

SILIBAZISO MLOTSHWA
versus
DISTRICT ADMINISTRATOR, HWANGE DISTRICT N.O
and
SAUNDERS MLOTSHWA
and
MINISTER OF RURAL DEVELOPMENT,
PRESERVATION AND PROMOTION OF
CULTURE AND HERITAGE N.O
and
THE PRESIDENT OF ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 10 JUNE AND 16 JUNE 2016

Special Plea

N. Mlala for the plaintiff
L. Musika for the 1st, 3rd & 4th defendants
J. Mhlanga for the 2nd defendant

MATHONSI J: The plaintiff is the eldest daughter of the late Chief Nyangayezizwe Mvuthu Mlotshwa who was the substantive chief of Mvuthu area in Hwange District until his death in March 2014. The second defendant is her uncle, the brother of her father, who has been seconded for appointment as the next chief Mvuthu.

The plaintiff has instituted summons action against her uncle and the cited government officials including the President of the Republic of Zimbabwe seeking the following relief:

- “a) An order for the setting aside and declaration as null and void the appointment of the second defendant as a substantive chief Mlotshwa of Mvuthu area under the Hwange District by the 1st defendant and/or 3rd defendant and 4th defendant on the grounds that the process of appointment is not in compliance with section 3 of the Traditional Leaders Act [Chapter 29:17] read with the constitution of Zimbabwe in particular section 51, section 56, section 63.
- b) An order that pursuant to (a) above the 1st and 3rd defendants ensure compliance with section 3 of the Traditional Leaders Act [Chapter 29:17] in the choice of a substantive chief Mlotshwa for Hwange District, Mvuthu area within 90 days of

granting of the order, failing which the plaintiff being the eldest daughter of the late Chief Mlotshwa (Mvuthu) and being heir apparent and with no legal impediment prohibiting her to be substantive chief Mlotshwa be and is hereby declared as such under the Traditional Leaders Act and customs, practices and norms.

- c) An order that any of the defendants who opposes the relief sought pays the costs of suit on an attorney-client scale.”

The plaintiff’s case could have been presented better and the pleadings drafted in a more elegant manner, but in essence she avers in her declaration that they are the descendants of the Nguni people who hail from South Africa. They follow the lineal system of succession in the appointment of a chief sometimes expressed in the term “a chief begets a chief” meaning that the eldest child of the Chief succeeds the chief. This system contrasts with the rotational system often found in Shona culture where chieftainship moves from one family to the other within the clan.

As the last chief Mvuthu is survived by only three daughters, she being the eldest, and he had no son whatsoever, it means that she should succeed her father as the next chief Mvuthu. On account of her gender, those charged with the responsibility of selecting a successor, discriminated against her and moved the chieftainship sideways to the second defendant her uncle, whose name has been forwarded to the appointing authority, the President, for appointment as substantive Chief Mvuthu overlooking her, the heiress apparent.

As if the discrimination on the basis of gender was not bad enough, the second respondent does not hail from the chief’s area of jurisdiction, he does not even have a homestead there, but has lived all his life in South Africa. His appointment is therefore at variance with all the known norms and customs of the people and is motivated only by sexism, greed and other vices. It is for that reason that she craves the grant of an order setting aside the nomination aforesaid.

The defendants have filed special pleas to the claim. In their special plea, the first, third and fourth defendants averred as follows:

“1st, 3rd and 4th defendants plead specially to the plaintiff’s summons and declaration as follows:

1. The plaintiff has approached the wrong forum. The High Court does not have jurisdiction to determine disputes concerning the appointment, suspension and removal of traditional leaders.
2. In terms of section 283 (c) (ii) of the Constitution of Zimbabwe Amendment (No 20) Act 2013, these disputes must be resumed (*sic*) by the President.
3. The 3rd and 4th defendants have been wrongly joined as parties because what transpired was the nomination process and only involved the 1st defendant.

WHEREFORE, the 1st, 3rd and 4th defendants pray for plaintiff's claim to be dismissed with costs."

As if in chorus, the second defendant also filed a special plea objecting to the jurisdiction of this court. He averred:

"2nd defendant specially pleads to plaintiff's claim as contained in the summons and declaration as follows:

1. This Honourable Court does not have jurisdiction to entertain or resolve any dispute concerning and or in connection with the appointment, suspension or removal of a traditional leader including a chief.

Wherefore second defendant prays that the plaintiff's claim may be dismissed with costs on an attorney and client scale."

The plaintiff has tried to aver in her replication that she does not seek to be appointed or nominated as substantive chief but desires "protection from discrimination during the nomination process," a kind of distinction without a difference not helpful at all when considered against the specific provisions of the constitution dealing with chieftainship disputes.

