

ELECTION RESOURCE CENTRE
and
CHIEF FORTUNE CHARUMBIRA
and
NATIONAL COUNCIL OF CHIEFS
versus
MINISTER OF LOCAL GOVERNMENT,
PUBLIC WORKS AND NATIONAL HOUSING

HIGH COURT OF ZIMBABWE
PHIRI J
HARARE, 21 & 23 May 2018

Unopposed Court Application

G. Mupunga, for the applicant

PHIRI J: This was an unopposed court application in respect of which the applicant sought and obtained the following order against the respondents:

- “1. The remarks made by the first respondent on 28 October 2017 on the occasion of the Annual Conference of the Council of Chiefs and on 13 January 2018, to the effect that traditional leaders have been supporting and must continue to support ZANU (PF) and its presidential candidate at the forthcoming 2018 elections be and is hereby declared to be in contravention of the Constitution of Zimbabwe.
2. The first respondent be and is hereby ordered to retract in writing the statements that he made to the effect that traditional leaders should support and vote ZANU (PF) by issuing a countermanding statement in newspaper with national circulation and endeavour to make the statement available to private and public media houses and the national broadcaster within 7 days of being served with this order.
3. Third respondent be and hereby directed to commence disciplinary proceedings for misconduct against the first respondent.
4. Second and third respondents be and are hereby directed to take steps with a view to putting in place mechanisms, as contemplated under section 287 of the Constitution of Zimbabwe.
5. The first respondent shall pay the costs of suit.”

The application was brought by an organisation called the Election Resource Centre

which is a Registered Trust which is concerned with issues of Elections, Democracy and Good Governance in Zimbabwe.

The first respondent in this case is Chief Fortune Charumbira who was cited in his personal capacity and in his capacity as a traditional leader and President of the National Council of Chiefs.

The leadership is established as an institution under Chapter 15 of the Constitution of Zimbabwe and appointments are made in terms of the Traditional leaders Act [*Chapter 29:17*].

The second respondent is the National Council of Chief a body Corporate established in terms of s 285 of the Constitution of Zimbabwe and constituted in accordance with s 37 of the Constitution of Traditional Leaders Act [*Chapter 29:17*].

The second respondent is a body whose functions under s 286 (1) (b) and (e) of the Constitution includes maintaining the integrity and status of traditional institutions and defining and enforcing correct and ethical conduct on the part of traditional leaders.

The third respondent is the Minister of Local Government, Public Works and National Housing cited as the authority responsible for the Administration of the Traditional Leaders Act [*Chapter 29:17*] and the institution of Traditional Leadership.

Procedure

The court application was served on the first, second and third respondents on 23 February, 2018.

The third respondent responded by indicating that the Ministry of Local Government Public Works and National Housing will abide by the decision of this Honourable court.

The first and second respondents did not file any notice affidavit of opposition or an opposing as required by the rules of the High Court of Zimbabwe, 1971, in terms of r 233.

This matter came before this court as an unopposed application on 28 March, 2018 and the Presiding Judges directed that the applicants file Heads of Argument in support of the application as this case raised constitutional issues and it was necessary that this court delivered a written judgment.

The application was accordingly considered and deliberated upon by the court sitting in the motion court on 9 May, 2018.

The Facts

The facts of this matter are captured in the founding affidavit deposed for and on behalf of the applicants by one Trust Maanda, the chairperson of the applicants Board of Trustees.

