

ZVARIKURA SHUMBA
and
MIKE MUJAYA
And
BHENI MUSINA
and
RAMEKI MDZOKERE
and
PARADZAI BINGWA
And
RARA MUSINA
and
ERIA MUSINA
and
CHARLES MUJAWO
and
MAPOPE MURIRA
and
TARUPWA MASERE
versus
REUBEN MUPASI MARINDA
(In his capacity as CHIEF CHIWARA designate)
and
MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS
& NATIONAL HOUSING N.O
and
DISTRICT ADMINISTRATOR GUTU DISTRICT N.O

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 29 January 2018 & 14 February 2018

Court Action –Traditional Leaders Act-Constitution of Zimbabwe

S Mushonga, for the plaintiffs
T S Manjengwa & TS Musangwa, for the defendants

MUSHORE J: The plaintiffs instituted action in this matter essentially challenging the appointment of first defendant's appointment as Chief Chiwara on the basis that his appointment as Chief on 6 December 2013 was premised on incorrect information. They also allege that the appointment was wrongful as *per* the law and practice and principles of succession of the Karanga clan. The appointment was done by third Defendant after three

family consultation meetings had taken place. The present matter was instituted because the plaintiffs believe that the 1st plaintiff should have been nominated as Chief owing to the facts that he is the heir apparent to the throne. They contend that the outcome of the family consultative meetings was that first plaintiff was chosen to be the successor to the Chieftainship. They are seeking a declaration of rights and incumbent relief removing first defendant from the Office of Chief Chiwara, and an order compelling a meeting of elders to deliberate the customary principles of the Chiwara clan with a view to electing a new candidate for appointment. They are also desirous that the proceedings of the meeting of elders be minuted and recorded by third defendant; and that the recommendations made in that meeting be forwarded to the President for the President to appoint a new Chief.

As background, the first plaintiff and first defendants are descendants of two family houses those being the houses of Mazvarirashe and Matengarufu. Matengarufu and Mazvarirashe were blood brothers and sons of the Chief Dumbukunyuka (Mutema) who ascended the Chiwara throne and remained as Chief up until 1985. The late Chief Dumbukunyuka designated Mazvarirashe (his younger son, from whose line of succession first plaintiff claims heir ship) the Chieftainship; and designated his older son Matengarufu (from whom first defendant claims ascendancy) the role of Keeper of the Chieftainship and in charge of the ancestral shrines and burying Chiefs. First plaintiff feels entitled to consideration as Chief, by virtue of the fact that he is the eldest successor in the Mazvarirashe line, and that he is older than first defendant. First defendant pleads that the succession to the throne did not exclude the Matengarufu descendants being considered for the chieftainship and that accordingly as a direct descendant of Chief Dumbukunyuka, he is also entitled to the Chieftainship. He pleaded that his appointment was properly done, and lawfully ratified by the President.

At the commencement of the trial in this matter all of the defendants took points *in limine*.

First defendant's counsel proposed that this court lacks the jurisdiction to determine the matter by virtue of s 283 (c) (i) of the Constitution of Zimbabwe Amendment (No.20) Act 2013. The section she cited reads as follows:—

283 Appointment and removal of traditional leaders

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”

In support of that proposition, she cited the case of *Elias Gambakwe & 3 Ors v Herbert Chimene & 3 Ors* HH 465/15 over which UCHENA J (as he then was) presided.

Her perception of the outcome of this case as it relates to s 283 (c) (i) lent her to conclude and submit that it was the President who had been conferred the Constitutional power to resolve disputes such as the dispute in the present matter.

In the *Gambakwe* case, a similar scenario had presented itself in the form of a grievance placed before the High Court for its determination. In that case the applicant complained that the Provincial Administrator for Masvingo District had nominated and imposed the first respondent upon them as their Chief, contrary to their customs. The applicants approached the High Court for an interdict to stop the respondents from processing papers for the nomination of the first respondent. Applicant’s counsel was reliant upon section 3 of the Traditional Leaders Act [*Chapter 29:17*] when she submitted that because the respondents had not paid heed to section 3 of that Act, the appointment made and contested by applicant would inevitably be declared to be null and void. In opposing the application, respondent cited s 283 of the Constitution, which section he understood to mean *{inter alia}*, that the responsibility to resolve disputes lay with the President; and that it was only after the President had resolved the dispute, that the courts had a right to review the proceedings. UCHENA J then found that when taking section 283 of the Constitution in account:-

“They (disputing parties) can, in addition to presenting their grievances to the President for resolution; present them to the provincial assemblies of Chiefs; which can in turn include them in its recommendation to the President”

My understanding of the underlined portion in the above *dicta* is that the court’s found that the President had powers to resolve disputes brought by individuals who were sparring in one way or another. I find myself disagreeing with the underlined portion of the finding because I am of the view that the President has a much narrower dispute resolution role than that suggested by the court in the Gambare case.

