
INTERROGATING THE INVOLVEMENT OF TRADITIONAL LEADERS IN ELECTORAL PROCESSES IN ZIMBABWE

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Abstract

The partisan conduct of traditional leaders during electoral process contravenes national law and has been a source of electoral disputes in Zimbabwe. However, there remains a dearth of legal studies, with a nuanced analysis of cases regarding this conduct. Using court cases, extant literature and election reports, and this chapter explores the legal expectations for the role and conduct of traditional leaders during electoral processes. The Chapter argues that the Constitution and relevant legislation clearly and unambiguously define the role of the institution of traditional leadership in electoral processes. Further, the chapter argues that despite being rigid in their application of procedural rules, Zimbabwean courts have made some key judgements against the partisan conduct of traditional leaders. The challenge however remains that of traditional leaders who defy court orders. The chapter vouches for relaxation of court rules and procedures, and demands respect for and enforcement of court judgements.

1. INTRODUCTION

In some parts of Africa, traditional leaders remain the main form of government for the rural populace. This is the case in Zimbabwe, where the Constitution,¹ read together with the Traditional Leaders Act [Chapter 27:17], establishes traditional leadership. These laws prohibit traditional leaders from engaging, directly or indirectly, in partisan politics.² However, existing literature³ and election reports⁴ point to traditional leaders' active participation in

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¹ Section 280 – 283 of the Constitution of Zimbabwe.

² Section 281 of the Constitution of Zimbabwe.

³ L Ntsebeza *Democracy Compromised: Chiefs and the Politics of the Land in South Africa's National and Provincial Elections* (2005) 43; C Logan 'The Roots of Resilience Exploring Popular Support for African Traditional Authorities' (2015) 27 *Journal of Contemporary African Studies* 221; T Chigwata 'The role of traditional leaders in Zimbabwe: Are they still relevant?' (2016) 20 *Law, Democracy & Development* 71; G, Mwonzora & E Mandikwaza, 'The Menu of Electoral Manipulation in Zimbabwe: Food Handouts, Violence, Memory, and Fear – Case of Mwenezi East and Bikita West 2017 by-elections' (2019) 54 *Journal of Asian and African Studies*, p 1130.

⁴ *European Union (EU) '2018 European Union Election Observation Mission: Final Report, Republic of*

politics. This is especially true with respect to influencing electoral outcomes in favour of the ruling Zimbabwe African National Union Patriotic Front (ZANU PF) party. Important as these studies are, however, they lack nuanced case law analyses that build jurisprudence on the involvement of traditional leaders in electoral politics.

This chapter therefore seeks to fill the void described above and provides analysis of the law *vis-a-vis* the practice, especially backed with cases on the conduct of traditional leaders in partisan politics. Thus, the chapter contributes to the existing literature on the legally defined role of traditional leaders *vis-a-vis* their conduct during elections in Zimbabwe. Beyond this debate, the chapter critiques existing jurisprudence with regards to traditional leadership's involvement in electoral processes, making use of judicial, quasi-judicial cases, and extant literature in Zimbabwe. A study of this nature builds a case for consolidation of democracy by imploring litigants to effectively implead for de-politicisation of traditional leaders, and the greater consolidation of inclusive and competitive democracy.

1.1. Methodology and structure of Chapter

Methodologically, the Chapter heavily relies on extant literature from books, journals, reports, legal documents, case laws, newspaper articles, and opinions of traditional leaders. This is in addition to the views of lawyers and individuals within civil society organisations involved in electoral politics and democratisation in Zimbabwe. The Chapter also benefits from the experience of the second author, who has been in electoral litigation during the 2008, 2013 and 2018 harmonised elections in Zimbabwe. The experiences of the first and third authors who once worked as Human Rights Officers responsible for handling complaints (election related complaints included) at the Zimbabwe Human Rights Commission was also important and immensely benefited the study.

The Chapter is divided into three sections. Section I is this introduction and background. Section II is an examination of legal instruments guiding the conduct of traditional leaders *against* the practice in Zimbabwe. Section III examines the existing jurisprudence on the involvement of traditional leaders in electoral politics. Section IV is the conclusion section, which summarises the discussion and proffers suggestions on entrenching the proper conduct of traditional leadership in electoral politics and democratisation.

2. CONCEPTUALISATION AND POLITICAL MANIPULATION IN COLONIAL AND POST-COLONIAL ZIMBABWE

Traditional leadership comprises of indigenous institutions of governance such as chiefs, headman and village heads. Zimbabwe's peri-urban and rural communities are manned by close to 2500 village heads, with each of these leaders overseeing close to 35 households.⁵ The

Zimbabwe Harmonised Election 2018' October 2018 https://eas.europa-eu/election-observation-mission/eom-zimbabwe-2018_en (accessed 20 February 2020) 1; *Zimbabwe Election Support Network (ZESN) Report of the Zimbabwe Electoral Support Network on Pre-Election Political Environment and Observation of Key Electoral Processes* (2018).

⁵ Centre for Conflict Management and Transformation (CCMT) *Role and responsibilities in rural local governance in Zimbabwe: parallels, overlaps and conflict* (2014) 10.

village heads report to a headman, who are close to 452 countrywide.⁶ A headman is a sub-chief who is accountable to the paramount chief of an area.⁷ By their nature, traditional leaders remain the most respected and immediate form of local government in many rural communities of Africa.⁸ The importance of this institution also emanates from its ability in many instances to deliver various governmental responsibilities where the State is absent or has a limited presence.⁹ In Zimbabwe, traditional leaders are the custodians of tradition, culture and community development in areas under their jurisdiction.¹⁰ They play both the executive and judicial roles in their communities, enforcing customary laws and settling customary law disputes.

