

PHINIEL MUDHUMO
and
ANTIBHEDIFIA VURAYAI
and
CHRISTOPHER MAPHOSA
versus
REGINA SIBANDA

HIGH COURT OF ZIMBABWE
WAMAMBO J & ZISENGWE J
MASVINGO, 10 March, 2021 and 26 August, 2021

Civil Appeal

I. Moyo for the appellants
N. Chisanga, for the respondent

WAMAMBO J. This is an appeal from the Magistrates Court sitting at Mwenezi. The respondent made an application for a “Peace Order” and interdict. The application was opposed. The court *a quo* found for the respondent and made the following order:-

“Application for interdict is hereby granted as follows-

- 1. Respondents are hereby ordered not to disrupt meetings called by applicants pursuant to her duties as village head.*
- 2. No order as to costs.”*

The basis of the application before the court *a quo* can be summarised as follows:-

The respondent is village head Nyimo since 2007. Her people known as Chirongedze were resettled in the area, over thirty years ago having been displaced to make way for Manyuchi dam. Chief Maranda filed a supporting affidavit confirming respondent as village head Nyimo. Respondent’s village falls under headman Ruvengo who falls under Chief Maranda. The three

respondents claim to be the legitimate village head, secretary and deputy village head respectively. Each time she holds a meeting the respondents hurl insults at her in public and among other insults refer to her as a prostitute. At various meetings for food aid, Presidential Input Scheme and a meeting requested for by the Mwenezi Development Training Centre the respondents disrupted the meetings. She reported the respondent's activities to Chief Maranda and the District Administrator to no avail.

On the other hand the respondents raised points *in limine*. They aver that the respondent proceeded to combine an application for peace order and an application for an interdict which applications have distinct requirements. They aver that the application is skirting the real issue which is the issue of who between 1st appellant and respondent is the legitimate village head. Further that respondent sought to resolve a leadership dispute through this application. It is averred that there are material disputes of fact and that the requirements of an interdict were not met.

The court *a quo* found that the issue of the application being bad at law was unmeritorious as the order sought is clear from the draft order. That it is styled as an application for peace order and interdict is but "just a name". The court *a quo* then dealt with the merits. The court *a quo* found that respondent proved that she was a village head while the appellants did not proffer any evidence as to who as opposed to respondent is the legitimate village head. Relying on Order 22 Rule 5(c) of the Magistrates Court (Civil) Rules 2018 the court *a quo* granted an order as varied to the extent as referred to earlier in this judgment.

It is important to note that appellants' argument relied extensively on the allegation that respondent failed to prove that she is a village head. 1st appellant filed a certificate of appointment which reflects that he is a presiding officer of the Wanezi Block see "Annexure A".

However what is noteworthy is the fact that appellants concentrated on the leadership issue and barely scratched the issue of the alleged insults and disturbances at meetings.

In response appellants tersely responded to these allegations by offering a bare denial.

I note that the parties are at loggerheads over who is the village head and what her duties are. Sight must however not be lost on the real issues to be determined in this case.

The grounds of appeal revolve around the existence of disputes of fact and the combination of two applications in one. The fourth ground of appeal is that the court *a quo* misdirected itself

by declaring the respondent as village head despite appellants proving that the area in question is a resettlement area.

I am inclined to agree with the court *a quo*'s finding that the title of the application may be misleading but the draft order and the founding affidavit clarify this issue. The application was basically an interdict.

Realising that the issue was essentially a power struggle of who is the village head the court *a quo* went on to effectively declare respondent as the village head. The issue of who is the village head can clearly be processed through a different channel among others an application for a declaratur before the High Court.

By effectively declaring respondent a village head in the order the court *a quo* clearly misdirected itself. The court *a quo* should have concentrated on the real issue before it which was to stop the interruptions and insults allegedly hurled at respondent by the appellants.

In the determination of whether or not respondent had a clear right the court *a quo* fell into error.