In advancing arguments in support of the special pleas both *Mr Musika* who appeared for the first, third and fourth defendants and *Mr Mhlanga* for the second defendant relied on the authority of *Gambakwe and Others v Chimene and others* HH 465/15 and *Munodawafa and Others v District Administrator Masvingo* HH 571/15, in which this court sought to interpret the provisions of s283 of the constitution. What they did not do is to address their minds on the status of the authority of *Moyo v Mkoba and others* 2013 (2) ZLR 137 (S), a case in which the Supreme Court pronounced itself on the justiciability of the process of selecting a chief in light of the new dispensation introduced by s283 of the new constitution. I shall return to that.

Mr Mlala for the plaintiff submitted lengthy heads of argument and supplementary heads of argument. For all his industry and extensive, certainly not intensive, research, he did not

address the gist of the special pleas. He complained bitterly about crass male chauvinistic arguments used to discriminate against the plaintiff by the clan and to disqualify her from succeeding her father on no other ground than that she is a woman. It is regrettable that the plaintiff's people have adopted a classicist position of preserving the male domination mentality, that only the masculine gender has capacity to hold leadership office, in a time capsule as something perfect, pure and unchanging in the face of constitutional imperatives like s56 of the constitution that men and women have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

It is disgraceful that when all the progressive legal instruments are in place there are still some among our people who cherish the feudalistic views expressed in casting aside the plaintiff on gender in favour of someone else when the succession principles of her clan clearly point to her as the heiress to the throne. The government can only put in place the legal mechanisms for the advancement of women's rights but as long as our people do not embrace those rights, the struggle for the emancipation of women and the enjoyment of these rights will remain a pipe dream.

The biggest problem confronting the plaintiff in the present matter is not that she does not have a constitutional right to equal opportunities in the cultural and social sphere, because she certainly has that right, it is the forum that she has approached as an expression of that right. Has she come to the right court?

In terms of s283:

“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 and through the National Council of Chiefs and the Minister responsible for traditional leaders in accordance with 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.”

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.

What is however not in dispute is that chieftainship wrangles now fall, by constitutional provision, to be resolved by the President on the recommendations of the provincial assembly of chiefs. By clear and unambiguous language the law giver has bestowed that responsibility on the President.

The issues to be determined in this matter have already been subjected to erudite judicial pronouncements before. In *Gambakwe and Others v Chimene and Others, supra*, UCHENA J (as he then was) considered the effects of s283 (c) (ii) of the constitution and concluded that it imposes a duty on the President to resolve disputes concerning the appointment of chiefs whether they occur before or after the appointment, to the exclusion of the courts. The learned judge asked rhetorically;

“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 such dispute.”

The learned judge went on to conclude that since a provincial assembly now has the mandate to make recommendations to the President on how a chief should be nominated, it means that an aggrieved person has alternative remedies to approach the provincial assembly of chiefs for it to make recommendations to the President over and above the remedy of submitting a grievance to the President.

It is trite that, even though this court has inherent jurisdiction to decide any matter, traditionally it will not invoke such inherent jurisdiction where a party has other domestic remedies through which it can obtain recourse.

A few weeks after UCHENA J (as he then was) had pronounced himself in *Gambakwe, supra*, TSANGA J was confronted with the same question of the effect of s283 of the Constitution in *Munodawafa v District Administrator Masvingo, supra*. She followed the reasoning in the earlier matter but also added the crucial point, which I totally agree with, that this court will always be a forum of jurisdiction and for its jurisdiction to be completely ousted would require a specific provision to that effect.

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.

The judgment of the Supreme Court in *Moyo v Mkoba and Others, supra*, was delivered on 7 August 2013. The constitution which ushered in s283 was promulgated on 22 May 2013 although most of its provisions only came into effect on 22 August 2013. What is apparent though is that the apex court dealt with the provisions of s3 of the Traditional Leaders Act [Chapter 29:17] as they applied before the new constitution changed the law relating to selection of a chief.

In that case MALABA DCJ remarked at 147 A- B:

“The president is required to act on his own deliberate judgment after he has information relating to the prevailing customary principles of succession applicable to the community to which he must give due consideration. Whether the information placed before the President relates to the matters to which, he is required to give due consideration is a justiciable question ---.”

It occurs to me that the remarks of the learned Deputy Chief Justice remain good law even after the coming into effect of the new constitutional dispensation. In other words, the process of selection at the level of the provincial assembly and the responsible minister and the recommendations they make to the President can still be subjected to judicial review while the appointment by the President cannot, as it is executive discretion. What has changed however is that the dispute must first and foremost be submitted to none other than the President himself for resolution.

I have no doubt that the plaintiff has a good case to make about how and indeed why she was overlooked on gender bias in breach of her constitutional right. However the debatement of those issues must take place before the President in terms of the current law. There is therefore merit in the special pleas filed by the defendants and this court has to decline jurisdiction.

In the result, it is ordered that;

1. The special pleas filed by the defendants are hereby upheld.
2. This court declines jurisdiction in this matter.
3. The plaintiff shall bear the costs of suit.

Sansole and Senda, plaintiff's legal practitioners
Masiye-Moyo and Associates, 2nd defendant's legal practitioners
Attorney General's office, 1st, 3rd & 4th defendant's legal practitioners