Taking advantage of traditional leader's proximity to communities, and the respect they command in many rural and peri-urban areas, politicians have manipulated this institution as optimal agents for facilitating dissemination of political information and propaganda to the grassroots.¹¹ In many African nations, the compromised relationship between traditional leaders and political elites dates back to the colonial era. As Chigwata has noted 'successive governments in both colonial and independent Zimbabwe have sought to maximise this strength for their respective narrow political interests.'¹² In their efforts to consolidate power, the British, Portuguese and French colonialists used varied means, including indirect and direct rule systems, to co-opt traditional leaders into formal institutions. In so doing, they delegated power downward and used them to govern subjects,¹³ thereby securing reliable mouthpieces for their colonial agenda.¹⁴ In most cases, compliant traditional leaders were relied on to mobilise natives for taxation and to provide free labour in white farms on behalf of the colonial government.¹⁵ The locals strong resistance this role by traditional leaders. Traditional leaders were also relied on to legitimise the colonial authority in Africa. Thus, traditional leaders acted "as brokers between colonial powers and locals, often trading their (and people's) acquiescence for material or political goods".¹⁶

During this colonial era, traditional leaders who complied and bowed to the demands of colonialists were handsomely rewarded, while dissenting leaders were heavily punished and removed from office.¹⁷ The role of traditional leaders has in many instances been controversial, such as the situation in Uganda where the Buganda Chieftdom stood out as collaborators and were used as the centre for spreading colonial rule. The colonialists however faced challenges

⁶ N Musekiwa 'The role of local authorities in democratic transition' in E Masunungure & J Shumba (eds) *Democratic Transition* (2012) 242.

⁷ As above.

⁸ Chigwata (Note 3 above), 243.

⁹ As above.

¹⁰ D Kadt & AL Horacio 'Agents of the Regime? Traditional Leaders and Electoral Politics in Africa' (2018) 80 *The Journal of Politics*, 384.

¹¹ Musekiwa (Note 6 above), 242.

¹² Chigwata (Note 3 above), 243.

¹³ M Mamdani *Citizen and Subject* (1996); DT Acemolgu & AR James 'Chiefs: Economic Development and Elite Control of Civil Society in Sierra Leone' (2014) 122 *Journal of Political Economy* 323.

¹⁴ Chigwata (Note 3 above), 243.

¹⁵ EG Marsh, ED Roper & DA Kotze 'Local government in Rhodesia' in WB Vosloo, DA Kotzee & WJO Jeppe (eds) *Local government in Southern Africa* (1974) 184.

¹⁶ Kadt & Horacio (Note 10 above), 390.

¹⁷ Zimbabwe Election Support Network (ZESN) *Role of Traditional Leaders in Elections and Electoral Processes in Zimbabwe: Position Paper* (2020) 1.

in Bunyoro Kingdom where the king was exiled for not complying with demands of the colonisers.¹⁸ In extreme cases such as in colonial South Africa and Mozambique, legitimate indigenous leaders were replaced with ‘puppet’ leaders or parallel structures to undermine their authority and quell dissenting voices to colonial rule.¹⁹

In the post-independence era, literature also portrays traditional leadership as an avenue through which ruling parties consolidate power. As a respected institution that is closer to the people, traditional leaders have been relied on by ruling elites to make subjects tow their partisan political lines. Chigwata notes how the ZANU PF party galvanised support from traditional leadership to deal with the rising force of the opposition Movement for Democratic Change (MDC) in rural areas since the year 2000.²⁰ Through performing varied roles, that included mobilisation of party supporters, and intimidating dissent voices, the institution of traditional leadership has remained a politicised entity.²¹ While all political parties are interested in working with traditional leaders, ruling parties are often the ones who control this institution. In the case of Zimbabwe, chiefs are controlled through the Minister of Local Government who oversees their appointment and removal whilst setting their conditions of service in terms of section 50 of the Traditional Leaders Act (Chapter 29:17).

Indeed, traditional leaders are more likely to trade the votes of their subjects with incumbent elites with better access to resources than opposition parties.²² In Zimbabwe, the state’s influence on traditional leaders also stems from the fact that the President appoints traditional leaders in accordance with the relevant and prevailing traditional culture, norms and practices.²³ In appointing traditional leaders, the President consults with the relevant Minister responsible for traditional affairs and the District Administrator.²⁴ This appointment criterion leaves room for the President as the appointing authority and his party to manipulate and control traditional leaders.²⁵ Usually, the Ministry of Local Government, responsible for the administration of traditional leaders, is superintended by senior ZANU PF officials such as Ignatius Chombo (2000 to 2015), Saviour Kasukuwere (2015 to 2017) and currently July Moyo who assumed office in November 2017. This is to ensure that the institution of traditional leaders is in perpetual capture by the ruling party for partisan political benefits.

