FAINIOS MIHWA MAPINGURE
versus
PROVINCIAL ASSEMBLY OF CHIEFS MASVINGO PROVINCE
and
SENATOR CHIEF CHITANGA
and
FORTUNE ZEPHANIA CHARUMBIRA
and
MINISTER OF LOCAL GOVERNMENT PUBLIC WORKS AND NATIONAL HOUSING

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 14 June & 19 December 2019

Opposed application

F Mukwewa, for the applicant
L Madhuku, for the 2nd respondent
T Mpofu with W Chinamhora, for the 3rd respondent

TSANGA J: The applicant seeks to compel the Provincial Assembly of Chiefs in Masvingo Province to constitute and convene an investigative committee to look into the complaint and dispute concerning the appointment of the Charumbira Chieftainship. The applicant is member of the Karanga tribe. At the heart of his complaint is that the appointment of Fortune Zephania Charumbira as substantive chief of the Charumbira chieftaincy, is illegal because it was done contrary to the prevailing cultural, customary and traditional principles of succession of the community concerned. His appointment is said to have been by primogeniture contrary to karanga tradition whereby appointment is collateral in that it rotates according to the seniority of houses of those entitled to chieftaincy. The introduction of an appointment format alien to karanga custom is said to have had its origin from the colonial era when specifically Chief Madyira died in 1943 and his son Mazhira was appointed chief due to his proximity to the white colonial regime. Thereafter Chief Zephania Charumbira, the third respondent's father was appointed. The incumbent chief is said to have been appointed substantive chief in 2000 despite protest from other houses.

The first respondent is the Provincial Assembly of Chiefs Masvingo, whilst the second respondent Senator Chief Chitanga is its chairperson. The third respondent, Fortune Charumbira, is the incumbent chief of the Charumbira clan. The fourth respondent is the Minister of Government Public Works and National Housing. The first and fourth respondents chose to abide by the final decision of this court and were therefore not represented at the hearing.

Applicant says that the first and second respondents have a duty to preside over disputes and as such what he seeks is that they be compelled to act in terms of hearing the dispute pertaining to the Charumbira chieftaincy, within 30 days of the order. He says he wrote to the first respondent on the 12th and 13th of September 2017, asking the first and second respondent to constitute a committee. They have failed to do so. Notably, in his supporting affidavit, the second respondent as chairperson of the Provincial Assembly of Chiefs denies ever receiving the letter in question written in September 2017.

It is applicant's averment that he is entitled to administrative justice in terms of s 68 of the Constitution, a section which calls for administrative conduct that is lawful, prompt, efficient, reasonable and procedurally fair. Section 3 of the Administration of Justice Act is equally drawn with regard to these principles. Applicant also relies on s 286 of the Constitution as read with the Traditional Leaders Act [*Chapter 29:17*] regarding the right to choose a chief or traditional leader in accordance with the tradition, custom and culture of the people concerned. The right to equal protection of the law in terms of 56 is equally emphasised.

The application is opposed and several points have been raised *in limine* by the incumbent chief and supported by Senator Chief Chitanga as the chairperson of the Provincial Assembly of Chiefs. The main point *in limine* emphasised on behalf of the second and third respondents was that there is no cause of action as applicant cannot found his contentions on the Traditional Leaders Act that was not in place at the time that the action the he complains of arose. The Traditional Leaders Act came into force on the 1st of January 2000. The reality is that though the incumbent chief, Fortune Charumbira, was initially made acting chief in 1992, he was in fact sworn in or inaugurated as substantive chief on 24 May 2000. Having been only appointed as **substantive chief** in May 2000 after the Act commenced, this means that at the time of his actual appointment as a chief, the Traditional Leaders Act was in already in place. Section 3(2) (a) (i) which speaks to giving due

consideration to "the prevailing customary principles of succession, if any, applicable to the community over which the chief is to preside'' would have been applicable. It is this provision that the applicant has founded his cause of action on. The point *in limine* that the legislation was not in place at the time of his appointment lacks merit and is dismissed. However, there are other critical points *in limine* raised.

