LIVISON CHIKUTU
and
PHENEAS CHITSANGE
and
ALBERT DHUMELA
versus
MINISTER OF LANDS, AGRICULTURE, WATER, CLIMATE & RURAL RESETTLEMENT
and
MINISTER OF LOCAL GOVERNMENT & PUBLIC WORKS
and
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE
and
ATTORNEY GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 12 October 2021

Date of written judgment: 5 January 2022

Opposed application

Mr *T. Biti*, for the applicants
Mrs *O. Zvedi*, for the respondents

MAFUSIRE J

[1] This is a constitutional application. The applicants want s 4 and s 6(1)(b) of the Communal Land Act [*Chapter 20:04*] declared *ultra vires* the Constitution of Zimbabwe. The draft order does not identify which particular sections of the Constitution the impugned provisions allegedly conflict with. But according to the founding affidavit, the impugned provisions are an infringement of the applicants' right to life; their right to human dignity; their right to property; their right to equal protection and benefit of the law; and their right to culture and language, allegedly as protected by s 48; s 51; s 72; s 63; s 56(1) and s 68 of the Constitution.

[2] Section 4 of the Communal Land Act vests all communal land in the President, the third respondent herein. The provision reads:

> "**4 Vesting of Communal Land**
>
> Communal Land shall be vested in the President, who shall permit it to be occupied and used in accordance with this Act."

[3] Section 6 of the Communal Land Act empowers the President to make additions to or make subtractions from communal land. The impugned provision reads:

> "**6 Additions to and subtractions from Communal Land**
>
> (1) Subject to this Act … … , the President may, by statutory instrument—
> (a) ... … … …;
> (b) after consultation with any rural district council established for the area concerned, declare that any land within Communal Land shall cease to form part of Communal land."

[4] The Communal Land Act defines 'Communal Land' as consisting of land which, immediately before the 1st February, 1983, was Tribal Trust Land in terms of the Tribal Trust Land Act, 1979 (No 6 of 1979), subject to any additions thereto or subtractions therefrom made in terms of s 6. In terms of the Tribal Trust Land Act, tribal trust land consisted of land which, immediately before the appointed day[1], was Tribal Trust Land in terms of the Land Tenure Act [*Chapter 148*], subject to any additions thereto and subtractions therefrom made in terms of that Act. Tribal trust land, according to the Tribal Trust Land Act, vested in the President.

[5] According to the uncontroverted facts presented by the applicants, they are all members of an ethnic community in Zimbabwe called the Hlengwe Shangaani. This community occupies the south eastern Lowveld of Zimbabwe: mainly areas bordering, or falling within Chikombedzi, Chiredzi, Gonarezhou, Hippo Valley, Malilangwe, Mwenezi and Triangle, along rivers such as Save, Runde and Limpopo. This ethnic group is also found in parts of Mozambique and South Africa. It traces its history to more than 500 years ago in the parts that they are settled in. It claims occupation of the lands in question well before the advent of colonialism in the 1890s. It even claims occupation before the seismic *Mfecane* migration that happened in

[1] The day the Act would come into operation

Southern Africa in the 19th century when large swathes of ethnic groupings escaped with their leaders from Tshaka, the ruthless military ruler from Zululand. The migrants moved to occupy lands north of rivers Limpopo and Zambezi in parts of present day Zimbabwe, Mozambique, Malawi and Zambia.

[6] What has triggered this constitutional onslaught by the applicants are a series of legal instruments passed by central Government, through the respondents, in February and March 2021. First, was Statutory Instrument 50 of 2021 on 26 February 2021 (Communal Land [Setting Aside of Land] [Chiredzi] Notice, 2021). In terms of it, an improperly described Minister of Local Government, Urban and Rural Development purportedly gave notice of the setting aside of 12 940 hectares in the administration district of Chiredzi for the purpose of 'lucerne production'. The notice went on to order that any person occupying or using the affected land otherwise than by virtue of a right held in terms of the Mines and Minerals Act [*Chapter 21:05*] should depart permanently with all his or her property from the land by the date of the publication of the notice, unless he or she acquired rights of use or occupation in terms of s 9(1) of the Communal Land Act.