Mindful of the influence and important role of traditional leaders in societal development, the ruling party in Zimbabwe has also used state resources and power to shower benefits to this institution. In the heat of political competition, traditional leaders have received motor vehicles, fuel subsidies, household electrification and other improvements of their homes, and allowances and salaries, which are usually reviewed during the period towards elections or

¹⁸ P Mutibwa *Uganda Since Independence: A story of unfulfilled hopes?* (1992).

¹⁹ EG Marsh, ED Roper & DA Kotze ‘Local government in Rhodesia’ in WB Vosloo, DA Kotzee & WJO Jeppe (eds) *Local government in Southern Africa* (1974) 184.

²⁰ Marsh, Roper & Kotze (Note 15 above), 287.

²¹ ZESN (Note 18 above) 2; European Union (EU) (n 5) 2; Mwonzora & Mandikwaza (Note 3) 1145.

²² M Slovik ‘Don’t Back No Losers! The Supply of Political Labor and the Political Organization of Clientelism’ unpublished manuscript, 2014.

²³ Section 283(i) Constitution of Zimbabwe, 24.

²⁴ As above.

²⁵ C Keulder, *Traditional leaders and local government in Africa: Lessons from South Africa* (1998) 142; J Makumbe ‘Local government institutions and elections’ in J de Visser, N Steytler & N Machingauta (eds) *Local government reform in Zimbabwe: A policy dialogue* (2010) 87; Chigwata (Note 3 above) 243.

where key political activities or processes are taking place. This is confirmed in that 226 vehicles worth US\$6m were given to chiefs in October 2017 and announced by the then Local Government Minister Saviour Karukuwere ahead of the National Council of Chiefs Conference which was to be attended by the then President of Zimbabwe RG Mugabe. At this material time, the ruling party was facing internal turbulences and it is believed that Mugabe wanted to buy the loyalty of chiefs. The vehicles came with a raise in the allowance of chiefs. This is arguably as payback for appreciation of the services they render in their areas of jurisdiction.²⁶ These goodies and gifts have worked incentivised the traditional leaders to act as campaign managers and agents of the ruling party. Following his ascendancy to power in 2017, President Emmerson Mnangagwa convened a forum with chiefs in the city of Gweru city and offered them voter vehicles and improvement of their welfare. Critiques equated this to swaying traditional leaders' allegiance to the incumbent party and president ahead of the 2018 elections. The legal basis for the vehicles and other goodies that chiefs receive are not generally outlined as official benefits that are legitimately expected in terms of the terms and conditions of the office of a chief. They are not clearly laid down in advance but just given at the time that the ruling party decides, and usually at the most convenient political period to the interests of the ruling party. Mnangagwa won this election, amid stiff competition and allegations of manipulation of votes by the closest contender, Nelson Chamisa of the Movement for Democratic Change Alliance (MDC-A).²⁷

As recipients of benefits and incentives from the incumbent governments, traditional leaders are accused of disregarding their traditional role as they become appendages to ruling parties. As payback to ruling parties, for the goodies given to them, traditional leaders often mobilise supporters for the ruling party in their areas of jurisdiction ahead of elections. For these reasons, Dominika Koter labelled traditional leaders "king makers" who use their authority, power and resources to directly influence the electoral behaviour of their subjects.²⁸

Just like in the colonial era, post-independence governments have used the 'carrot and stick' method to coerce the conformity of traditional leaders. For instance, three traditional leaders were threatened with demotion and expulsion by the Minister of Local Government, for failing to attend a ZANU PF meeting meant to evict a former party member, Temba Mliswa from Spring Farm in Hurungwe West constituency.²⁹ The three leaders were accused of absenting themselves from ZANU PF meetings because they were supporting and being sympathetic to Temba Mliswa. They were violently attacked and threatened with dethronement by the then Minister of Local Government, Ignatius Chombo.³⁰ It highlights the risks of being apolitical and the insecurity in the offices of the traditional leader. Similarly, Chief Ndiweni, a long-time critic of the ruling party was stripped of his crown, jailed and later on released, and what triggered the targeting of the long-time critic of the ruling party was arguably his stance on alleged human rights violations by the government and his perceived alignment to opposition politics.³¹ Many traditional leaders fear the same predicament, bowing to the demands of the ruling party instead.

²⁶ Chigwata (Note 3 above), 243.

²⁷ F Fayawo *Zimbabwe's 2018 Elections: The Changing Footprints of Traditional Leaders* (2018).

²⁸ D Koter 'King Makers: Local Leaders and Ethnic Politics in Africa' (2013) 65 *World Politics*, 188.

²⁹ *Goodwill Zinyama and Others vs The State and Another ZHRC/CI/33/15*.

³⁰ As above.

³¹ 'Chief Ndiweni released from prison after securing bail pending appeal' *ZimLive* 29 August 2019.

3. LEGISLATIVE FRAMEWORK

This section analyses the legislative framework on elections in Zimbabwe, particularly on the conduct of traditional leaders in electoral processes. The discussion focuses on the Constitution, the Electoral Act [Chapter 2:13] and the Traditional Leaders Act [Chapter 29:17].

3.1. The Constitution [Amendment No. 20] 2013

The institution of traditional leaders is established in chapter 15 of the Constitution. The responsibilities of traditional leaders are explained in section 280 (2) of the Constitution. These include performing the cultural, customary and traditional functions of the community. Section 281 of the Constitution outlines the principles to be observed by traditional leaders. Section 281(1) of the Constitution 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, treat all persons within their areas equally and fairly,

Section 281(2) of 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 lays down the functions of traditional leaders 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.