A critical issue is that of the non-joinder of the President of the Republic of Zimbabwe to this application. It is said to be fatal to the application on the ground that the appointment and resolution of chieftainship disputes is the President's prerogative. The first respondent's role, as the Provincial Assembly of Chiefs, is said to be to make recommendations to the President but that the initiation of the entire process itself, as the argument goes, must be done by the President himself. As such, this application which seeks to compel the Provincial Assembly of Chiefs and its chairperson to come up with recommendations, is said to essentially put the cart before the horse in circumstances where the President has not acknowledged the existence of a dispute. It is therefore emphasised by Chief Fortune Charumbira that the Provincial Assembly of Chiefs and its cited Chairperson cannot set off a process which is not sanctioned by the President or impose upon the President recommendations which he has not sought.

The applicant's core response to this point *in limine* is that s 283 (c) does not stipulate that it is the President who must initiate the process. He argues that the President's main role as gleaned from the provision, is to act on the recommendations that are given to him through the Minister from the Provincial Assembly of Chiefs. Applicant also relies on rule 87 of the High Court rules that non joinder is not an issue and that in any event a party can be joined at any stage.

An additional point *in limine* raised is prescription on the basis that the failure to follow customs is said to have started in 1943 up to the present day. In particular, the relief sought being that of a *mandamus,* which falls under general law, the issue is said to have been affected by extinctive prescription following failure to challenge the affront within a three year period from the knowledge of it. Applicant's response to this point *in limine* is that the matter is governed by customary law which is not affected by prescription and that the remedy he seeks is essentially akin to an interdict. Related to this issue of prescription is also raised that of estoppel whereby it is argued that the applicant is estopped from challenging Chief Fortune Charumbira's chieftaincy, having never approached the court in the last 26

years but has instead lived with the Charumbira's chieftaincy. It is further averred that entertaining this application would set a bad precedent whereby people accept a position only to turn around and adopt a position inconsistent with their previous actions.

Failure to join the President

Our courts have been very clear that any dispute concerning chieftaincy now falls to be resolved through s 283 of the constitution. Unless remedies mentioned therein have been exhausted, the High Court has made it clear in cases such as *Gambakwe and Others* v *Chimene and others* HH 465/15; *Munodawafa and Others* v *District Administrator Masvingo* HH 571/15; *Silibaziso Mlotshwa* v *District Administrator, Hwange District N.O & Ors* HB 161/16 to mention a few that it will decline to exercise jurisdiction in light of s283 of the Constitution which deals with disputes. That said, the applicant in this case is not trying to skirt s 283 by coming to court but is in fact seeking to enforce s 283 by getting the Provincial Assembly of Chiefs to play its role as per that section. In other words, he is only before the High Court because the Provincial Assembly of Chiefs is, according to him, not acting as mandated in the relevant constitutional provision. He thus wants it to be compelled to take action. He believes that his quest for action does not need to involve the President because from the applicable provision, the President's role in a dispute comes in later after the Provincial Assembly of Chiefs has acted.

It is on this point that respondents who have challenged him differ with him and where they say he is offside. They emphasise that it is only the President who can declare a dispute and set the Provincial Assembly of Chiefs in to motion to make its recommendations. Senator Chief Chatanga, the chairperson of the Assembly averred to having never received any communicating regarding a dispute. This is disputed by applicant.

The provision in question upon which joinder is said to be essential is worded thus:

> **"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."