The supporting affidavit of Chief Maranda was heavily relied on by the court *a quo* in the determination. This reliance was erroneous. The Traditional Leaders Act [*Chapter 29:17*] in section 11 provides as follows:-

“11(1) Subject to subsection 2 the Secretary shall appoint a sufficient number of persons nominated by a headman, with the written approval of the Chief of the area concerned, as village heads for each village to assist the headman to carry out his duties

(2) Before appointing any person as village head in terms of subsection (1) the Secretary shall write to the headman concerned to nominate a person for appointment and unless in the opinion of the Secretary, there are good reasons to the contrary, the Secretary shall appoint as village head any person so nominated by the headman.”

A reading of the above clearly reflects that the person at the centre of the appointment of village head is the headman.

The Secretary invites the headman to nominate a village head, then the Chief approves the said appointment in writing and then the Secretary appoints the headman unless there are good reasons to the contrary.

The Secretary and the headman play a pivotal role. It is clear that the Chief plays the role of a written approval of the persons nominated by the headman. There is nothing that was proffered in the application before the court *a quo* proving that respondent was nominated by the headman. There is no supporting affidavit from the headman. There is a requirement that the Chief has to give a written approval of the nominated village head. This written approval was not part of the papers filed by the respondent. The Secretary in making the appointment of a village head clearly has a paper trail to consider. The said supporting affidavit does not allude to any of the requirements of section 15 as having been satisfied.

It follows from the above that the respondent did not establish a clear right. The court *a quo* against this yawning gap went on to indirectly issue a declaratur which a Magistrates Court cannot at law grant. Having failed to establish a clear right the court *a quo* misdirected itself by making an order effectively installing the respondent as a village head.

However it should be noted that not only a village head or a person in authority needs the protection of a court order for that harassment to be desisted from. The respondent established the disruptive actions of the respondents. She gave details of the various occasions when this occurred and what action she took in response thereto. On the other hand appellants were satisfied to concentrate on the issue of who should be the village head. They did not meet the allegations of disruptive behaviour except to deny it tersely.

I find that the respondent actually proved that the appellants disrupted meetings that she called for.

If the appellants did not and are not inclined to such disruptive behaviour an order interdicting them from such behaviour cannot be resisted by them. In fact it should be welcome to any peace loving person.

I will borrow from MATHONSI J (*as he then was*) in the matter of *Sithabiso Monga v Nobandile Moyo* HB 282/17 wherein at page 3 he said:-

“In that regard I am unable to understand why a party who has been ordered to keep the peace resort to a preventive order would appeal against such an order.

It is a truism that in any civilised society citizens must forever conduct themselves in a peaceful manner towards one another. On what basis therefore can a citizen be allowed not to be peaceful towards another as to be entitled to overturn a court order merely underscoring what is standard behaviour in a civilised society? Is the appellant suggesting

that she should be allowed to breach the peace? It cannot be a basis for setting aside a peace order to say that the respondent is the one who should have been ordered to keep peace.”

By parity of reasoning the above applies equally to the instant case. However there is need to amend the court *a quo*'s order. The court *a quo* effectively declared respondent as village head which I have found to be a misdirection.

I am mindful that in the first place the respondent had applied for an order interdicting the 1st appellant not to act as a village head and all respondents not to disrupt meetings called by applicant s village head.

In exercising powers bestowed upon it the court *a quo* should have excised the portions dealing with the appointment of respondent as village head.

It should be stated from the onset that I am not installing respondent as a village head and to run away from that implication. I will exercise powers as derived from Section 31 of the High Court, Act [*Chapter 7:06*] which provides as follows:-

“31(1) On the hearing of a civil appeal the High Court –

(a) Shall have power to confirm, vary, award or set aside the judgment appealed against or give such judgment as the case may require.”

In exercising powers as per Section 31(1) above I will amend the court *a quo*'s order to the following extent to meet the justice of the case.

It be and is hereby ordered as follows:-

1. The order granted by the court *a quo* be and is hereby set aside and substituted with the following –

“Respondents be and are hereby ordered not to disrupt meetings called by applicant.”

2. There be no order as to costs.

WAMAMBO J.

ZISENGWE J. agrees

Mutendi, Mudisi and Partners, appellants legal practitioners
Chuma, Gurajena and Partners, respondent's legal practitioners