In paragraphs 15 and 16 of this founding affidavit the aforesaid Board Chairman stated the following:

- “15. On 28 October 2017 at the official opening of the annual conference of the national Council of Chiefs, the first respondent pointed out to the respect accorded to chiefs by then President, Robert Mugabe and stated categorically that chiefs have been supporting and must continue to support, ZANU (PF) and its President in the forthcoming elections in 2018.
16. Several private media houses and the public media including the national public broadcaster captured the exact words causing offence that the first respondent uttered. They are as follows: As Chiefs, we agreed during the 2014 congress that Cde Mugabe is our candidate for the 2018 elections. We are all united and he is still our candidate. We have been supporting him and we can confirm that winning is guaranteed” I attach hereto marked ‘TM2’, TM3’, and ‘TM4’ news reports by the Zimbabwe Broadcasting Corporation, the Zimbabwean newspaper, the Daily News newspaper and the Zimbabwe Lawyers for Human Rights respectively. I have also attached and marked ‘TM5’ a letter of complaint to several relevant authorities penned by the applicant son after the first respondent’s remarks were reported.”

The applicant averred that despite concerns that were raised by the applicant raised the first respondent did not withdraw his statement.

The applicant submitted that after the then President Robert Mugabe was deposed in December, 2017, and subsequently, at a meeting held between President Emmerson Mnangagwa, who had taken over from President Robert Mugabe, the first respondent repeated his remarks that chiefs should support President Mnangagwa and his ZANU (PF) Party.

The respondent’s speech made at a meeting held between President Mnangagwa and the Chiefs was annexed to the founding affidavit and among other things the first respondent in vernacular said:

- “19 At a meeting that was held between President Mnangagwa and the chiefs on 13 January 2018, the first respondent repeated his remarks that chiefs should support President Mnangagwa and his ZANU PF party. His full speech in vernacular is attached hereto. Among other things, the first respondent said: ‘Vamwe vaiti madzimambo mabva kuconference kuBulawayo, makatizve totsigira musangano muna 2018. Isu mashaniri icho ichokwadi woti mazvitaurei izvozvo? (Some people were saying at your conference in Bulawayo you, chiefs said you will support the party in power. That is the truth and you ask why we have said it.)

UNLAWFULNESS OF THE FIRST RESPONDENT’S REMARKS

The applicant contended that the remarks made by the first respondent violated the provisions of s 281 of the Constitution of Zimbabwe and ss 45 and 46 of the Traditional Leaders Act [*Chapter 29:17*].

THE CONSTITUTION

SUPREMACY OF THE CONSTITUTION

Section 2 of the Constitution of Zimbabwe 2013 provides that the Constitution is the supreme law of the country and that any law or conduct inconsistent with it is invalid.

THE CONSTITUTION

Section 281 of the Constitution states that:

4.3 The provisions of s 45 are consistent with the provisions IN [Chapter 15 of the Constitution that are designed to keep traditional leaders outside of partisan politics, in particular, s 281 which states that:

- “(1) Traditional leaders must:
 - (a) act in accordance with this Constitution and the laws of Zimbabwe;
 - (b) observe the customs pertaining to traditional leadership and exercise their functions for the purposes for which the institution of traditional leadership is recognised by this Constitution; and,
 - (c) treat all persons within their areas equally and fairly,
- (2) Traditional leaders must not:
 - (a) be members of any political party or any way participation in partisan politics;
 - (b) act in a partisan manner;
 - (c) further the interests of any political party or course; or
 - (d) violate the fundamental rights and freedoms of any person.)

THE TRADITIONAL LEADERS ACT

Section 45 of the Traditional Leaders Act [*Chapter 29:17*] provides that:

“in an election, traditional leaders are entitled to exercise their right to vote for any candidate of their choice, but traditional leaders may not stand for election to public office as president, parliamentarian or councillor. Traditional leaders may also not canvass or campaign for any candidate in an election or act as election agents or managers for election candidates. Nor any traditional leaders nominate any person as a candidate in an election for political office.”

Section 2 of the Traditional Leaders Act [*Chapter 29:17*] provides for the disciplinary procedure where it is alleged that a chief has committed an offence or any act of misconduct.

It was submitted for and on behalf of the applicant that the first respondent’s remarks violated the provisions of s 281 of the Constitution of Zimbabwe and ss 45 and 45 of the Traditional Leaders Act [*Chapter 29:17*].