Notably, as has been observed in the cases cited above, no new Act of Parliament has yet been put in place setting out the actual guidelines to be observed when a dispute erupts. This lament was put thus in *Silibaziso Mlotshwa* v *District Administrator, Hwange District N.O & Ors (supra)*:

> "The current Act of Parliament providing for matters referred to in s283 is the Traditional Leaders Act [Chapter 29:17]. As has been said repeatedly about the delays in aligning the laws to the current constitution that Act is still lagging behind awaiting alignment. For instance, the Act does not provide a dispute resolution mechanism regarding the appointment and succession of chiefs. While it does provide for a provincial assembly of chiefs in s35 it does not have as one of its functions making recommendations to the President envisaged by the constitution."

Without properly articulated guidelines, interpretative disputes are bound to arise. Despite the arguments by the second and third respondents that the process is initiated by the President, it is obvious from a reading of the provision that nowhere does it state so in the actual provision itself. The two respondents say it is the practice in reality. The provision lends itself to ambiguities or vagueness in determining whether the process is to be top down or bottom up as far as the President's role is concerned.

The interpretation of the provision in the case *Mlotshwa* v *District Administrator, Hwange District N.O* & *Ors* would in fact suggest that the process is bottom up.

> "What is clear though is that s283 of the constitution has created domestic or internal remedies for a party who is aggrieved by a process of selecting a chief. ***Such person is at liberty to approach the provincial assembly which is reposed with the authority to make recommendations to the President, or to submit a grievance to the President for resolution.*** To the extent that such remedies are available, this court will not readily exercise jurisdiction". (My emphasis)

It is in fact a crucial provision which rests on a fundamental issue of interpretation of the constitutional values and underlying purposes that were intended by the provision. Was the intention to genuinely mainstream and devolve democratic customary values in decision making from the bottom up or was it to essentially maintain the colonial legacy of

administratively driven justice with seeming undertones of democracy. It would do well in a proper case for the Constitutional Court to definitively interpret the import of this provision for the avoidance of doubt.

Materially, whether the President declares the dispute and sets the process in motion of having the matter investigated through the appropriate channels, or, whether the process is truly energised and escalated from below in seeking the President's final input, goes beyond the issue of the President's joinder in a dispute.

It is a provision which is of significance to the rights of many ordinary citizens who are governed by chiefs. Customary law is incorporated into our constitution through sections 16 and 63. Section 63 recognises the personal right to language and culture of one's choice. Section 3 the Constitution lays out its founding values and principles. In particular s 3 (2) (h) lists among principles of good governance, "the fostering of national unity, peace and stability with due regard to diversity of languages, customary practices and traditions. Furthermore, under national objectives suffice it to observe that s 16 (1) which deals with culture, enjoins the state and all its institutions of government to "promote and preserve cultural values and practices which enhance the dignity and wellbeing and equality of Zimbabweans'. Furthermore, s 16 (2) calls on all state institutions to endeavour to preserve and protect Zimbabwe's heritage whilst s 16(3) specifically calls for respect for traditional institutions. Against this backdrop, a narrower approach in interpretation which focuses on the President having the key administrative function of a declaratory role in the dispute and in the removal of the chief, placing the issue firmly in his hands from start to finish, would seem to contrast sharply with an interpretative approach that is bottom up, truly post-colonial, and, is informed by a genuine desire to decentralise democratic processes that have to do with the preservation of culture, albeit ultimately bowing to his authority. The provision lends itself just as easily to an interpretation which departs from a colonial legacy of a top down approach with a thrust towards fostering democratic dispute resolution within administrative structures that are central to the people.

Be that as it may, regardless of the deeper constitutional interpretative thrust that underlies the provision and indeed this dispute, the issue of the President's joinder to this matter is one that can be decided. This can be done by answering the question whether he is an interested party who ought to have been cited in these proceedings which seek to compel the Provincial Assembly of Chiefs to act in accordance with its mandate as outlined in s 283

of the Constitution. What is not disputed is that the ultimate task of resolving a dispute is his. It is obvious from a reading of the section that he is an interested party.