[7] Then there was Statutory Instrument 51 of 2021 on the same date (Communal Land [Excision of Land] Notice, 2021). In terms of it, the President, acting in terms of s 6(1)(b) of the Communal Land Act, excised the same land and declared that it had ceased to be part of Chiredzi Communal Land. The obnoxious order directing occupiers and users of the affected land to depart immediately with their property was left out.

[8] Then on 9 March 2021 was Statutory Instrument 63A of 2021 (Communal Land [Setting Aside of Land] [Chiredzi] Notice, 2021: Correction of Errors). It corrected the mistake in SI 50 of 2021. Where the latter had referred to the Minister of Local Government, Urban and Rural Development, and to its purpose as being lucerne production, the correcting instrument now referred to the Minister of Local Government and Public Works, the second respondent herein. The 'purpose' was

changed from 'lucerne production' to 'establishment of an irrigation scheme'. Again the order to users and occupiers to depart immediately was left out.

[9] Finally, on 16 March 2021 was Statutory Instrument 72A of 2021 (Communal Land [Setting Aside of Land] [Chiredzi] Notice, 2021). In terms of it, the second respondent gave notice in terms of s 10 of the Communal Land Act for the setting aside of the same piece of land for the purpose of establishing an irrigation scheme. It went on to repeal SI 50 of 2021. Again no mention was made of the order for users and occupiers to depart immediately.

[10] The applicants' grounds for the constitutional challenge are multiple. **Both parties have abandoned all the preliminary objections that they had initially raised in the papers**. For *locus standi*, **the applicants** rely on s 85 of the Constitution. This is the provision that entitles any of the persons listed therein to approach a court for appropriate relief where they allege a breach of a fundamental right or freedom enshrined in the Bill of Rights. They include any person acting in their own interest; any person acting on behalf of another person who cannot act for themselves; any person acting as a member, or in the interests of a group or class of person; or any person acting in the public interest. The respondents have not contested the applicants' *locus standi*.

[11] Distilled, the applicants' case, as I have understood it, and in my own words, is this:

- Given the history and manner of occupation of the lands in question by their ancestors, it is wrong to classify their territories as communal land within the meaning of the Communal Land Act. Their ancestors were not placed in those areas by colonialism. Their lands are not tribal trust land as is the case with the majority of the other ethnic groups in Zimbabwe. Their land was not artificially created and carved out by the Land Apportionment Act. They have owned it in their own right as indigenous people.

- For the respondents to strip them of their land, or to displace them in the manner, and for the purposes intended, is to virtually pass the death sentence upon the entire community. The community occupies the land of their ancestors. It ekes out a living from pieces of lands ranging in sizes from about 12 hectares to about 16 hectares. The community comprises peasant farmers. They practise mixed farming. This consists of, among other things, crop and livestock production. Some members of the community

are contract farmers for Delta Beverages for the production of sorghum. They rely on their land for virtually everything in life: food; medicines; culture; education; dignity; marriage, you name it.

- The intended move by the respondents is an unlawful deprivation of their right to property as enshrined in s 71 and s 72 of the Constitution. In terms of the Constitution, no person may be compulsorily deprived of their property except in terms of a law of general application and for the public good, and on reasonable notice. Whilst the Land Acquisition Act [*Chapter 20:10*] may be such a law of general application, the Communal Land Act is not. However, the Communal Land Act is exempt from the Land Acquisition Act.

- The Communal Land Act has a violent, obnoxious and racist origin. It is a racist colonial relic. It is most shocking and inexplicable that a black government, born out of a bloody and protracted war of liberation against the white settler regime over the land question, has decided to retain this racist construct in its statute books. The vesting of communal land in persons other than the original owners stemmed from the racist philosophy that the aboriginal owners of that land, the indigenous black Africans, were barbarians with no grain of civilisation. Their backward state of development prevented them from treating land as a commercially tradable commodity that was capable of individual ownership.

