

TAKANAYI MUREYI
versus
FORTUNE CHARUMBIRA

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 26 August 2013

G. Mtisi, for the applicant
J. Samukange, for the respondent.

MTSHIYA J: This matter came before me as an urgent chamber application. I then set it down and heard the parties' legal practitioners on 26 August 2013. After hearing, the legal practitioners I dismissed the application with costs.

On 13 September 2013 the applicant's legal practitioners, Messrs *Musendekwa and Mtisi*, wrote to my clerk requesting that I give reasons for my decision to dismiss the application. These are they.

In his urgent application filed on 21 August 2013, the applicant sought the following relief:

“FINAL ORDER SOUGHT

1. The respondent be and is hereby interdicted from uttering any hate language denouncing me and my political party.
2. The respondent be and is hereby ordered to stop forthwith engaging in any political activities in Masvingo West Constituency.
3. The respondent shall pay costs of suit on attorney-client scale.

INTERIM ORDER

1. That pending the determination of the final order the respondent is interdicted from
 - (i) Coercing his subjects from attending political meetings or rallies.
 - (ii) Threatening his subjects with death or evictions for supporting applicant and MDC-T.

SERVICE OF THE INTERIM ORDER

The applicant's legal practitioners be and are hereby given leave to serve this provisional order on the respondent."

The applicant herein was a candidate in the harmonized elections conducted on 31 July 2013. He contested and lost the Masvingo West National Assembly seat. He contested the seat on the ticket of the Movement for Democratic Change (MDC-T) led by the former Prime Minister Morgan Tsvangirai. In his founding affidavit, he states that he has since filed a petition with the Electoral Court under case number EC 35/13 challenging the results of the election on the basis of "multiple electoral malpractices and irregularities which marred the election."

The respondent, whom the applicant alleges to have "continued to conduct meetings and/or rallies in the Masvingo West Constituency denouncing him and his party MDC-T," is a Traditional Chief in the Constituency. The respondent is also the President of the Traditional Chiefs' Council in Zimbabwe.

The applicant averred that after the elections the respondent continued to conduct meetings for people to attend what he called "Partisan Political Meetings." These meetings, the applicant went further, were in turn addressed by the ZANU PF winning candidate, Mr Ezra Chadzamura.

In para(s) 10-15 of his founding affidavit the applicant states as follows:

- "10. I am advised by my legal practitioners of record, and such advice I accept that the office of the Chief is an apolitical office and Chiefs are primarily there to promote unity and social cohesion not to be an extension of any political party or candidate.
11. In this context, the actions by the respondent to force march villagers meetings and denouncing me are illegal and should be stopped as a matter of urgency.
12. Masvingo West Constituency is a relatively rural community and conservative where chiefs are held in high esteem as vanguards of traditional norms and values and the continued meddling in political affairs of this constituency by the respondent is thus an evil political mechanism which is designed to exert undue pressure on the electorate against me and my political party, such that even in the event that my election petition is successful, it would not be conducive to hold a fresh election anytime soon because the electorate would not be conducive to hold a fresh election anytime soon because the electorate would still be in deep

slumber of intimidation and threats by respondent.

13. I am also of the view that since I have filed an Electoral Petition and amongst my grounds is the fact that the respondent has been intimidating people to vote for ZANU PF, it is in the best interests of justice to have respondent stopped since I may be prejudiced in the event of the Electoral Court nullifying the elections of July 31st 2013 in Masvingo West Constituency and ordering a re-run.
14. A Chief as a social leader should not utter hate language like “Down with Takanayi Mureyi” rather, he is supposed to unify people beyond their political orientation. His open support for ZANU PF as evidence by affidavits of the concerned subjects annexed hereto marked **Annexure “B1, - B8”** wherein he has been intimidating and jointly giving eviction and death threats to villagers with ZANU PF winning candidate for the Constituency is completely unacceptable, unlawful and unconstitutional.
15. My right to seek an order from the Honourable Court to bar the chief from intimidating villagers and giving an advantage to one political party at the expense of another is well established since I am a Politician, I was a candidate in this particular constituency and I have a direct interest in this matter as I am awaiting ruling on my Electoral Petition and my supporters have been the prime targets of the respondent.”

Indeed in support of his case, the applicant produced a number of affidavits from villagers in the Masvingo West Constituency. In some of the affidavits the villagers recount their experiences mainly before the harmonised elections referred to above. Given the alleged conduct of the respondent, the applicant sought the relief indicated at p 1 herein (re interdict against the respondent).

Mr *Mtisi* for the applicant correctly argued that the new constitution did not allow the respondent to conduct himself in the manner he was alleged to be doing. He said, notwithstanding the fact that some of the affidavits from the villages dealt with experiences prior to the elections, there was still ample evidence showing that the respondent had, after the elections, continued to conduct himself in the manner alleged in this application. He did not agree that granting the application was tantamount to supporting the applicant’s petition already before the Electoral Court. He therefore urged the court to grant the relief sought.

There were no opposition papers filed but Mr *Samukange*, for the respondent, submitted that the respondent denied the allegations of threats and intimidation directed against the applicant and other villagers. He said the relief sought was meant to support the applicant’s petition already before the Electoral Court in that if the order prayed for *in casu* were granted, that would be confirmation of the applicant’s allegations.

Mr *Samukange* argued that the effect of the relief sought would also interfere with the respondent's role as a Traditional Chief. He said the respondent, as a chief, had to address his people from time to time. He agreed that the Constitution did not allow the respondent to engage in politics but the allegations *in casu* were not admitted and therefore the respondent should be allowed access to his people as provided for in the Traditional Leaders Act [Cap 27:17] (the Act).