The provisions of section 281(2) of the Constitution require traditional leaders be refrain from partisan politics. The execution of the traditional leaders' functions necessitates the holding of public meetings. However, such meetings 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." Such meetings must be used to advance constitutional norms and values including access to information and political rights in election times.

The exclusion of traditional leaders from partisan politics in terms of the Constitution of Zimbabwe is peremptory. It is unconstitutional for traditional leaders to be members of any political party (including the ruling party), to act in a partisan manner, further the interests of any political party, or violate the fundamental human rights and freedoms of any person (including political rights).

3.2. Traditional Leaders Act

The Traditional Leaders Act [*Chapter 29:17*] elaborates the role and lawful conduct of traditional leaders. Section 45 of the Traditional Leaders Act provides that:

[I]n 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.

This provision is consistent with section 281 of the Constitution which prohibits traditional leaders from participating in partisan politics. It also prevents traditional leaders from standing for or holding any political office whilst proscribing participation in political activities. However, many traditional leaders have contested in elections under a political party ticket. For instance, during the 2018 elections, an acting Headman, one Mukahanana, contested for a seat under the ZANU PF ticket in Mutasa Central Constituency.³² He was also accused of directing all known opposition supporters in his area to be assisted in the voting process.³³ When the issue was brought to light, the candidate opted to let go of the traditional leadership position and pursue his political campaign.

Likewise, the 9th Parliament of Zimbabwe comprises of traditional leaders who are members of Parliament. This includes Chief Zwelivelile Mandla Mandela of Mwezo Traditional Council

³² Zimbabwe Human Rights Commission (ZHRC), *2018 Harmonized Elections Report* (2018) 20.

³³ As above.

and Chief Sango Patekile Holomisa of amaHegebe in Mqanduli.³⁴ The prohibitions on traditional leader's partisan participation in electoral processes does not infringe their right to vote as provided in section 67 of the Constitution.³⁵ They can vote, but cannot be voted for in national politics. The question that may be asked whether the limitation on traditional leaders' political participation is reasonably justifiable. As Makumbe has noted,³⁶ this requirement does not prevent traditional leaders from seeking political office. Rather, it requires leaders with such ambitions to relinquish their posts before joining politics. This ensures that traditional leaders remain independent and impartial. As an important institution with a broader mandate in community development, traditional leadership must be kept outside the toxicity of political parties to retain its dignity and respect. Thus, the prohibitions on political participation are reasonably justifiable in a democratic society.

4. PRACTICES OF TRADITIONAL LEADERS DURING ELECTIONS

This section analyses the situation on the ground, ZHRC case reports and extant literature to establish whether traditional leaders comply with their constitutional and legal obligations. Traditional leaders can play a pivotal role in pre-election period by through mobilising residents and disseminating electoral information. In 2018, the ZHRC noted how the Zimbabwe Electoral Commission (ZEC) placed posters at chiefs, headman and village heads' homesteads. These leaders were also given flyers and pamphlets for onward distribution.³⁷ ZEC and other organisations accredited to conduct voter education relied on traditional leaders for mobilisation of communities while conducting their voter registration and education exercises.³⁸ Working with the decentralised institution of traditional leadership, organisations effectively disseminated election related information through traditional and community gatherings.

Pursuant to their role in entrenching peace in society, some traditional leaders in the Midlands and Manicaland provinces called upon their subjects to shun away from violence during the 2018 elections.³⁹ Nonetheless, many traditional leaders remain accused of fanning political violence against opposition supporters in contravention of section 133A (a and c) of the Electoral Act.⁴⁰ Many of these traditional leaders also remained silent when their subjects were

³⁴ ZESN (Note 17 above), 6.

³⁵ Section 67 provides as follows: Political rights (1) Every Zimbabwean citizen has the right—(a) to free, fair and regular elections for any elective public office established in terms of this Constitution or any other law; and (b) to make political choices freely. (2) Subject to this Constitution, every Zimbabwean citizen has the right— (a) to form, to join and to participate in the activities of a political party or organisation of their choice; (b) to campaign freely and peacefully for a political party or cause; (c) to participate in peaceful political activity; and (d) to participate, individually or collectively, in gatherings or groups or in any other manner, in peaceful activities to influence, challenge or support the policies of the Government or any political or whatever cause. (3) Subject to this Constitution, every Zimbabwean citizen who is of or over eighteen years of age has the right— (a) to vote in all elections and referendums to which this Constitution or any other law applies, and to do so in secret; and (b) to stand for election for public office and, if elected, to hold such office. (4) For the purpose of promoting multi-party democracy, an Act of Parliament must provide for the funding of political parties.

³⁶ Makumbe (Note 25 above), 88.

³⁷ ZHRC (Not 32 above), 21.

³⁸ As above.

³⁹ Fayawo (Note 27 above).

⁴⁰ Mwonzora & Mandikwaza (Note 3 above), 1144

intimidated and suffered gruesome human rights abuses. During the elections in 2000, 2002, 2005, 2008 and 2013, violence was instigated by war veterans, youth militias and state aligned security forces. Camps and bases were established by war veterans and youth militias to assault and kill opposition supporters and activists.⁴¹ Those who survived these gruesome attacks either towed the expected political party line or migrated other areas.

