HB 90/17
HC 2940/15

LOVEMORE ZVOUSHE

And

LENATHI MOYO

Versus

TIMOTHY MOYO

And

THE CHAIRMAN
ASSEMBLY OF CHIEFS – MIDLANDS PROVINCE

And

DIRECTOR, TRADITIONAL LEADERS SUPPORT
SERVICES

And

THE MINISTER, RURAL DEVELOPMENT, PRESERVATION
OF NATIONAL CULTURE & HERITAGE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 31 MARCH & 27 APRIL 2017

Opposed Application

Siziba for applicants
J. Tshuma for 1st respondent
Mrs Hove for 2nd, 3rd and 4th respondent

MAKONESE J: The applicants claim that the Negove Chieftainship revolves around the Chedare, Mateveke and Nehundi families. The post of Chief Negove in the District of Mberengwa became vacant in 2012 following the death of Munyangati Moyo of the Mateveke family. On 19th March 2015 a meeting was convened at Mbuya Nehanda High School at Mberengwa for the purpose of selecting of an appropriate person to assume the position of substantive Chief Negove. At that meeting 1st respondent was duly nominated for appointment

as Chief Negove. On 13 July 2015 the President of the Republic of Zimbabwe acting in terms of section 3(1) of the Traditional Leaders Act (Chapter 29:17) appointed 1st respondent as substantive Chief Negove. A meeting was held at Mponjami Dam in Mberengwa on the 16th August 2015 where the Negove people, including the applicants and respondents' family members were finally informed that 1st respondent had been appointed substantive Chief Negove. Applicants dispute the appointment of 1st respondent as substantive Chief Negove and have filed this court application seeking the following relief:

> "It is hereby ordered that:
>
> 1. 2nd and 4th respondents be and are hereby ordered to make a recommendation to the President of Zimbabwe within ten (10) days from the date of this order to enable him to resolve the Negove chieftainship dispute.
> 2. 2nd and 4th respondents are ordered to pay costs of suit on an attorney and client scale."

This application is opposed by the 1st respondent on various grounds. 1st respondent avers that this application is an abuse of court process by both applicants, in that they have neither alleged nor established that they personally are eligible to be appointed to the Negove Chieftainship. They have not been recommended for such appointment. 1st applicant does not lay a claim to be recommended for appointment. He purports to represent a family. He personally does not assert, let alone prove a right to be recommended for appointment. In so far as 2nd applicant is concerned he clearly states that it is a person from the Nehundi family who is eligible for the chieftaincy. He is not claiming the post of Chief Negove. It is not quite clear how his family got involved in the dispute.

The 1st respondent raises a number of points *in limine* which I need to examine before dealing with the merits.

Non citation of the President

1st respondent contends that the non-citation of the President renders the application fatally defective. In response applicants argue that it was not necessary to cite the President as

this is not an application for a review of the President's appointment. It is common knowledge that the appointment of 1st respondent as substantive Chief Negove followed upon a recommendation of the Provincial Assembly of Chiefs in terms of section 283 of the Constitution of Zimbabwe Amendment (No. 20) 2013. That the President is an interested party to these proceedings is beyond doubt. The order sought by the applicants is for an order that a recommendation be made to the President within ten days "to enable him to resolve the disputed Negove Chieftainship dispute." It cannot be argued logically that the President has no substantial interest in the matter. The question whether the non-joinder of the President is fatal was discussed in a number of previous cases. In *Wakatama & Ors* v *Madamombe* SC-10-12, the court held that the issue is simply disposed of by reference to rule 87 of the High Court Rules which provides as follows:

> "87 (1) No cause or matter shall be defeated by reason of the mis-joinder or non-joinder of any party and the court may in any cause or matter determine the issues or question in dispute so far as they affect the rights and interests of the parties to the cause or matter.
>
> (2) At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application –
>
> (a) …
>
> (b) order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, to be added as a party …"

The above provision is clear and allows no ambiguity. In the event, the non-citation of the President in this matter does not render the application fatally defective. This position was restated by the Supreme Court in the case of *Sobusa Gula Ndebele* vs *Chinembiri Bhunu* SC-29-11.

I would, therefore dismiss this point *in limine*.

