawful recommendations in terms of the law and the Constitution regarding the Mvuthu chieftainship as captured in his sentiments as recorded in the minutes of 21 December 2014.

The nature of the relief sought by the applicant also provides an answer to the nature of the application. Clearly, the relief sought is in the form of a mandatory interdict/mandamus. Except for paragraph 2 of the relief which counsel for the applicant has rightly withdrawn, paragraphs 3, 4 and 5 are mandatory interdicts seeking to compel the 1st respondent to perform specific statutory and constitutional duties.

The order sought by the applicant is couched as follows:-

"1. The 1st respondent's recommendation to the Mvuthu family on 21st December 2014 of nominating the 2nd respondent as the appointee to the Mvuthu Chieftainship be and is hereby declared unlawful, null and void.

2. The 1st respondent be and is hereby compelled to recommend to the President of Zimbabwe the applicant as an appointee to the Mvuthu chieftainship.

3. Failing paragraph 2 above, the 1st respondent be and is hereby compelled to re-convene a meeting for the selection of a chief within 60 days of granting of this order in accordance with section 3 of the Traditional Leaders Act and the Constitution.

4. The 1st respondent be and is hereby compelled to make lawful recommendations to the President regarding the appointee to the Mvuthu Chieftainship in accordance with the dictate of the constitutional imperatives of human dignity, non-discrimination and equality before the law as enshrined in sections 51, 56 and 80 of the Constitution.

5. The 1st respondent be and is hereby compelled to act lawfully within the constitutional dictates and imperatives of human dignity and equality before the law as enshrined in the sections 51, 56 and 80 of the Constitution in the selection process envisaged in paragraph 3 above.

6. The 2nd respondent be ordered to pay costs of suit on an attorney client scale."

These prayers constitute in my view an effective remedy to the applicant as they seek to protect the applicant from a breach of duty by a public official. In the circumstances, I find that the application before me is that of a mandamus.

DOES THE APPLICATION SATISFY THE REQUIREMENTS OF A MANDAMUS?

It is 2nd respondent's argument that applicant has failed to establish the requirements of a mandamus as 1st respondent performed his duties in accordance with the empowering statute and had no discretion beyond presiding over the nomination meeting. Thus in recommending the 2nd respondent as the Chief to be appointed, the 1st respondent was simply following the wishes and established traditions and customs of the Mvuthu clan.

It was also contended that applicant has domestic remedies which she failed to pursue and that applicant should have proceeded by way of review of 1st respondent's decision.

The applicant's argument as I understand it is that she has relied on various statutory and constitutional provisions as the basis for the mandamus. These are they:-

1. Section 2 (2) of the Constitution which imposes a legal obligation on the 1st respondent to uphold and fulfill the obligations of the Constitution when carrying out the selection process of a Chief in terms of section 3 of the Traditional Leaders Act (Chapter 29:17).
2. Section 85 of the Constitution according the applicant the right of standing to seek a mandamus against the 1st respondent who is a public official;
3. Section 56 of the Constitution provides that all persons are equal before the law and have the right to equal protection and benefit of the law. It also provides that women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres. Gender, sex, culture and custom are specified prohibited grounds of discrimination.
4. Section 80 of the Constitution buttresses this provision by providing that all laws, customs, traditions and cultural practices that infringe the rights of women conferred by the Constitution are void.
5. Section 51 of the Constitution provides for the right to human dignity.
6. Sections 44 and 45 of the Constitution provide that the State and every person and every institution and agency of the government at every level, be it executive, legislative and judicial, must respect, protect, promote and fulfill the rights and freedoms set out in Chapter 4 of the Constitution. Therefore, as an administrative authority, the 1st respondent has a statutory duty to act according to the dictates of the Constitution in performing his duties in terms of section 3 of the Traditional Leaders Act.

In my view 1st respondent has failed to comply with the above statutory obligations. That failure is exhibited by the following:-

(a) Despite being fully aware of the provisions of equality and non-discrimination, the 1st respondent proceeded to carry out his duties in terms of section 3 of the Traditional Leaders Act in a discriminatory manner.

(b) A reading of the minutes of 21 December 2014, does not provide any recommendation by the 1st respondent. The minutes do not indicate how the 2nd respondent ended up being recommended as the possible Chief Mvuthu.

(c) The 1st respondent was fully aware that in terms of the relevant customary Nguni/Ndebele principle he was obliged to recommend the applicant to the President for appointment.

There are three requirements for the grant of a mandamus namely;

(i) A clear right

(ii) An injury actually committed or reasonably apprehended and

(iii) Lack of similar protection by any other remedy

See *Alliance Cash & Carry (Pvt) Ltd* case supra

It is settled law that whether the applicant has a right is a matter of substantive law and whether that right is clearly established is a matter of evidence. Therefore, in order to prove on a balance of probabilities that right which he seeks to protect, the applicant must profer some evidence.