While the law obliges traditional leaders to be impartial, research shows how the institution has been used by politicians to canvass support for certain political parties. Fayawo notes how several village heads and headman in Zhombe openly supported the opposition MDC-A during the 2018 elections.⁴² Some village heads were also assimilated in party structures to coordinate electoral activities.⁴³ There is also evidence of village heads canvassing votes for political parties in contravention of the Electoral Act.

During voter registration and education exercises, some traditional leaders misled their subjects into believing that pictures taken during the biometric voter registration process would be used to trace how people vote.⁴⁴ Some traditional leaders are also accused of tracking voting preferences of registrants whose registration slip serial numbers they had recorded.⁴⁵ In the run-up to the 2018 elections, the ZHRC received 46 complaints regarding forced collection and recording of voter registration slip serial numbers by ZANU PF members and traditional leaders.⁴⁶ These actions were contrary to section 133A(d) of the Electoral Act.⁴⁷ They intimidated registrants, thereby undermining the integrity, fairness and credibility of the election.

Some traditional leaders made it impossible for opposition political parties to freely associate and campaign ahead of the elections. In such areas, only the ruling party candidates and their colleagues were allowed to campaign. During the 2015 Hurungwe West by-election, the independent candidate, Temba Mliswa, revealed how traditional leaders participated in partisan politics in violation of the Constitution.⁴⁸ When interviewed by the ZHRC, many traditional leaders confirmed that they were strong ZANU PF supporters and that they no longer wanted Temba Mliswa to be their parliamentary representative since he had been expelled from ZANU PF.⁴⁹

Similarly, the 2018 elections had selective food and agricultural distribution by traditional leaders in favour of supporters of the ruling party while denying such aid to opposition supporters.⁵⁰ Several observer reports also lamented how traditional leaders were influencing the electorate by threatening to cut supply of agricultural inputs and food aid for those villages

⁴¹ Fayawo (Note 27 above).

⁴² Fayawo (Note 27 above).

⁴³ Musekiwa (Note 7 above), 242

⁴⁴ Fayawo (Note 27 above).

⁴⁴ *European Union (EU)* (Note 5 above), 2.

⁴⁵ As above, p 1.

⁴⁶ ZHRC (Note 32 above) 21.

⁴⁷ Section 133A (a) of the Electoral Act prohibits the “persuasion of another person that he or she will be able to discover for who that person cast his vote or her vote.”

⁴⁸ *Temba Mliswa vs The State and ZANU PF*, ZHRC/CI/38/15.

⁴⁹ As above.

⁵⁰ Mwonzora & Mandikwaza (As above, note 3) 1144; ZHRC (n 33) 20; *European Union (EU)* (n 5 above) 2.

that did not vote for ZANU-PF.⁵¹ In Rushinga Constituency, the ZHRC received a complaint that Chief Makuni distributed presidential inputs based on a beneficiary list that he allegedly compiled and which only benefited ZANU PF supporters.⁵² Upon investigating the case, the ZHRC confirmed that food aid was given to people wearing ZANU PF t-shirts and party card carrying members. Traditional leaders were also accused of using registration slips as an entitlement to presidential inputs and food aid, contrary to the best electoral practices of non-discrimination and fairness.⁵³

Reports of the election day suggest that traditional leaders worked closely with political parties against the law. Several traditional leaders reportedly frog-marched their subjects to vote for the ruling party.⁵⁴ In some cases, traditional leaders carried a register and crosschecked voters that came to vote. In fact, traditional leaders in Hurugwe confirmed that it was a norm to escort their subjects to polling stations for voting, to ensure they vote for the 'right candidate', that is the for the ruling ZANU PF candidate.⁵⁵ This practice seriously affects the legality and legitimacy of the vote in Zimbabwe.

5. JURISPRUDENCE AND COURT CASES

This section deals with legal recourse for misfeasance by traditional leaders, judicial remedies and the challenges faced in this type of litigation. The analysis is based on decided cases since the enactment of the 2013 Constitution.

5.1. Election Resource Centre vs Chief Charumbira and others

The cases of *Election Resource Centre vs Chief Charumbira and others* [HH 270/18] and *Elton Mangoma and Another vs Chief Charumbira and others* [HCMSV 92/18],⁵⁶ both expose the controversy surrounding the role of traditional leaders in Zimbabwean politics. In both cases, Chief Fortune Charumbira, the President of the Chiefs' Council, is accused of acting unlawfully and unconstitutionally. It was alleged that, during an address at the Annual Chiefs' Conference on the 28th October 2017, he made remarks to the effect that traditional leaders have been supporting and must continue to support ZANU PF and its presidential candidate. He was quoted thus:

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.⁵⁷

⁵¹ ZHRC (Note 32 above), 20.

⁵² As above.

⁵³ ZHRC (Note 32 above).

⁵⁴ *European Union (EU)* (Note 4 above) 2; ZHRC (Note 32 above), 21.

⁵⁵ *Mliswa case* (Note 62 above).

⁵⁶ In this case the High Court banned and prohibited all traditional leaders from making further political statements on their involvement and allegiance to ZANU PF on any public platform. A further ruling was made in that case on the fact that traditional leaders, who include Chiefs, Head persons or Village Heads as provided in section 280(2) of the Constitution, must not be involved in partisan politics as this is a violation of the right to a free and fair election as provided for in terms of section 67(a) of the Constitution. Conducting campaigns on behalf of the ruling party by traditional leaders was ruled to be unconstitutional and a violation of the right not to be treated unfairly or in a discriminatory manner on the basis of political affiliation.