Whether the matter should have been brought on review

The 1st respondent contends that the application before this court is an application for review which is disguised as a court application. In essence the applicants are asking this court to set aside a recommendation made to the President by the Provincial Council of Chiefs on the grounds of alleged gross irregularities, bias and fraud. These are grounds for review. The substantive relief sought by the applicants purports to be a mandamus, and yet in fact what should be sought is a review in terms of the High Court Rules. I entertain no doubt that the application before the court ought to have been one for review. In adopting the wrong procedure, the applicants have placed themselves in a difficult position in that the application is clearly not properly before the court. This application could be disposed on this point alone.

Whether there are material disputes of fact

The 1st respondent has averred that there are material disputes of fact which cannot be resolved on the papers. These material disputes relate to the following issues:

(a) What is it that happened on the 19th March 2015? 1st respondent disputes the factual assertions by the applicants. The various letters written by the applicants' legal practitioner who was not in attendance at the meeting are not minutes of the proceedings of that day. It amounts to hearsay.
(b) The entitlement of applicants' families to succeed to the Negove Chieftainship is disputed. The existence of these families in the Negove genealogy is disputed. The 1st respondent also disputes the existence of the Chedare family, which he is said to belong to.

The disputes are material and were known to the applicants at the time they filed the application. In *Midzi* v *Estate Late Brian Harry* HH-123-06, MAKARAU J (as she then was) states at page 2 of the cyclostyled judgment as follows:

> "*The general rule is that application or motion proceedings should not be used where there is likely to be a material conflict in the evidence deposed to in affidavits attached to the application …"*

See also *Mashingaidze* v *Mashingaidze* 1995 (1) ZLR 219 (H) and *Masukusa* v *National Foods Ltd & Anor* 1983 (1) ZLR 232.

The applicants argued that this application is primarily for an order compelling 2nd and 4th respondents to invoke the provisions of section 283 (a) (ii) of the Constitution of Zimbabwe in referring the dispute to the President. This argument is flawed for a number of reasons.

(a) The 2nd and 4th respondent held a meeting on 19th March 2015 at Mberengwa whose resolution was to recommend the appointment of 1st respondent as Chief Negove.
(b) At the meeting of the 19th march 2015, there was no dispute declared by any of the papers at least from the papers filed of record.
(c) The appointment of 1st respondent by the President as Chief Negove was effected on the 13th July 2015.
(d) On 16th August 2015 a meeting was held at Mberengwa to announce the appointment of 1st respondent as Chief Negove.
(e) The appointment of 1st respondent as Chief Negove was done in terms of the law.

It seems to me that the applicants are challenging the recommendation made to the President following the meeting of the 19th March 2015. If that is the case then they ought to have filed an application for review within the prescribed time limits. As I have already indicated there are material disputes of fact as to exactly what transpired on the 19th March 2015. The applicants allege that the appointment of 1st respondent did not follow the traditional practices of the Negove clan. If that is the position of the applicants this court cannot entertain that dispute on the basis of the papers without hearing oral evidence. In any event, and regard being had to the provisions of section 283 (c) (ii) of the Constitution of Zimbabwe, such a dispute would have been referred to the President for resolution, if it had become apparent to 2nd and 4th respondents that a genuine dispute did in fact exist before the recommendation for appointment was made.

Disposition

I conclude that the application is clearly vexatious and meant to harass the respondents. The applicants adopted the wrong procedure in bringing this application. The application before the court is a disguised application for review bearing the label of a court application. There are material disputes of fact which were apparent to the applicants when the application was filed. I have been requested to order costs *de bonis propriis* against the applicant's legal practitioner. I do not think there is sufficient justification to order costs against the legal practitioner personally. It is my view, however that the respondents have been put out of pocket unnecessarily. 1st respondent did file papers in opposition and raised the issue of the propriety of this application. 2nd to 4th respondent though represented at the hearing indicated that they would be bound by the order of the court.

In the result, I make the following order.

1. The application be and is hereby dismissed.
2. The applicants are ordered to pay 1st respondent's costs on the legal practitioners and client scale.

H. Tafa & Associates c/o Mlweli Ndlovu & Associates, applicant's legal practitioners
Webb Low & Barry 1st respondent's legal practitioners