

SOLOMON CHIRONDA
versus
LUXFORD MUTOPO

HIGH COURT OF ZIMBABWE
MUZENDA J
HARARE, 5 December & 19 December 2018

Opposed Application.

Ms B Mutawa, for the applicant
T Runganga, for the respondent

MUZENDA J: Solomon Chironda (the applicant) is seeking the following order:-

“IT IS DECLARED THAT:

1. The applicant is the lawful and rightful village head of Ndaya Village, Musosomwa, Ward 15.
2. Respondent has no legal basis or capacity to head Ndaya, Village and should vacate the position of village head of Ndaya Village Musosomwa Ward 15.
3. The applicant assume title and position as the village head of Ndaya Village

IT IS CONSEQUENTLY ORDERED THAT

The Respondent shall pay costs of suit including Counsel”

The respondent (Luxford Mutopo) is a nephew to the applicant of Ndiya Village Musosomwa Ward 15. Ndiya Village was established and registered in 1936. The Respondent argues that the first village head was his great grandfather, Ndiya, after his death in 1942, Karasa took over who was his younger brother. After the death of Karasa in 1947 Samson Chimhuto followed. After the death of Chimhuto John Kativhu became village head, When Kativhu, died his young brother Michael Nyahunzvi became village head, then after his death in 2017 the respondent came into office.

On the other hand applicant alleges that the respondent’s accession to that position, was unlawful and without right, title or inheritance. The dispute was referred to Chief Chipfuyamiti and on 26 August 2012 the Chief ruled in applicant’s favour. The respondent refused to recognize the applicant as village head. The applicant took the community Court’s judgment for registration at the local magistrates court and still the respondent was not amused by that registration. When

the applicant realized the stance taken by the respondent he decided to apply for a declaratur, in terms of the draft outlined in this judgment.

The respondent raised three points *in limine*.

- (a) that the community court that presided over the dispute had no jurisdiction to adjudicate over village headship issues without the prerequisite consent of the respondent.
- (b) In terms of s 11 of the traditional leaders Act (*Chapter 29:17*) (“the Act”) a village head is appointed by the Secretary upon the recommendation of the headman
- (c) in terms of s 283 (c) (ii) of the Constitution disputes concerning appointment suspension and removal of traditional leaders is the preserve of the President on the recommendation of the Provincial Assembly of Chiefs through the Minister responsible for traditional leaders, hence the courts have no jurisdiction and the judgment of the chief was a nullity and hence a declaratur cannot be premised on a nullity.

The preliminary points raised by the respondent if they succeed, they will dispose of the matter. However an analysis of the Act, the constitution and the law would basically cover all the three points as coming to one whether issues of traditional leaders can be dealt with by the courts.

Traditional Leaders Act, Chapter 29:17

In s 2 (1) (b) a “village head” means any person appointed as a village head in terms of s 11.

In s 5 (1) (k) the chief’s duty is found “in approving nominations by headman of village heads for appointment in terms of this Act; and.”

Section 11 - Appointment of village heads

- (1) Subject to ss (2) the Secretary shall appoint a sufficient Chamber of persons nominated by a headman with the written approval of the Chief of the village to assist the headman to carry out his duties.

Provided that any village head appointed in terms of this subsection shall be installed in office by the headman who nominated him.

- (2) Before appointing any person as village head in terms of subsection (1) the secretary shall invite the headman concerned to nominate a person for appointment

and unless in the opinion of the secretary there are good reasons to the contrary the secretary shall appoint as village head any person so nominated by the headman:

The Chief's role on the issue of village headship is that of approval. He recommends or assent to the nomination. His role is secondary but not final. The key and primary participant is the headman who forwards a nominee to the chief for the latter's approval. Once the approval is done the papers go to the district administrator's office for onward transmission to the appointing authority, the Secretary. The secretary in terms of section 11 of the Act then appoints the nominee and issues warrants for the village heads appointment. The secretary sends back the approved letters of appointment to the district administrator who in turn makes the necessary entries in his or her office and forwards the letters of appointment to the headman. The headman will then advise the nominee or appointee and proceed to install him in terms of the proviso to s 11 of the Act. The attendance of the Chief is at the pleasure or invitation of the headman who is literally the guest of honour. The Chief does not have the jurisdiction to preside over disputes between subjects who wish to be village heads. The decision of the Community Court relied upon by the applicant is unaffected a "declaratur" where the Chief's court recognises the applicant as a village head of Ndiya Village without following the provisions of the Traditional Leaders Act. I agree with the respondent's contention that the ruling by the chief's court was a nullity because if the chief's court does not have jurisdiction to preside over the nature of the dispute nor given to appoint a village head. The Chief merely approves the nomination. The nature of the relief sought by the applicant seeks to transform the court into an opportunity authority through a declaratur. The applicant was not nominated by a headman, there is no approval by the Chief and he was not appointed by the Secretary to so in what way is the applicant "the lawful and rightful village head of Ndiya Village?" How does the applicant assume his title and position as the village head of Ndiya Village without following the procedure outlined in the Act?

Section 283 of the Constitution

"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).....
- (ii) dispute concerning the appointment, suspension and removal of traditional leaders must be resolved by the President in the recommendations of the provincial assembly of chiefs through the Minister responsible for traditional leaders.
- (iii).....
- (iv)

Hence it is not in dispute that the supreme law of the country is explicit as to who should be responsible for the resolution of disputes as the one before this court . In the matter of *Elias Gambakwe and 3 others v Herbert Chimene and 3 Ors*, UCHANA J, on p 5 of the cyclostyled judgment had this to say;

“While the courts 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 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 responsibility to the President.

As already said in the requirements in s 283 (c) (ii) of the Constitution that disputes concerning the appointment of chiefs “must be resolved.

1. HH 465/15 by the President on the recommendations 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. Otherwise 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 dispute..... and the disputes to be resolved include those which arise before the appointment of a chief or ruling chief”

I am satisfied that there is a dispute between the parties and that such a dispute is the one envisaged in s 283 (c) (ii) of the Constitution and further that such a dispute should be channelled via the provincial council of chiefs up the hierarchy to the office of the President. The points *in limine* raised by the respondent have weight and they ought to be upheld. It is therefore ordered that

The applicant’s application is dismissed with no order as to costs.

B. Chipadza Law Chambers, applicant's legal practitioners
Mbawo & Partners, respondent's legal practitioners