- The racist colonial notion that natives had no concept of private ownership of land found expression in various racist pieces of agrarian legislation, writings and judicial pronouncement. It all started with the Berlin Conference in 1884 – 1885. European powers carved out for themselves swathes of the African continent on the notion that blacks were barbaric, backward and not capable of owning land. The British colonised what is present day Zimbabwe. They allowed the imperialist and adventurist Cecil John Rhodes and his British South Africa Company to cheat, rob, steal and plunder the African of his land. Blacks were driven and penned into unproductive 'native reserves'.

- Regarding legislation and/or legal instruments, it all started with the Morris Carter Commission of 1925. It was a Commission set up to debate the issue whether blacks and whites could live side by side. From the premise that the black man, even under the veneers of civilisation, always reverted to his congenital barbarism, the African was pushed into unfertile tribal lands that were held in trust for him to minimise contact with the civilised white settlors. The fertile lands were reserved for the white settlors. Then followed a series of racist legislation which condemned the indigenous black population to those wretched lands. Among others, there was the Land Apportionment Act of 1930. Then the Land Husbandry Act of 1951; the Land Tenure Act, and then the Tribal Trust Land Act. All these were designed to segregate land into, among others, white and native areas. The whites took the lion's share of all the fertile lands. The blacks were condemned to eke out a living in overcrowded, dry and extremely unfertile territories.

- The decision of the Privy Council in England in the case of *In re Southern Rhodesia* (1919) AC 211 gave judicial pronouncement to the racist construct that separate ownership of land was an alien concept to the native who was at the lower end of the scale of social organisation and civilisation.

- With the attainment of independence in Zimbabwe in 1980, the new black Government merely renamed the Tribal Trust Land Act the Communal Land Act. But it retained completely intact the racist provision depriving indigenous people occupying communal lands the right to have titled deeds. It is irrational and in defiance of logic that white settlors who forcibly took away black owned farms or built towns and townships in black areas could own that land privately, yet indigenous owners settled in so-called reserves just across those farms or townships could not, and still cannot, obtain the right to private title. There is no logic in a situation where an African can acquire title to a small piece of land that he or she buys, or is allocated to him or her, in a township like Tshovani in Chiredzi, or Borrowdale in Harare, or Makokoba in Bulawayo, but with the same African, a stone throw away in Chilonga Communal Land, being unable to acquire similar title to the land of his or her birth.

- Internationally, the various conventions and charters on human and people's rights have guaranteed the rights of access to, and the use of land and other natural resources held under communal ownership. Several other countries have grappled with agrarian reforms but in a rational and thoughtful manner. The applicants are entitled to the right to self-worth and human dignity in terms of the Constitution. The intended move by the respondents deprives the applicants and their community of the right to live on their lands. They will be moved without compensation. They have not been properly consulted. Government functionaries have merely appeared on the scene to inform them of the intended development. Lucerne production, or the purported irrigation scheme, are intended to benefit rich foreigners, not the local community.

- The agrarian reform undertaken by the Government from 2000 is an unfinished business. Government must issue title deeds or tradable certificated of occupation which can be hypothecated. There can be established a controlled land market for communal lands. Such a controlled market will ensure that foreign land barons do not buy out communal land. In countries such as Ghana and Kenya, the land tenure systems are such that indigenous communities own their land which they can parcel out and sell subject to control by the community leaders.

[12] The respondents contest none of the above narrative. Through the Attorney-General, the fourth respondent herein, who has deposed to an affidavit on behalf of all of them, the substantive case for the respondents, again as I have understood it, and in my own words, is this:

- Section 4 and s 6(1)(b) of the Communal Land Act are not *ultra vires* the Constitution. There is nothing wrong in vesting communal land in the State President.