Mr *Samukange* went further to argue that apart from other remedies available to the applicant, such as reporting to the police, the Act had provisions that dealt with acts of misconduct perpetrated by person's in the position of the respondent. He therefore prayed for the dismissal of the application with costs.

Due to the nature of the allegations in this application, I did not find it difficult to accept the urgency of the matter. The respondent's legal practitioners did not raise issue with urgency. I therefore proceeded to look at the merits of the matter.

There is no issue regarding the Constitutional provision which disables the respondent from engaging in politics. Section 281(2) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 (the Constitution) provides as follows:

- “(2) Traditional leaders must not-
- (a) be members of any political party or in any way participate in partisan politics;
 - (b) act in a partisan manner
 - (c) further the interests of any political party or cause; or
 - (d) violate the fundamental rights and freedoms of any persons.”

Section 282 (1) of the Constitution then spells out the functions of traditional leaders, such as the respondent, as follows:

“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.”

I want to believe that, in the main, the execution of the above functions necessitate the holding of public meetings – which meetings, of course, should not be for the purposes of

“(a) furthering the interests of any party or cause; and
(b) violating the fundamental rights and freedoms of any person.”

The allegations *in casu* suggest that the respondent proceeded to do (a) and (b) above. As already indicated, that was denied. It is clearly illegal to conduct oneself as alleged. However, I find merit in the submission that if the allegations are indeed true, the applicant has other remedies available to him. This, the applicant accepts. In para 24 of his founding affidavit he states:

“Further, applicant has no other remedy under the circumstances considering that the police are also failing to rein over him and granting of an interdict against the respondent is the only available remedy.”

There is no clear evidence that the matter was ever placed before the police for their investigation/action. All nine supporting affidavits filed herein are silent on whether or not any police reports were made. It is only the applicant who makes reference to police reports. In para 20 of his founding affidavit he states as follows:-

“20. This matter is of great urgency in that despite the parted (*sic*) illegality of the respondent’s conducts, efforts to report to the police have been made with the police only making empty promises to stop and control the chief but it appears the respondent has totally lost respect to the laws and the constitution of Zimbabwe because he had engaged a high gear calling and frog matching his subjects to ZANU PF meeting where I am denounced through hate speech.”

The above averment does not in any way say the police have refused to act. Furthermore, there is no indication that the other traditional leaders have been called upon to rein in one of their own as provided for in s 7 of the Act. The said section provides for the investigation of any acts of dishonesty and misconduct on the part any chief such as the respondent.

The section provides, in part, as follows:

“(1) Where-

(a) a chief has been found guilty of any offence involving dishonesty; or

- (b) after an investigation in terms of subsection (7), a chief has been found guilty of an act of an act of misconduct in relation to the customs and traditions observed in his area; or
 - (c) a chief has been charged with any offence involving dishonesty; or
 - (d) an investigation in terms of subsection (7) into alleged misconduct on the part of a chief has been or is about to be instituted;
- The Minister may suspend the chief from his duties.”

The allegations against the respondent, if true, admit of nothing else other than a full report upon investigations. Such report should be placed before the authorities vested with the power to protect citizens such as the applicant. The applicant has every right to approach this court on an urgent basis where threats against his life are made by any person regardless of their status. However, in doing so, the applicant must first prove that the other remedies have been denied him. That is not the case *in casu*.

The law is clear on when the remedy of an interdict, such as prayed for *in casu*, can be granted. In *Charuma Blasting and Earthmoving Services Private Limited v Njainjai & Ors* 2000 (I) ZLR 85 (5) SANDURA J said:-

“What an applicant for an interdict should establish in order to succeed has been set out in many previous cases.

In *Setlogelo v Setlogelo* 1914 AD 221, INNES JA (as he then was) said the following at 227:

“The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonable apprehended, and the absence of similar protection by any other ordinary remedy.”

Subsequently, in *Eriksen Motors (Welkom) Ltd v Proten Motors, Warrenton & Anor* 1973 (3) SA 685 (A) HOLMES JA, dealing with the issue of temporary interdicts, said the following at 691C-G:

“The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the court. Where the right which it is sought to protect is not clear, the court’s approach in the matter of an interim interdict was lucidly laid down by INNES JA in *Setlogelo v Setlogelo* 1914 AD 221 at p 227. In general, the requisites are:

- (a) a right which, ‘though prima facie established, is open to some doubt’;
- (b) a well-grounded apprehension of irreparable injury;
- (c) the absence of ordinary remedy.

In exercising its discretion the court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience.

The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater the need for the other factors to favour him... Viewed in that light, the reference to a right which, 'though prima facie established, is open to some doubt', is apt, flexible and practical, and needs no further elaboration."

The above paragraphs set out the factors, and indeed the law to be taken into account before an interdict is granted.

Whereas I do not dispute the applicant's clear right to protection, I do believe, as I have already demonstrated, that similar protection, other than an interdict, is still available to the applicant. In that light, I accept that the circumstances of this case do not therefore justify a measure that will effectively interfere with the respondent's exercise of his Constitutional duties.

The founding affidavit and the supporting affidavits are clear testimony that, in the main, the applicant is relying on what he has been told – namely that the respondent and the winning candidate for the Constituency have denounced him at victory rallies. He does not tell us what he himself has heard. Nowhere does he say he himself has heard the threats, or seen the respondent coercing his people to the said rallies.

Furthermore, given the import of paras 12-15 of his founding affidavit, one is persuaded to link the application to the applicant's petition already before the court. The paragraphs referred to seem to solicit support for the said petition.

For the foregoing reasons, I dismissed the urgent application with costs.

Messrs Musendekwa – Mtisi, applicant's legal practitioners
Messrs Venturas & Samukange, respondent's legal practitioners