⁵⁷ Page 3 of the judgement.

He repeated those remarks again on the 13th of January 2018. Among other things, Chief Charumbira said:

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.⁵⁸

The Court declared the utterances by Chief Charumbira to be in clear violation of section 281(2) of the Constitution and section 45 of the Traditional Leaders Act. The Court ordered as follows:

Chief Charumbira to retract in writing the statements that he made to the effect that traditional leaders should support and vote ZANU (PF) by issuing a countermending statement in a 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.⁵⁹

Chief Charumbira ignored the court order and remained adamant. Instead he made further utterances at the ZANU-PF Annual Conference in December 2018 restating institutional support to the ruling party:

The problem is that some in the audience are nervous. *They were actually saying, 'chiefs, why don't you leave politics' and I said 'no, chiefs are doing their job...Those in Zanu-PF must not be more nervous than the chiefs themselves when we're working with you. Some of you are nervous and are actually discouraging the chiefs ... We will not stop coming. Those who want to go to court, we'll meet in court. Zanu-PF is the party of chiefs.*⁶⁰
[Emphasis added]

In 2019, the Election Resource Centre filed a criminal case against Chief Charumbira. The media was awash with reports of the Chief's imminent arrest. However, this did not happen and, to date, the court order remains unenforced. The total disregard of a standing court order by Chief Charumbira shows how the institution of traditional leaders' does not respect the rule of law. This creates bad precedent for future litigation as litigants will lose faith in the effectiveness of judicial remedies.

These cases demonstrate that actions, conduct and attitudes by traditional leaders contravene section 281 of the Constitution and warrants their removal from office in terms of section 283(c)(i) of the Constitution. The case studies also show that there is no legislative framework which protects traditional leaders from political manipulation by political parties. Traditional leaders should be independent and impartial so that they can work to foster peace and political tolerance.

⁵⁸ At p 3.

⁵⁹ At p 1 of the judgment, particularly Paragraph 2 of the relief sought and obtained.

⁶⁰ See: 'Chief Charumbira dares Zanu PF rivals' *The Daily News* 30 December 2018; 'Charumbira defies court again as he declares chiefs' support for Zanu-PF' *Bulawayo24 News* 15 December 2018.

5.2. Cases Dismissed on Procedural Technicalities

There are many other cases against traditional leaders' participation in partisan political activities which were not successful before the courts. This has mainly been due to procedural technicalities. Although factual issues had been placed before the courts, the cases were not determined on the merits.

5.2.1. Failure to comply with the exhaustion of internal remedies principle

There are cases which are actually determined on the merits but are dismissed because of failure to exhaust internal remedies. There is a distinction between cases where the merits are never determined, wherein the case is dismissed because it is in the wrong format or wrong names of respondents have been cited. In the case of *Takanayi Mureyi vs Fortune Charumbira*,⁶¹ the applicant was a candidate in the harmonized elections conducted on 31 July 2013. He complained of electoral malpractices against the President of the Traditional Chiefs' Council, who was also a traditional leader in his constituency. The applicant argued that, as a chief, the respondent is supposed to unify people beyond their political orientation. As such, he should not have uttered such hate language as, "Down with Takanayi Mureyi." The applicant argued that the chief's open support for ZANU PF, intimidation of and threats to villagers were all completely unacceptable, unlawful and unconstitutional.

The case was dismissed for lack of compliance with the exhaustion of internal remedies principle. It was ruled that the applicant matter ought to have reported the case to the police for investigation before approaching the court on an urgent basis. On the issue of exhaustion of internal remedies, Mtshiya J, as he then was, highlighted that:

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.⁶²

In dismissing the case, Mtshiya J, stated as follows:

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.⁶³

This shows some of the challenges that litigants face when approaching the courts for redress. In terms of the law, litigants are expected to exhaust all internal remedies before approaching the courts. The problem with complying with this rule in election complaints involving traditional leaders is that when such cases are reported to the police, the police do not

⁶¹ *Takanayi Mureyi vs Fortune Charumbira* HH 363/13. This case was determined on its merits. However, it was dismissed because applicant failed to adhere to the exhaustion of all internal remedies principle.

⁶² At p 6.

⁶³ At p 7 of the judgment.

investigate, citing political reasons. This leaves litigants between a rock and a hard place: they cannot approach the courts before reporting to the police but do not get any joy when they do report to the police. This leaves traditional leaders unaccountable and the general public without a remedy.