It was submitted on behalf of the applicants that “the first respondent’s statement admonishing chiefs to support a particular candidate and political party in the forthcoming elections, of Zimbabwe in 2018, are contrary to the values of Zimbabwe and the national objectives enshrined in s 3 [Chapter 2] of the Constitution of Zimbabwe specifically among the relevant values are supremacy of the Constitution, the rule of law and good governance.

It was also contended that the first respondent brought the constitutional institution of traditional leadership into disrepute contrary to the provisions of [Chapter 15] of the Constitution of Zimbabwe.”

The applicant further submitted that the violation of the constitution that the applicant complains of did not only occur at the time that the first respondent made the offending remarks. The violation of the Constitution is a continuing Act;

“I also contend that the violation of the Constitution that the applicant complains of did not only occur on the day at the time that the first respondent made the offending remarks. The violation of the Constitution is a continuing act. For as long as retraction or withdrawal of the statement is not made, or some other remedial action is taken, the violation of the Constitution continue to happen. Respect for the letter, spirit and values of the Constitution is a non-negotiable. It is an imperative.” (See paragraph 33 of the Founding Affidavit)

LOCUS STANDI IN JUDICIO

This court was satisfied, after considering the applicants heads of argument and submissions and a perusal of the Trust Deed of the applicant that the applicant had *locus standi* to institute the current proceedings.

This court is satisfied that the applicant has *locus standi* in its own interest and in the public interest. This court agrees that s 85 of the Constitution of Zimbabwe has widened the class of persons who can approach the court alleging a breach of rights enshrined in the Constitution.

This court accepts that “the applicant has shown that “as a think tank whose mandate includes matters of elections, governance and democracy, the unconstitutional remarks made by the first respondent directly affect it even though they were not directed at the applicant *per se*.”

Also see the remarks of MALABA J in *Loveness Mudzuru & Ruvimbo Tsopodzi v Minister of Justice, Legal and Parliamentary Affairs N.O & Ors* at page 14 where he stated:

“With respect to the objective of liberating the ‘narrow traditional conception of standing’ and adopting a ‘broad and generous approach to standing’ in constitutionally guaranteed human rights litigation, under the new s 85 (1) where he stated:

‘The object of s 85 (1) of the Constitution is to ensure that cases of infringement of fundamental rights which adversely affect different interests covered by each rule of standing are brought to the attention of a court for redress. The object is to overcome the formal defects in the legal system so as to guarantee real and substantial justice to the masses, particularly the poor, marginalized and deprived sections of society. The fundamental principles is that every fundamental human right for freedom enshrined in [Chapter 4] is entitled to a full measure of effective protection under the constitutional obligation imposed on the State. The right of access to justice, which is itself a fundamental right, must be made available to a person who is able, under each of the rules of standing to vindicate the interest adversely affected by an infringement of a fundamental right, at the same time enforcing the constitutional obligation to protect and [promote the right or freedom concerned.]’

Loveness Mudzuru & Ruvimbo Tsopodzi v Minister of Justice, Legal & Parliamentary Affairs N.O & Others, supra, at p 14 of the unreported judgment.”

JURISDICTION

This court is also satisfied that it has jurisdiction to deal with the present matter in terms of s 86 of the Constitution.

Section 86 provides that

- “(1) (a) any person acting in their own interests;
 (b) any person acting on behalf of another person who cannot act for themselves;
 (c) any person acting as a member or in the interest of a group or class of persons;
 (d) any person acting in the public interest;
 (e) any person acting in the interest of its members is entitled to approach a court alleging that a fundamental right in this chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.

The Role of Traditional Chiefs

In its heads of argument the applicant submitted that Traditional Chiefs perform a mixture of administrative and judicial functions. They also perform ceremonial religious functions. They also discharge judicial functions when they preside over customary law courts.

