

ELIAS GAMBAKWE  
and  
SANANGURAI MUCHAKABARWA  
and  
MARWISA MUZOKURA  
and  
CHIMENE MBUDZI  
versus  
HEBERT CHIMENE  
and  
BIKITA DISTRICT ADMINISTRATOR  
and  
MASVINGO PROVINCIAL ADMINISTRATOR  
and  
MINISTER OF LOCAL GOVERNMENT RURAL AND URBAN DEVELOPMENT N.O.

HIGH COURT OF ZIMBABWE  
UCHENA J  
HARARE, 13 and 20 May 2015

**Urgent Application**

Miss *P. Makurumure*, for the applicants  
*J. Dondo*, for the 1<sup>st</sup> respondent  
Miss *R. Hove*, for the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> respondents

UCHENA J: The first applicant claims to be the guardian (zibambo) of the Budzi chieftainship. The second to the fifth applicants are the eldest surviving male children from the four houses among which the Budzi chieftainship rotates. The applicants claim that the guardian and the eldest male children of each house have the responsibility of nominating a person to be appointed chief of the Budzi clan. They say the second respondent nominated and imposed the first respondent for appointment as Chief Budzi against their customs.

The first respondent is the eldest son of the late Gwinyai Dzivakwe who was appointed Chief Budzi but had not been installed when he died. He has been nominated for appointment as acting chief Budzi and it is believed the second to the fourth respondents are in the process of preparing papers for his appointment by the President. The applicants seek an interdict to stop them from processing papers for the first respondent's appointment. The second respondent is the District Administrator of Bikita district under which the Budzi

chieftainship falls. The third respondent is the Provincial Administrator of Masvingo province under which Bikita district falls. The fourth respondent is the Minister of Local Government Rural and Urban Development through whom the recommendations for a chief or acting chief's appointment is forwarded to the President.

The applicants filed this urgent application seeking the following interim order;

“ That pending determination of this matter the Applicants are granted the following relief;  
(a) 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents be and are hereby interdicted from processing and forwarding to His Excellency the President of Zimbabwe the documents pertaining to the nomination and appointment of the 1<sup>st</sup> respondent as Acting Chief Budzi.”

Miss *Makurumure* for the applicants' relied on s 3 of the Traditional Leaders Act [*Chapter 29:17*], to establish the applicants' right to nominate a person to be appointed Acting Chief Budzi. She submitted that because the provisions of s 3 and the customs of the Budzi clan were not followed the nomination of the first respondent is most likely going to be declared null and void in an application for a declaratory order the applicants filed under HC 4111/15. She submitted that the process of appointing a chief takes about a month hence the applicant's apprehension that if the second to fourth respondents' are not interdicted from processing the appointment the appointment might have gone through by the time their application will be heard.

The respondents opposed the application. Mr *Dondo* for the first respondent submitted that the first applicant is not the guardian of the Budzi chieftainship, and therefore has no right to have been consulted in respect of the first respondent's nomination. He submitted that the first applicant's elder brother is the guardian of the Budzi chieftainship. He submitted that the second to the fifth applicants while heads of houses among which the chieftainship rotates do not have an interest in the current appointment as their houses have already had their chances as the current chief should come from the Chimene house. He submitted that the 5<sup>th</sup> respondent has a right to contest the Chieftainship as a member of the Chimene house but he is not the son of the last appointed chief Budzi and is therefore not entitled to be appointed the Acting chief Budzi.

Mr *Dondo* for the first respondent further submitted that the resolution of disputes should be done by the President, in terms of s 283 of the Constitution on the recommendation of the provincial assembly of Chiefs through the Minister responsible for traditional leaders. He submitted that the Constitution gave the responsibility to resolve disputes concerning the

appointment of Chiefs to the President. He submitted that the courts can only intervene on review after the President will have resolved the dispute.