5.2.2. Failure to provide contact details of persons accused of electoral malpractices

The cases of *Tracy Mutinhiri v Jeremiah Chiwetu*, *Wilson Makanyaire v Temba Mliswa and Bednock Nyaude v Toendepi Matangira* also related to the conduct of traditional leaders.⁶⁴ The petitioners in the three cases alleged that the chiefs, headmen and other traditional leaders in their constituencies had engaged in corrupt or illegal practices. The major defect in these cases was the petitioners' failure to provide details of persons accused of electoral malpractices in terms of rule 21(f) of the Electoral Rules which provide that:

21. An electoral petition shall generally be in the form of a court application and shall state... (f) Where the petitioner relied on a corrupt or illegal practice, the petition had to state the full name and address, if known, of every person alleged to have been guilty of such a practice.⁶⁵

While some of the alleged perpetrators were named in Mr Makanyaire's petition, the names were not given in full and no addresses were provided. None of the petitioners claimed that the alleged perpetrators' names and/or addresses were unknown to them.⁶⁶ In dismissing the petitions, Justice Bhunu stated as follows:

A petitioner is obliged to render strict compliance with the Rules, failure of which the Court has no option but to invalidate the petition. The Electoral Court, being a creature of statute, is strictly bound by the four corners of the enabling Act.⁶⁷

5.2.3. Failure to comply with High Court Rules

The case of *Temba Mliswa vs ZEC and others* [HH 586/15] dealt with the failure to comply with High Court Rules. It was alleged that the ZANU PF Minister of Local Government, Ignatius Chombo, had tasked traditional leaders with the role of systematically leading their subjects to polling stations and monitoring how they would vote. This was done in order to identify those who would have voted for the independent candidate and former ZANU PF member, Temba Mliswa. The matter was struck off the roll for failure to comply with the rules of the court, precisely r231 and r232 of the High Court Rules, 1979. The Applicant consciously chose the procedure through which he brought his application to Court, and that is through a

⁶⁴ *Tracy Mutinhiri v Jeremiah Chiwetu ECH 11-13*. All 3 cases were combined as they presented similar complaints.

⁶⁵ Electoral (Applications, Appeals and Petitions) Rules 1995 Statutory Instrument 74A of 1995.

⁶⁶ Veritas. 'Election Petitions Challenging 2013 Election Results in the Electoral Court Part II: Petitions Dismissed by Electoral Court' Court Watch 5/2014. Available at <http://www.veritaszim.net/courtwatch?page=2>, accessed on 7 April 2020.

⁶⁷ At p 5 of the judgment.

court application.⁶⁸ It was argued that that procedure determines the time frames within which the respondents are expected to file their responses. Where an applicant files an ordinary application in terms of r 231 (3) of the High Court rules 1971, which the applicant used a respondent is in terms of r 232 entitled to file his response within not less than 10 days, exclusive of the day of service, plus one day for every additional 200 kilometres or part thereof where the place of service is more than 200 kilometres from the court where the application is to be heard. It was further submitted that the application had been prematurely set down as the *dies induciae* had not yet lapsed and the respondents were entitled to file their responses within the time permitted by the rules. Uchena J dismissed the application and sated as follows:

The need to hear electoral cases urgently is not in dispute. I accept that such cases should be heard as soon as possible, but an applicant has to follow the correct procedures to achieve that objective. It does not assist the smooth and efficient administration of justice, for an applicant to apply for remedies on the 11th hour, and for his legal practitioners to choose a wrong procedure and thereafter expect the court to extricate them from their chosen timing and procedure, without their doing what the law of procedure requires them to do, to achieve that objective.⁶⁹

Research suggests that due diligence must be exercised by petitioners and litigants to circumvent the procedural hurdles in court processes. In addition, there is also need for judicial activism, where courts are prepared to deal with merits of cases involving constitutional issues without over-emphasising procedural irregularities. In *Mukaddam v Pioneer Foods (Pty) Ltd and Others*,⁷⁰ the Constitutional Court of South Africa relied on the same principle of flexibility where it stated that:

Flexibility in applying requirements of procedure is common in our courts. Even where enacted rules of court are involved, our courts reserve for themselves the power to condone non-compliance if the interests of justice require them to do so. Rigidity has no place in the operation of court procedures.⁷¹

5.3.Complaints against the conduct of Traditional Leaders in Presidential Electoral Petitions

The case of *Morgan Tsvangirai vs Robert Mugabe and others* [CCZ 7/2013] was the first presidential election petition under the 2013 Constitutional. The Applicant sought a declaration that the elections were null and void. In his Founding Affidavit, the Applicant argued that ‘traditional leaders commandeered rural voters under their jurisdiction to vote at specific times and to declare illiteracy so that they would be “assisted” to vote.’ However, the issue was never

⁶⁸ See Order 32 r226 of the High Court Rules, 1971 which provides on the nature of applications as follows:

(1) Subject to this rule, all applications made for whatever purpose in terms of these rules or any other law, other than applications made orally during the course of a hearing, shall be made— (a) as a court application, that is to say, in writing to the court on notice to all interested parties; or (b) as a chamber application, that is to say, in writing to a judge.

⁶⁹ At p 4.

⁷⁰ *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 5 SA 89 (CC).

⁷¹ Para 39. See also the case of *PFE International and Others v Industrial Department Corporation of South Africa Ltd* 2013 1 SA 1 (CC) where the Court reaffirmed the principle that rules of procedure must be applied flexibly.

properly ventilated and decided as the petitioner withdrew his case before it could be deliberated upon by the Constitutional Court. The reasons for withdrawal hinged on the fact that petitioner had not received the requested election material for use in the petition, thus, he could not meaningfully argue his case.⁷²