In the present matter, it is common cause that applicant is the eldest daughter of the late Chief Nyangayezizwe Mvuthu Mlotshwa. In view of this, she is the next in line of succession to the Mvuthu Chieftainship which is lineal. On the evidence, it cannot be doubted that the succession principle of the clan clearly points to the applicant as the heiress to the throne. Herein lies the basis of her clear right that she seeks to protect.

As regards irreparable injury it is clear to me that the applicant stands to suffer irreparable harm if the 1st respondent is not compelled to act according to law. The 1st respondent's dereliction of his statutory duty to uphold the Bill of Rights has the effect of excluding applicant from the selection process of the Mvuthu chieftainship. In terms of the law as per the principle in *Moyo v Mkoba* supra, once the President makes an appointment based on the unlawful actions of the 1st respondent, the applicant cannot challenge the appointment before the courts as the matter falls within the parameters of executive discretion.

Further, a violation of constitutional rights amounts to irreparable harm since once violated it is impossible to return the victim to the status prior to the violation. In any event, the law does not make it a requirement that the constitutional right should have been violated as a fact. What the applicant has to show is that a right is under threat and that therefore there is a reasonable probability of an infringement of that right. A right is infringed or threatened if the conduct is objectively inconsistent with a right contained in the Bill of Rights – *Farreira v Levin* 1996 (1) SA 984 (CC)

In casu, there is ample evidence in the minutes of the 21st December 2014 of the violation of the applicant's rights as contained in the Bill of Rights. These minutes show that the Mlotshwa men argued quite strongly that it was non-cultural amongst the Nguni people for a woman to reign as a Chief. They contended that a female Chief would be an insult and unheard of in their customs and tradition. Therefore, the applicant's biological profile became an automatic bar from being considered as a potential Chief in the nomination process.

The applicant has submitted that there is no similar protection by any other ordinary remedy except approaching the court for a mandamus. I agree. A mandamus is an appropriate remedy to compel a public official to act lawfully in the performance of his or her statutory obligations. While it is accepted that the decision of the 1st respondent is subject to judicial review, in the circumstances a mandamus is the most appropriate remedy and the applicant cannot be non-suited for opting to follow that route.

Also I am not persuaded that petitioning the President is a competent domestic remedy in that the matter is not yet in the President's hands. Therefore, I find that there are no satisfactory domestic remedies to exhaust first.

On the issue of costs I am of the view that 2nd respondent should bear costs of suit on a punitive scale. I agree with Advocate Dube's submissions that; "The 2nd respondent's conduct is that of a drowning man clutching at straws." He has strongly challenged the minutes of the 21st December 2014, his argument being that the whole selection process as captured by the 1st respondent was flawed and in breach of statutory duty. The question becomes why oppose the grant of a mandamus in light of such a concession?

What is baffling and defying logic is that notwithstanding the 2nd respondent's spirited challenge on the authenticity of the minutes of the nomination proceedings, he nevertheless wants to cling to those minutes' validity in so far as the outcome of the meeting is concerned. Surely, why should the outcome (i.e 2nd respondent's recommendation) be regarded as valid and proper if the process is flawed? The 2nd respondent's conduct is so grossly unreasonable that it actually exposes the fallacy and *mala fides* of his entire opposition. If the minutes do not reflect the correct position of the deliberations, then a *fartiori*, the need for reconvening a consultative meeting where full and accurate minutes would be recorded, culminating in lawful recommendations to the President. As such I find the 2nd respondent's conduct unreasonable, *mala fide* and an abuse of court process.

In the premises, the application for a mandamus is granted on the following terms:-

1. The 1st respondent's recommendation to the Mvuthu family on the 21st December 2014 of nominating the 2nd respondent as the appointee to the Mvuthu Chieftainship, be and is hereby declared unlawful, null and void.
2. The 1st respondent be and is hereby compelled to reconvene a meeting for the selection of a Chief within 60 days of granting of this order in accordance with section 3 of the Traditional Leaders Act and the Constitution.
3. The 1st respondent be and is hereby compelled to make lawful recommendations to the President regarding the appointee to the Mvuthu Chieftainship in accordance with the dictates of the constitutional imperatives of human dignity, non discrimination and equality before the law as enshrined in sections 51, 56 and 80 of the Constitution.
4. The 1st respondent be and is hereby compelled to act lawfully within the constitutional dictates and imperatives of human dignity and equality before the law as enshrined in section 51, 56 and 80 of the Constitution in the selection process envisaged in paragraph 2 above.
5. The 2nd respondent be and is hereby ordered to pay costs of suit at an attorney client scale.

25/06/2020

Sansole and Senda, applicant's legal practitioners
Masiye-Moyo and Associates (incorporating Hwalima, Moyo & Associates) 2nd respondent's legal practitioners