The Constitution, provides that: the functions of the National Council and provincial assemblies of Chiefs is to *per s 286 (1) (f) “facilitate the settlement of disputed between and concerning traditional leaders”*; and *per Section 286 (1) (a) to “protect, provide and develop Zimbabwe’s culture and traditions”*. Regarding the role and functioning of Traditional Leaders themselves, section 282 (1) (a) and (e) provides the following.

282 Functions of traditional leaders

- (1) Traditional leaders have the following functions within their areas of jurisdiction—
- (a) to promote and uphold the cultural values of their communities and, in particular, to promote sound family values;
 - (b) to take measures to preserve the culture, traditions, history and heritage of their communities, including sacred shrines;
 - (c) to facilitate development;
 - (d) in accordance with an Act of Parliament, to administer Communal Land and to protect the environment;
 - (e) to resolve disputes amongst people in their communities in accordance with customary law; and
 - (f) to exercise any other functions conferred or imposed on them by an Act of Parliament.

282 (2) (a) provides that:-

“Except as is provided for in an Act of Parliament, the Traditional Leaders have authority, jurisdiction and control over the Communal Land or other areas, for which they have been appointed, and over persons within the Communal Lands or areas”

Section 282 (3) reads:

“In the performance of their functions, traditional leaders are not subject to the direction or control of any authority, except as may be prescribed by an Act of Parliament”

Thus that Act of Parliament not being in existence at present, leaves the Traditional Leaders with the powers conferred to them in accordance with the Constitution; with sections 282 (1) (a) and (e) and also 282 (2) and 282 (3) being read together.

The role of the National Council and provincial assemblies of chiefs is found in Section 286 which reads:-

286 Functions of National Council and provincial assembly of Chiefs

(1) The National Council of Chiefs and, within its province, a provincial assembly of Chiefs have the following functions—

- (a) to protect, promote and develop Zimbabwe's culture and traditions;
- (b) to represent the views of traditional leaders and to maintain the integrity and status of traditional institutions;
- (c) to protect, promote and advance the interests of traditional leaders;
- (d) to consider representations and complaints made to it by traditional leaders;
- (e) to define and enforce correct and ethical conduct on the part of traditional leaders and to develop their capacity for leadership;
- (f) to facilitate the settlement of disputes between and concerning traditional leaders;
- (g) to perform any other functions that may be conferred or imposed on it by an Act of Parliament.

(2) An Act of Parliament must ensure that—

- (a) the National Council of Chiefs and all provincial assemblies of Chiefs are able to carry out their functions independently and efficiently; and
- (b) persons employed by the National Council of Chiefs and provincial assemblies of Chiefs carry out their duties conscientiously and impartially”

The National Council of Chiefs and provincial assemblies have powers vested in them to resolve matters unresolved by the traditional leaders until such time that an Act of Parliament is promulgated into law stating otherwise.

Thus the clear meaning of s 282 (1) (a) and (e) amongst other things is that it is the traditional leaders who have been given the mandate to resolve disputes amongst people in their communities in accordance with customary law. That would include matters such as the dispute in the present matter.

Section 283 (a) (i) and (ii) introduce the role of the President who is only permitted to act 'on the recommendation of the provincial assembly of Chiefs through the National Council of Chiefs and the Minister', in matters regarding the appointment, suspension, removal of Chiefs or any other dispute pertaining to such matters. It is to that end that I find that the President has not been conferred with resolution dispute powers alone without a determination having been made by the provincial assembly and the National Council of Chiefs and the

Minister. Further I do not believe that the section provides the President with the mandate or authority to resolve disputes directly. Therefore any Presidential action must be made on the basis of, and preceded by such a recommendation.

The facts in the present matter fall for determination within the meaning of s 282 and 286 in that it was intended by the legislature that dispute resolution be done in an open and transparent and un-politicised manner by traditional leaders.

In the *Gambare* case, the learned Judge seems to have taken his cue from ss 3 and 4 of the Traditional Leaders Act [*Chapter 29:17*] in arriving at the conclusion that the President could directly determine a dispute without the involvement or recommendation of the provincial assembly of Chiefs through the National Council of Chiefs and the Minister. This is what is stated in sections 3 and 4 of the Traditional Leaders Act which read as follows:-

3 Appointment of chiefs

(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.

(3) Subject to section seven, the President may, where he is of the opinion that good cause exists, remove a chief from office.

(4) Subject to this Act, a chief shall be paid, from moneys appropriated for the purpose by Act of Parliament, such salary, allowances, gratuities and pension as the President may fix from time to time.

4 Appointment of acting chiefs

(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.

(3) An acting chief shall be paid such allowances as may from time to time be fixed by the President from moneys appropriated for the purpose by Act of Parliament:

“Provided that an acting chief shall not be entitled to a salary, gratuity or pension”

Clearly, ss 3 and 4 of the Traditional Leaders Act which give the President wider powers in dispute resolution are unconstitutional in that the procedure outlined in those sections as they pertain to the appointment of Chiefs is not consistent with s 283 (c) (i) and (ii) of the Constitution.