The applicants submitted that when it comes to the concept of separation of powers, that is the hallmark of the Constitution, traditional leaders, are a sui generis creature since their functions span what they have both legs in both the executive and the judiciary. When Chiefs discharge judicial functions they would have to respect the principles of objectivity, impartiality, absence of bias and basic principles of natural bias.

Applicants submitted that;

“Section 45 of the Traditional Leaders Act prevents traditional leaders from standing for or holding any political office as President, Parliamentarian or Councillor while they hold office

as traditional leader. It also proscribes participation in political activities by Chief including canvassing, serving as election agents or manager for any candidate, for the election as State President, member of Parliament or Councillor. But, like all other citizens the proviso in section 45 guarantees for traditional leaders the right to exercise their right to vote in any National or Local Government election or referendum.”

The applicants also submitted, in its heads of argument that a rule excluding the right of traditional leaders from participating in and becoming members of political parties is a law of general application in terms of s 86 of the Constitution in that it applies to all traditional leasers without distinction or discrimination.

The purpose of the limitation is to ensure that traditional leaders remain independent and impartial. It is intended to ensure that as an logistical institution traditional leadership is kept outside the toxic policies of political parties thereby retaining the dignity and respect that traditional leaders command;

“It is submitted that a rule excluding the right of all traditional leaders from participating in partisan politics and becoming members of political parties is a law of general application in terms of section 86 in that it applies to all traditional leaders without distinction or discrimination. The purpose of the limitation is to ensure that traditional leaders remain independent and impartial. It is intended to ensure that as an important institution, traditional is kept outside the toxic politics of political parties, thereby retaining the dignity and respect that traditional leadership commands.”

Interpreting the Constitution of Zimbabwe

In its heads of argument the applicant submitted that this case is also important in so far as the interpretation of the Constitution of Zimbabwe. The applicant cited s 46 of the Constitution which gives guidance as to how the Constitution should be interpreted.

Section 46 of the Constitution provides guidance as to how the Constitution should be interpreted. Section 46 provides that when interpreting the declaration of rights the court:

- “ a) must give full effect to the rights and freedoms enshrined in this chapter.
 - b) must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3.
 - c) must take into account international law and at treaties and conventions to which Zimbabwe is a party:
 - d) must pay due regard to all the provisions of this Constitution in particular the principles and objectives set out in Chapter 2: and
 - e) may consider relevant foreign law
in addition to considering all other relevant factors that are to be taken into account in the interpretation of a Constitution.
- (2) when interpreting an enactment, and when developing the common law and customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter.”

The applicant in its heads of argument also cited the cases of *Hewlett v Minister of Finance & another* 1981 ZLR 571 and *State v ZUMA and others* 1995 (2) SA 642. In *Hewlett v Minister of Finance & another* 1981 ZLR 571

This court has already referred to the approach used by MALABA J (*supra*) in the case of *Loveness Mudzuri & Ruvimbo Tsopodzi v Minister of Justice Legal & Parliamentary Affairs N.O. & Ors* (*supra*).

It is this court's observation that the general trend in interpreting Constitutions is now a progressive move away from the literal approach "Literalism" towards a more "purposive" and broader approach such as that espoused in the approach taken by MALABA J in the aforementioned case.

In the present case this court holds that the applicant has shown that the remarks made by the first respondent directly affected it and in the alternative infringed upon the rights of the community at large or "a significant section of the community". There was a violation of the Constitution by the first respondent.

THE REMEDY

This court accordingly holds that the applicant is entitled to the relief that it sought.

In the final analysis this court accepts that section 85 of the constitution provides that any persons listed in the section may approach a court alleging a breach of the declaration of rights, and the court may grant appropriate relief.

Appropriate relief will in essence be the relief that is required to protect and enforce the Constitution.

Accordingly, in the present case this court holds that the relief sought is appropriate as it strikes at the heart of the infringement.

This court accordingly grants the relief prayed for in terms of the Amended Draft Order.

Mupanga, Bhatasara Attorney, applicant's legal practitioners