Against the back drop and import of s 283, there is no order which can be crafted to compel action which would not be of relevance to the President in his role in ultimately resolving the dispute. After all it is the President who appoints a chief at his discretion. Since it is the President who appointed Chief Charumbira, he has a right to be aware of and to be party to any case whatsoever before the courts that touches on that appointment. In other words, he is an interested party and arbiter in any dispute involving chieftaincy on terms of s 283 (c) of the Constitution. As such, joining him to any proceedings brought before the courts is indeed an imperative. Whether the substantive provision is interpreted bottom up or top down, the inescapable conclusion is that the President is an indispensable party to any controversy that involves the removal of a chief he has appointed. He ought to have been cited at the onset more so since ordinarily the courts do not readily exercise jurisdiction in these matters in light of the thrust of s 283 of the new constitution.

As regards the non-joinder and misjoinder of parties, Rule 87(1) provides as follows:

> "No cause or matter shall be defeated by reason of the misjoinder or nonjoinder 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."

Non joinder or misjoinder is not fatal and a matter, may still be heard to finality even where there has been non joinder. However as stated in the case of *Rodger & Ors* v *Muller & Ors* HH 2 2010 r 87(1) of the High Court Rules, 1971, does not absolve a litigant of the obligation to cite all relevant parties.

Also rule 87(2) permits the court in a cause or matter whether on its own motion or *mero motu* to join a party or dispense with a party at any stage of a cause or a matter.

In terms of r 87(2):

> "At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either on its own motion or on application-
> (a) ……..
> (b) order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, to be added as a party.
> but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised."

Equally, the discretion by the court to join a party is also one that is judiciously exercised. Where a party had an opportunity to rectify the issue of joinder because the other

side raised it and yet still chooses to forge ahead without the joinder, the court may not regard the circumstances as warranting a proper exercise of its discretion. The papers will often tell their story as to whether an issue has been raised and a party has elected to proceed regardless.

Where a court decides not to exercise its discretion to proceed without joinder or to join a party has who is an indispensable party to the proceedings, then failure to join in the initial instance, by a party who could have done so, is generally fatal. The court can dismiss the claim in the absence of the citation of a necessary party.

Non joinder is fatal to this application for the reason that the applicant had ample opportunity to attend to the joining of the President before this hearing. His application was lodged on 4 April 2018. By 26 April 2018 applicant was fully aware of the respondent's position regarding the failure to join the President. Applicant did nothing to join the President. I am in agreement with the second and third respondents that r 87 of the High Court Rules, cannot be used to hide behind failure to observe an obligation to cite an interested party in the hope that the court will rely on this provision should the party be necessary.

Having found that there is critical non joinder it will not be necessary to delve in-depth into the issue of prescription or estoppel, save to say the issue is definitely a customary law one in substance. Moreover, the respondents acknowledge in their heads of argument that the applicant did not exhaust local remedies before approaching the courts. It is argued in paragraph 3.8 and 3.9 that the proper course, given the averment that no complaint was received by the chairperson of the Assembly, would be for the applicant to approach second respondent. Indeed given that Chairperson is now aware, assuming he genuinely was not, then there is no reason why the process laid down for disputes should not be followed. In any event, it is also the Provincial Assembly of Chiefs this is better placed to determine whether the dispute has a long standing history that the applicant has averred.

Whilst the point *in limine* on joinder is upheld, I do not think that an order of costs against the applicant would be appropriate in this case given the absence of harmonisation of the Constitution with relevant legislation. It is ultimately disrespectful of the constitutional status of customary law which impacts on many people's lives when ordinary people are left to dither for years on end regarding how processes are supposed to operate efficiently due to lack of speedier harmonisation of relevant legislation with the constitution. In the final result;

It is hereby ordered that:

1. The point *in limine* regarding the fatality of non-joinder of the President of the Republic of Zimbabwe in this application is upheld.
2. The application is dismissed.
3. There is no order as to costs.

Mukwewa Law Chambers, applicant's legal practitioners
Gill Godlonton and Gerrans, 2nd and 3rd respondents' legal practitioners