Miss *Hove* for the *second to fourth* respondents agreed with Mr *Dondo*'s submissions and further submitted that the applicants are erroneously relying on s 3 of the Traditional Leaders Act [*Chapter 29:17*], which provides for the nomination of persons for appointment as substantive chiefs. She submitted that s 4 of the Traditional Leaders Act which provides for the appointment of Acting chiefs does not provide for a nomination procedure. She therefore submitted that the applicants had no right to nominate an Acting Chief and are therefore not entitled to the interdict sought.

Sections 3 and 4 of the Traditional Leaders Act provide as follows;

- “3 (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; and  
(b) wherever practicable, shall appoint a person nominated by the appropriate persons in the community concerned in accordance with the principles referred to in subparagraph (i) of paragraph (a):  
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.  
4 (1) Subject to subsection (2), in the event of the office of a chief becoming vacant through the death of the chief, or his removal or suspension from office in terms of this Act, the President may appoint an acting chief to preside in his stead for such period or periods as the President may fix.  
(2) An appointment in terms of subsection (1) shall cease to have effect—  
(a) on the date the President, in terms of subsection (1) of section *three*, appoints a chief for the community concerned; or  
(b) on the cancellation of the suspension of the chief of the community concerned in terms of subsection (3) of section *seven*; or  
(c) when the President cancels the appointment.”

Miss *Makurumure* for the applicants in her response conceded that s 3 does not apply to the appointment of an Acting Chief. She further conceded that Acting Chiefs are appointed in terms of s 4 (1). That concession is fatal to the applicants' application which depended on the provisions of s 3 (2) which gives the applicants a role in the nomination of a person for appointment as Chief Budzi. Section 4 (1) which applies to the appointment of Acting Chiefs does not provide for their participation, it merely provides that if the office of a chief is

vacant “the President may appoint an acting chief to preside in his stead for such period or periods as the President may fix.” That should have been the end of the inquiry if the Constitution, had not changed the law, because an interdict can only be granted to a party who has an actual or *prima facie* right. The applicants in terms of s 4 (1) do not have any such rights.

Section 4 (1) of the Traditional Leaders Act is not consistent with the provisions of section 283 of the Constitution. In terms of section 2 (1) as read with section 10 of the Sixth Schedule of the Constitution “any law, practice, custom or conduct inconsistent” with the Constitution “is invalid to the extent, of the inconsistency”. Section 4 (1) of the Traditional Leaders Act cannot because of its inconsistency with section 283 (c) (i) of the Constitution be the determinant factor in this case.

Section 283 of the Constitution which provides for the appointment of Chiefs provides as follows;

- “**283** An Act of Parliament must provide for the following, in accordance with the prevailing culture, customs, traditions and practices of the communities concerned—
- (a) the appointment, suspension, succession and removal of traditional leaders;
  - (b) the creation and resuscitation of chieftainships; and
  - (c) the resolution of disputes concerning the appointment, suspension, succession and removal of traditional leaders; but—
    - (i) the appointment, removal and suspension of Chiefs must be done by the President on the recommendation of the provincial assembly of Chiefs through the National Council of Chiefs and the Minister responsible for traditional leaders and in accordance with the traditional practices and traditions of the communities concerned;
    - (ii) disputes concerning the appointment, suspension and removal of traditional leaders must be resolved by the President on the recommendation of the provincial assembly of Chiefs through the Minister responsible for traditional leaders;
    - (iii) the Act must provide measures to ensure that all these matters are dealt with fairly and without regard to political considerations;
    - (iv) the Act must provide measures to safeguard the integrity of traditional institutions and their independence from political interference.”

