

CHIRUMHANZU CHIEFTAINSHIP DYNASTY
(TRADITIONAL LEADERS STEERING COMMITTEE)

AND

JULIUS CHIMBI CHIGEGWE

Versus

MVUMA DISTRICT DEVELOPMENT COORDINATOR

AND

FIDELIS MUDZENGI

HIGH COURT OF ZIMBABWE
WAMAMBO J
MASVINGO 20 AUGUST & 9 SEPTEMBER, 2020

Urgent Chamber Application

J. Ruvengo, for the applicants
K. Munatsi, for the 1st and 2nd respondents
No appearance for the 3rd respondents

WAMAMBO J: The applicants seek the following order.

Pending determination of this matter the applicant is granted the following relief:-

- i. 1st and 2nd respondents be and are hereby interdicted from processing and forwarding to His Excellency the President of Zimbabwe the documents pertaining the alleged nomination of 3rd Respondent for appointment of Acting Chief Chirumanzu

- ii. 2nd Respondent instruction to 1st Respondent and the subsequent actions taken based on the Attorney General's advice in respect of the selection process of Acting Chief Chirumanzu be and are hereby declared unlawful and irregular.

The brief background of the matter is as follows.

On 13 August 2020 1st Respondent convened a meeting with applicants and other clan members at Rutunga, Chirumhanzu. The meeting was convened to choose the nominee to the vacant position of Acting Chief Chirumhanzu, this after the substantive Chief passed away. The applicants are unhappy about this process, thus this application.

The 1st application aver that they are an executive committee whose mandate is to ensure proper succession, nomination and subsequent appointment of chiefs and acting chiefs. The 1st applicants Constitution forms part of the record as Annexure "B".

The applicant's over a range of irregularities as follows:

1st respondent did not give concerned family members an opportunity to take part in the selection proper of the candidate to be forwarded as Acting Chief Chirumanzu. The selection of 2nd respondent was an imposition and unilateral despite the protests of applicants and other family members gathered who had the names of their own preferred candidates among them 2nd respondent. There has been a disregard of the law as no proper process was followed in the nomination of the candidate.

The above main points were expanded in oral agreement by *Mr Ruvengo*.

On the other hand, *Ms Munatsi* representing 1st and 2nd respondent sturdily opposed the application. Her stance was mainly that the court has no jurisdiction in terms of section 283 (i) of the 2013 Constitution, to resolve disputes concerning Chiefs, that being the prerogative of the President on recommendations of the Provincial Associations of Chiefs and that applicants approached the court prematurely without following domestic remedies available.

She argued that Section 4 of the Traditional Leaders Act [*Chapter 29:17*] was followed and the Act does not provide for a succession custom.

Further that the applicant has no constitutional role to play in administering chieftainship affairs. The Minister of Local Governments in terms of section 283 of the Constitution as read with section 4 of the Traditional Leaders Act is the one who recommends to the President a suitable person for appointment as Chief or Acting Chief.

No irreparable damage can be caused as the substantive Chief will be chosen within 2 years.

A number of cases were cited by both parties. Some were however decided before the 2013 Constitution while some were decided based on other considerations.

However among the cases cited by both parties is the case of *Elias Gambakwe and Others v Hebert Chimene and others HH465/15*.

The facts of that matter in part read as follows:

"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 2nd to 4th 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 facts of that matter are quite similar to the facts in the instant case.

UCHENA J (as he then was) closely considered the import of sections 3 and 4 of the Traditional Leader Act [Chapter 29:17]. He also traversed the import of section 283 of the Constitution with particular emphasis on section 283 (c) (i) as read with section 340(i) (c) of the Constitution.

Section 283 of the Constitution reads as follows;

"283. An Act of Parliament must provide for the following, in accordance with the prevailing culture, custom traditions and practise 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 practises 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)*
- (iv)"*

UCHENA J (as he then was) found as follows at pages 4 and 5: -

"Section 283 (c) (i) provides for appointment of a Chief by the President in accordance with the traditional practises and traditions of the communities concerned. While sections 3 and 4 of the Traditional Leaders Act distinguished the procedure for the appointment of a Chief and Acting Chief the Constitution only mentions the appointment of a Chief. In terms of section 340(i)(c) of the Constitution, the power to appoint a substantive office holder includes the power to appoint a person 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."

I note that counsel for the applicants also raised the point that the disputes in this case does not fall under section 283 c(ii) of the Constitution as the President cannot resolve dispute arising before the appointment of a Chief or acting Chief.

This same point was raised in the *Gambakwe* case (supra) and was resolved by the Learned Judge at page 5 as follows:

"As already said the requirement in section 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 Legislative intention that only the President and is inductive of the Legislative's intention that only the President should resolve such disputes. Otherwise how must the President resolve such disputes if the courts can also resolve them. The use of the word "must" mean he is obliged to resolve every such dispute. Miss Makurumire for the applicant further submitted that the provisions of section 283 (c) (ii) of the Constitution do not apply to disputes which arise before the appointment of a chief or acting Chief, but only to disputes which arise after a chief has been appointed. Miss Hove for the 2nd to 4th respondent submitted the word "concerning" which precedes the disputes to be resolved which includes appointment of Chiefs means "about" and "concerning".

This she argued means the disputes to be resolved included those which arise before the appointment 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 Chiefs appointment. The Cambridge Advanced Learners Dictionary supports the meaning given by Miss Hove. I therefore agree with Mr Dande and Ms Hove that applicants have come to the wrong forum."

In this case following the above dicta I find that the dispute in the instant case falls squarely within section 283 (c) (ii) of the Constitution. To that end such disputes must be resolved by the President on the recommendation of the Provincial Assembly of Chiefs through the Minister response for Traditional leaders.

The provision is clearly peremptory thus the use of the word "must" Effectively the dispute in the instant case cannot be dealt with by the court. I find in the circumstances that applicant has approached the wrong forum. *Mr Ruvengo* urged me to grant an order against 3rd applicant in default because of his non-appearance. I find that untenable because the relief sought is not against him but against 1st and 2nd respondent.

I therefore order as follows:

The application is dismissed with costs.

Ruvengo, Maboke and Company , applicant's legal practitioners

Civil Divison of the Attorney Generals Office, 1st and 2nd respondent's legal practitioners