In the case of *Nelson Chamisa vs Emmerson Mnangagwa and others*,⁷³ the conduct of traditional leaders and rogue security elements was one of the grounds for challenging the outcome of the 2018 Presidential elections. The Applicant alleged that he had evidence to show that traditional leaders were involved in the electoral process as election agents on behalf of the first respondent, Emmerson Mnangagwa. He contended that there were people who identified themselves as security officers. They went about campaigning on behalf of the first respondent. He alleged that these people were threatening villagers. It was alleged that ZEC failed to condemn the conduct of the traditional leaders and the rogue security agents. Mr Mpfu representing Nelson Chamisa, made reference to the involvement of traditional leaders, who allegedly threatened some members of the electorate to vote for the first respondent. He alleged duress as an element that questioned the validity of the first respondent's win. In the same breath, it was alleged that there were instances where there had been undue influence and bribery of the electorate through the distribution of "freebies." This, it was argued, resulted in an unfair advantage to the first respondent and worked to the disadvantage of the applicant. The Constitutional Court ruled that the allegations made by the applicant in relation to voters in the rural areas and the role of traditional leaders were unfortunate. It held that:

In an effort to show that the harmonised elections were not free, fair and credible, the applicant rehashed the allegation which has had pride of place in previous applications challenging the validity of elections in the country. The essence of the allegation is that voters in the rural areas vote for food aid or grain they receive from Government. If they are not voting for food aid, they are voting under the undue influence of traditional leaders who allegedly ensure that they vote for ZANU-PF. Rural voters are not respected as independent human beings capable of rationalising about the use of the vote to protect and advance their own social, economic and political interests. Whether living in rural or urban areas, Zimbabweans are educated people who are capable of understanding the meaning and use of the right to vote... The influence traditional leaders were alleged to have exerted on voters in rural areas to vote for the first respondent is not borne out by the facts. The allegation of involvement of traditional leaders was not linked to any other relevant information.⁷⁴

The court avoided ruling on the question of whether the traditional leaders had acted in the manner alleged and whether this would be constitutional and lawful. The court seemed defensive to the traditional leaders.

⁷² Part of the Affidavit withdrawing the Presidential election petition in case number CCZ71/13 read as follows: As at the time of deposing to this affidavit (3.43pm) on Friday August 16 2013) the judgment in the applications (for election material) had not been delivered. This in my view, seriously handicaps my prosecution of the petition and it had rendered it impracticable for me to proceed with same. The fact that I still do not have the material means that I cannot meaningfully prosecute my petition

⁷³ *Nelson Chamisa vs Emmerson Dambudzo Mnangagwa and Others CCZ 21/19*.

⁷⁴ At pp 110 and 111.

6. CONCLUSION AND POLICY OPTIONS

The Chapter discussed the role played by traditional leaders in the electoral process in Zimbabwe. It is apparent that the Zimbabwean laws governing the role of traditional leaders in electoral processes are largely clear, unambiguous and therefore adequate. They prohibit participation in politics and advancing the political interests of any political party and its members. However, traditional leaders still practice politics on behalf of political parties by canvassing for votes, intimidating and threatening voters, frog-marching and escorting voters to polling stations, using food aid for vote buying and publicly declaring their support for the ruling party.

Although cases of electoral malpractice involving traditional leaders are reported and litigated in courts, traditional leaders have a tendency of defying court orders with no consequences whatsoever. This blatant disregard of the law has resulted in a few cases being reported to the police or successfully litigated in the courts. Further, litigants face procedural challenges in reporting their cases to the police and the courts. According to findings of this chapter, the police appear reluctant to investigate matters involving traditional leaders for fear of being reprimanded by the ruling party. Courts are also unwilling to genuinely call traditional leaders to order as many times, courts rule on technicalities, avoiding direct condemnation of traditional leaders for aiding and abetting the ruling party during elections. The question for many aggrieved persons remains: What then is the use of going to court if the court order is not going to be complied with? What is the use of going to court, if the courts are unwilling to confront the demon of traditional leaders' involvement in the ruling party interests? This reduces faith in the justice system especially when the defiant traditional leaders are left unaccountable with no consequences whatsoever.

The chapter recommends for the Electoral Act Code of Conduct and the Electoral Act to be amended to exclude traditional leaders as parties who are formally or informally involved in politics as this is against the Constitution. There must be no ambiguity in as far as the prohibition of the involvement of traditional leaders in partisan politics is concerned. The traditional leaders must be proscribed from attending or organising any partisan political meetings or gatherings. Traditional leaders must not attend or address political party gatherings, including congresses and conferences organised by political parties. Any chief or headman involved directly or indirectly with partisan political activities including forcing their subjects to attend political gatherings or to vote for any particular political party must be prosecuted and severely punished, including being jailed and automatically disqualified to continue holding the office of a traditional leader. The current situation of repeated violations of electoral laws by traditional leaders is because there is no legal deterrence through criminal prosecution and punishment. A stiff penalty will deter would be offenders from deliberately violating electoral laws. Fear of losing the prestigious office of being a traditional leader, as well as all the benefits that come with it, would also be a self-restraint on the part of traditional leaders.

Judicial reform is required to enable a human rights-oriented jurisprudence. The current system emphasises technicalities over human rights promotion, protection and enforcement. All

matters that are brought to court for purposes of determining political rights and violation of electoral laws must be determined on merit, unless the matter is frivolous and vexatious. Judges must not avoid making decisions by over-emphasising technical conveniences over the citizens' rights to access to justice and protection of the law. Election related issues are human rights issues and must never be determined on procedural technicalities. Although courts cannot disregard or do away with legal or procedural technicalities, they must strike a balance with the imperative obligation of promoting, protecting, enforcing and fulfilling human rights in Zimbabwe.

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