Thus, the point *in limine* taken by the first defendant’s, that the plaintiffs’ alternate remedy is to approach the President for a resolution of the matter is misplaced.

During the hearing second defendant’s counsel submitted in the alternative that in the event that I were to find that this court’s jurisdiction has not been ousted by section 283, the jurisdiction of the High Court was limited to its powers of review in dealing with the matter. His observation in that regard is correct in that in cases of this nature, this Court’s jurisdiction is limited to reviewing procedural issues only. In accordance with the Constitution *{supra}* this court does not have jurisdiction to determine issues involving the substantive customary laws. S 282 (1) of the Constitution ousts the powers of this court to proceed to a determination that will touch upon matters of substantive customary law or matters which are concerned with the resolution of a dispute in terms of customs.

The nature of the relief claimed by the plaintiffs in their declaration involves making a finding on customary law issues. Plaintiff’s counsel suggested that there was a need for this court to guard and protect its powers of review in terms of s 26 of the High Court Act, [Chapter 7:06]. He enjoined the court to proceed to determine the matter by way of a review of the proceedings by the family and the District Administrator of December 2013 on the basis that the determination by first defendant “*was based upon wrong information*”. The prayer in plaintiff’s declaration reads in part as follows:-

Page 6 record

“9. Whereof the plaintiff pray that

- a) An order of Court be made declaring that Reuben Mapasi Marinda's appointment as Chief Chiwara was premised on wrong information as it is against the customary law practice and principles of succession to the Karanga Clan customs which were not followed or given due consideration in his appointment
- b) That the Chiwara Chieftainship of Gutu, Masvingo is ascended to by the eldest son amongst the plaintiffs who are descendants of the Mazvarirashe Clan and not any other family which is not a direct issue of the Mazvarirashe."

Clauses (d), (d) and (e) of the prayer in the declaration are consequential upon a favourable determination of (a) and (b) of the declaration with that determination necessitating an investigation of the customary laws of the Karanga Clan.

As I stated earlier, this court cannot determine matters of substantive customary law, thus I do not have the jurisdiction to review the present matter on the basis of the relief as sought and un-amended.

The way I see it if an irregularity has occurred, it pertains to 1st defendant's appointment by the District administrator. The actual irregularity may lie with the power or lack thereof of the District Administrator to have made the appointment in the first place. From an interpretation of ss 282 and 286 a.r.w. 283, the District Administrator had no legal authority to make such a determination on the 6th December 2013; neither did the President have the power to act upon a recommendation by the District Administrator in December 2014 in appointing the first defendant as Chief because the new Constitution was already law. The appointment of the 6th December 2013 is not inspired by the Constitution. The present matter should have been placed before the court, by court application for a declaration of rights regarding the implications of the relevant and above stated portions of the Traditional Leaders Act in the light of the new Constitution. Such an approach would have properly and efficaciously put that matter to rest; but that is of course an action which is within the purview of the plaintiffs' prerogatives.

. Insofar as my powers of review were concerned, I am mindful of the objection made by counsel for second and third defendants that on the papers as they are, the papers do not comply with Order 33 r 256 for the purposes of proceeding with review proceedings. Whilst I agree that Order 33 r 226 specifically intends that review proceedings be made by way of notice of motion, I do not see that if I were so inclined to have proceeded with the matter, that the format of the matter would pose a substantial hindrance; simply because all of the facts and issues are already before the court. In the interests of justice and finality to litigation, there would have

been no miscarriage of justice in applying my discretion in terms of r 4C to allow the matter to proceed on the papers as they are.

However, the application for review is not properly before the court for a different reason; that being that it has been made out of time and thus it falls foul of the peremptory provision in r 259 which prescribes that an application for review must be filed within a period of prescription of 8 weeks from the date when the alleged irregularity is said to have taken place. It is only upon good cause being shown that the court may entertain a matter which has been filed out of time. The decision complained of was made four years ago. Counsel for plaintiff did not apply for condonation. It is on that basis that the application for review cannot therefore proceed.

I had occasion to examine the case cited by counsel for plaintiff in his submissions in order to ensure that any determination which I made regarding my interpretation of section 283 *et al* of the Constitution would not find itself in conflict with a decision by the Supreme Court, by which I am bound. I am satisfied that no such conflict arises because in *Moyo v Mkoba & Ors* 2013 (3) ZLR 137 (S), although the case also involved a similar contest for a chieftaincy, the Supreme Court's attention was focused on interpreting various provisions in the Traditional Leaders Act and not the Constitution.

It is in all of the above circumstances that I uphold the point taken *in limine* by the defendants and I find indeed that s 283 of the Constitution does not countenance a civil court having the authority to preside over matters of laws of custom; even by way of a review as is prayed for in the instant matter. In the result I order as follows:-

“Plaintiff's claim is dismissed with costs”