Residents of communal lands have the right to use and occupy that land subject to the administrative oversight imposed by the Act. This is designed to ensure orderly development of communal lands. Residents of properly established townships in urban areas are governed by a different legal regime altogether. They cannot be compared to residents of communal lands. Communal lands are inhabited by ethnic communities with common customs and traditions. To allow private ownership of those territories poses grave danger to the customary practices, traditions and livelihoods of those people. Vesting of such lands in the President is done to ensure orderly development. The President does not own the lands in his personal capacity, but by virtue of the powers vested in him as the State President.

- No development of any significant proportion occurs in communal lands without prior and proper planning and consultations with the community leaders and the local authorities. This is what has happened in the case of Chilonga. The initial reference to 'lucerne production' was a mistake. What is intended to be done is to develop a vast irrigation scheme for the benefit of the local community. No one will be displaced as the land that has been identified is largely uninhabited. Those that may be affected will be relocated and compensated adequately in accordance with the provisions of the Act. Such kind of development is not uncommon. Sometimes it is necessary to bring vast tracts of land that may be lying idle into production for the benefit of the affected communities and the country as a whole. It has happened with the Kanyemba area, the Bulawayo Kraal and the Batoka in Hwange. The intended irrigation project in Chilonga will be an extension of the Tugwi-Mukosi project. To the extent that it overlooks the obvious benefits of the intended project, namely the generation of foreign currency, overall rural development, the provision of basic amenities like clinics, schools and better housing, and the establishment of an economic hub in Chilonga, the application is myopic. It is frivolous and vexatious.

- The Communal Land Act ensures that there is proper management of resources in the communal areas. Communal land encompasses a whole lot of other key natural resources such as wild life and natural forests which require protection. Traditional leaders in the communal areas interface with rural district councils to ensure that there is proper use of the land. The Act is a self-contained model for rural development and transformation.

[13] The application is a compelling dissertation on the history of the occupation of the territory that is now present day Zimbabwe; the savagery and ruthlessness that was associated with the forced dispossession of the local population of their resources, including land and cattle, and their virtual enslavement in the land of their births, all this by the incoming foreign white settlors. There can be no question that the Communal Land Act, particularly the vesting of title of such lands in any person other than the occupiers and users of that land, has its origins in the pathological hatred of the aboriginal races by the invading forces and the retrograde, self-serving

conceptions and philosophies concerning the indigenous African. He was viewed as a congenital barbarian, a sub-human being and an uncivilised savage who, among other despicable traits, did not recognise land as being capable of private ownership, and therefore a commercially tradable commodity. The history presented by the applicants in this application rings true for virtually every piece of the African continent that was under colonialism. It is virtually impossible to narrate it with dispassionate detachment without getting emotionally entangled.

[14] However, when it comes to the nuts and bolts of the case, and the remedy the applicants seek, it becomes a different ball game altogether. There are simply some things or problems that the law and the courts alone may not accomplish or resolve. There are simply some issues that a court alone may be ill-equipped to provide a solution to. There could be some questions that the law and the courts are perfectly poised and empowered to resolve. Then there are others that require a political solution. Sometimes politics has to speak first, and only then may the law take over. Where politics has not yet spoken, or where it has spoken something else, there may well be a lacuna in the law. The courts may be ill-equipped to fill up the gap. Where a matter is not capable of judicial resolution, the court may decline jurisdiction. I must explain what I mean.

[15] The Constitution, in Chapter 8, vests judicial function in the courts. Courts exist to exercise judicial power of the State. But in a constitutional democracy, the doctrine of the separation of powers confines the courts to their lane of operation. This was underscored in *Doctors for Life International* v *Speaker of the National Assembly & Ors* 2006 (6) SA 416 (CC) at para 37 as follows:

> "Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution."

[16] This principle was also clearly articulated in *International Trade Administration Commission* v *SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) at para 95:

> "Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."