Section 283 (c) (i) provides for the appointment of a chief by the President “in accordance with the traditional practices and traditions of the communities concerned”; While sections 3 and 4 of the Traditional Leaders Act distinguishes the procedure for the appointment of a chief and acting chief the Constitution only mentions the appointment of a chief. In terms of s 340 (1) (c) of the Constitution, the power to appoint a substantive office holder includes the power **to appoint a person to act in that office**, therefore, according to the

new Constitution the procedure provided for the appointment of a chief applies to the appointment of an acting chief. Section 340 (1) (c ) reads;

“340 (1) Except as otherwise provided in this Constitution, a power under this Constitution to appoint a person to an office includes a similar power—

(a) -----

(b) -----

(c) **to appoint a person to act in that office;**” (emphasis added).

Mr *Dondo* submitted that the provisions of s 283 (c) (ii) of the Constitution has the effect of ousting the court’s jurisdiction to determine issues concerning disputes over the appointment of chiefs, except the review of the President’s determination of such disputes. Miss *Makurumure* submitted that the court’s jurisdiction was not ousted by s 283 (c) (ii) of the Constitution. While the court’s guard jealously against the ousting of their jurisdiction, it is important for the courts to identify the intention of the legislature and act accordingly. In this case I from the use of the word “must” in s 283 (c) (ii) of the Constitution am persuaded that the Legislature in drafting the Constitution intended to give that responsibility to the President. My view is strengthened by the provisions of s 342 (1) of the Constitution, which provides as follows;

“342 (1) (1) A power, jurisdiction or right conferred by this Constitution may be exercised, and **a duty imposed by this Constitution must be performed**, whenever it is appropriate to do so .”  
(emphasis added).

As already said the requirement in s 283 (c) (ii) of the Constitution that disputes concerning the appointment of chiefs “must, be resolved by the President on the recommendation of the provincial assembly of Chiefs through the Minister responsible for traditional leaders;” imposes a duty on the President, and is indicative of the legislature’s intention that only the President should resolve such disputes. Other- wise, how must the President resolve such disputes if the courts can also resolve them. The use of the word “must” means he is obliged to resolve every such dispute. Miss *Makurumure* for the applicant’s further submitted that the provisions of s 283 (c) (ii) of the Constitution do not apply to disputes which arise before the appointment of a chief or acting chief, but only applies to disputes which arise after a chief has been appointed. Miss *Hove* for the second to fourth respondent’s submitted that the word “concerning” which precedes the disputes to be resolved which includes appointment of chiefs, means “about” and “involving”. This she argued means the disputes to be resolved include those which arise before the appointment of

a chief or acting chief. I agree. The use of the word “concerning”, which means something about or involving the appointment of chiefs, includes disputes which arise before a chief is appointed as long as they have something to do with a chief’s appointment. The Cambridge Advanced Learners’ Dictionary supports the meaning given by Miss *Hove*. I therefore agree with Mr *Dondo* and Miss *Hove* that the applicants have come to the wrong forum.

Section 283 (c) (i) of the Constitution introduced the involvement of the provincial assembly of chiefs on whose recommendation the President appoints chiefs. This means what the applicants wanted to do in terms of their customs as regards the nomination of the acting chief may be included in the provincial assembly’s recommendations to the President. Section 286 (1) (a) and (f) of the Constitution, provides that the functions of a provincial assembly of chiefs includes; the protection, promotion and development of Zimbabwe’s culture and traditions and the facilitation of settlement of disputes between and concerning traditional leaders. It is therefore within a provincial assembly’s mandate to make recommendations about how an acting chief should be nominated under the Budzi clan. This also means the applicants have alternative remedies through which they can stop the first respondent’s appointment. They can in addition to presenting their grievances to the President for resolution present them to the provincial assembly of chiefs which can in turn include them in its recommendations to the President.

The applicants’ application must therefore be dismissed with costs.

It is therefore ordered that;

1. The applicants’ application is dismissed.
2. The applicants shall pay the respondents’ costs.

*Messers Mukuku Law Firm*, applicants’ legal practitioners.  
*Messers Dondo & Partners*, 1<sup>st</sup> respondents’ legal practitioners  
*Attorney General’s Civil Division*, 2<sup>nd</sup> to 4<sup>th</sup> respondents’ legal practitioners.