[17] Courts do recognise the political question doctrine. There are certain decisions that are better left to Parliament or the Executive to resolve. In *Nyambirai v National Social Security Authority & Anor* 1995 (2) ZLR 1 (S) the Supreme Court, at p 9H – 10B, put it as follows:

> "I do not doubt that because of their superior knowledge and experience of society and its needs, and a familiarity with local conditions, national authorities are, in principle, better placed than the Judiciary to appreciate what is to the public benefit. In implementing social and economic policies, a government's assessment as to whether a particular service or programme it intends to establish will promote the interest of the public, is to be respected by the courts. They will not intrude but will allow a wide margin of appreciation unless, convinced that the assessment is manifestly without reasonable foundation."

[18] In the case of *Commercial Farmers' Union v Minister of Lands & Ors* 2000 (2) ZLR 469 (S) it was recognised that the land issue lies in the political domain to resolve. It was categorically accepted as fundamentally true that the land issue was a political question. It was said that the political method of resolving that question was by enacting laws. To this extent, it was recognised that the Government had just done that. It had enacted and amended the Land Acquisition Act. The only problem was that the Government was not obeying its own laws. When a Government does not obey its own laws there can be no question of the courts keeping mute in their lane. They will speak out. They will call the Government to account. It is their constitutional mandate.

[19] In the present case, I am not convinced that the impugned sections in the Communal Land Act are *ultra vires* the Constitution. The Act may have an obnoxious and racist parentage. But at independence in 1890 and beyond, up to the present day, the Government, in its infinite wisdom, decided to retain the Tribal Trust Land Act intact, albeit under a new title. It decided to leave the concept of vesting of communal lands

in the State President intact. That was a political decision. The respondents have argued why that was so. The applicants dismiss that argument. But I would think that without some sort of commission of enquiry on the whole agrarian reform, especially as it applies to communal lands, this court may not be sufficiently qualified to provide a wholesome solution to the question of private ownership of communal lands.

[20] It is not an unreasonable fear that the granting of title *carte blanche* to users and occupiers of communal lands may result in undesirable consequences. For example, foreign land barons may end up owning vast tracts of communal land. This may disrupt the orderly customary way of life in those territories. If there are safe-guards that may be put in place, like what the applicants say happened in Kenya and Uganda, I just do not have sufficient information and knowledge of what they are. A holistic approach to the question is required instead of providing some random remedy under some constitutional fiat.

[21] The history of the occupation of the territories the applicants and their community hail from may be unique. The respondents have not contradicted it. But in my view, this does not distinguish such territories from being communal lands within the meaning of the Communal Land Act. They remain communal land. They are classified as communal land. It is the same with territories in other areas. The State President does not own them in his own personal capacity. There are parameters within that Act governing such vesting of ownership. There are measures within the Act governing the excision of any communal land, the addition to or subtraction from it. Where there are developments intended to be carried out in communal lands, such as have been touted in this application, there are administrative procedures that have to be followed. These may, or may not be adequate. The applicants insist that none of such procedures has been followed. But this is a question of fact. It does not determine the constitutionality or otherwise of the impugned provisions. I see no discrimination as against the applicants and their community as communal land dwellers.

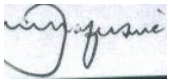
[22] The Executive and the Legislature are better placed than the courts to consider, on the basis of the material, information, the expertise, the resources, and so on, available to

them whether, in spite of the regrettable origins of the Communal Land Act, it is time that private ownership of communal territories is recognised so that individual title deeds can now be granted to the occupiers of such territories. It is not for the courts to decide or provide a solution under the guise of constitutionalism. It is a political question.

[23] The application cannot succeed. However, I disagree with the respondent's contention that it was frivolous and vexatious. It was not. It was public interest litigation. Such kinds of challenges may actually dog the courts in the future. Therefore, in dismissing the application, it is only fair that each party bears their own costs. The following order is hereby made:

The application is hereby dismissed but with no order as to costs.

5 January 2022



Tendai Biti Law, legal practitioners for the applicants
Civil Division of the Attorney General's Office, legal practitioners for the respondents