



Power of legal interpretation: Property and land as central questions of material decolonization

Conversation with Simon Masodzi Chinyai

Chief Simon Masodzi Chinyai was born in 1930 and is headman of the Chinyai community. The Chinyai people have been living in the area known to them as Chinyaieni – in Chimanimani, south-eastern Zimbabwe – since the 17th century. During British colonization and throughout the 20th century, Zimbabwe’s indigenous population was dispossessed of their traditional lands. Parts of Chinyaieni are known today as Westward Ho! Farm, one of the properties acquired by the company Border Timbers Limited (BTL), which is majority-owned by the German-Austrian-Swiss von Pezold family.

Land redistribution in post-independence Zimbabwe was widely accepted as a social and political imperative, but severely hampered by constitutional conditions negotiated in the 1979 Lancaster House Agreement. At the time, a population of approximately 6000 white farmers controlled 15 million hectares of the country’s agricultural land. In 2000, amidst mounting social unrest and a wave of rural land occupations the government radically accelerated its land reform program by expropriating land without compensation. BTL and the von Pezolds contested the expropriations of their timber plantations in national and international fora.

Headman Chinyai gives an account of the community’s ongoing struggle to assert their collective rights to their ancestral land and the impacts of the BTL dispute on their situation.

ECCHR: How did you become headman of the Chinyai clan?

Chief Simon Masodzi Chinyai: After the death of Headman Joseph Hlebani Chinyai, I was appointed to be the headman of Chinyai village in 2009. Joseph Hlebani was my uncle and before him my father, Mwaparadza, was headman. I was appointed not only by clan members, but also by spirit mediums, who identified me as headman to lead the people. At the installation, elders brought a beast [a head of cattle], and other people also contributed. The inauguration was done very well with all the elders present as well as the Chief Muusha and some representatives, and various other headman.

What is your role as a headman? How does the community hold and distribute its land?

In accepting other members into Chinyai village, I normally do that with the assistance of my council, which is made up of my police and my advisors. As headman I must know all the boundaries of our land. With the council, I move through the whole area, identifying the areas where it would be possible for people to be settled and to build their homes. The council is responsible to receive people when they come. I sit down with the person and ask where they



come from, what their problems are, why they leave their area and come into my area. And then of course, I give that person a place to stay nicely. Normally, we give four to five hectares. We do not really consider the size of the family, we all get the same. We need to give enough land so that even the children of tomorrow would be able to still live there.

For propitiating purposes, any person identified and given a place to stay has to prepare to brew two clay pots of traditional beer to show that they are going to adhere to all the rules and regulations of the Chinyai village. We call the neighbors around that person and drink with them and inform that person of the rules and regulations of the Chinyai clan. That person then becomes a member of our clan. That person must be loyal to the clan, they must respect the resources that surround them, they are supposed to lead by example by being able to live with other community members in the right way. If the land is not being used properly, if they are causing erosion by cutting trees randomly, they will be called to the council. If they don't stay with other people properly, then I call my council and sit down with them and counsel that person so that they might be able to stay with us in a human manner. The third time they are called to the council they will be asked to leave the Chinyai area.

The Chinyai are a culturally distinct Rozvi clan that was awarded land in the region by Mwene Mutapa, in return for having fought during the Mutapa-Manyika war against the Portuguese, which began in the 1670s and drove the colonial power out of the Mutapa State.¹ In the late 19th century, the region was invaded by Cecil Rhodes' British South Africa Company (BSAC) – operating under a mandate from the British Crown – leading to the establishment of Southern Rhodesia and ninety years of white minority rule.² Under colonial administration, indigenous communities were subjected to forced labor, exorbitantly taxed and their livestock compulsorily acquired at low prices or confiscated – under threat of eviction from the territory.³ From the 1950s, vast swathes of land in Chimanimani were developed into timber plantations, initially by the BSAC itself.⁴ By 1959, the Chinyai were forced to move into workers' compounds or overcrowded native reserves. Some retreated to an area of Chinyaieni known as Makotowe.⁵

¹ DN Beach. *The Shona and Zimbabwe 900-1850: An Outline of Shona History*. London, Heinemann: 1980. p. 134; 7 July 2010 Founding Affidavit of Phineas Zamani Ngorima para 5; 22 Sep 2009, Affidavit of Phineas Zamani Ngorima para 2.

² 2 Nov 2000 Founding Affidavit of Thomas Chikukwa para 5; 30 May 2010 Supporting Affidavit of Chadworth Ringsai Chikukwa para 7; 22 Sep 2009, Affidavit of Phineas Zamani Ngorima para 57; 2003 Affidavit of Jameson Mupodyi para 10-15. Also see Jocelyn Alexander, *The Unsettled Land: State Making and the Politics of Land in Zimbabwe, 1893-2003*, Ohio University Press: 2006 (on Chimanimani, p. 37).

³ 4 June 2007 Affidavit of Siyapeya Njini Chinyai para 18-19, 3 May 2003 Affidavit of Itai Chiinyai para 9-14

⁴ Border Timbers Ltd. (www.bordertimbers.com/about.php).

⁵ 3 May 2003 Affidavit of Itai Chinyai para 14; 18 Nov 2001 Affidavit of Joseph Hlebani Chinyai para 10-11; June 2002 Affidavit of Joseph Hlebani Chinyai para 4b; 16 May 2007, Affidavit of John Sithole Ngezimana Chinyai para 10.



How did you live during the colonial period?

I grew up within Chinyai village with my parents, but I spent some time away. I was employed as a young boy, away from the Chinyai village. I moved out and back, several times. I was employed by John Ball as a “tree nursery boy.” Ball was the first manager of the timber plantations and wanted to establish a tree nursery on a particular site. My father was identified by Ball to become the nursery supervisor. I assisted my father.

What are your memories of the first planting of the pine trees?

When the nursery was established, John Ball said that he needed five elders to each give one milking cow so that he could milk these cows in order to pay for the [chemical] dip, so that this would be done for five families. When a cow would no longer be bringing milk, then he chose again another five families to bring another five cows for milking, to pay for the chemicals. Ball established a dairy at Thornton Farm, the area we know as Gadyadzani. And when it was established they said, we no longer need any cattle, we need all cattle to be sold. The white man who bought all the cattle was called Shiri Muputa. And when this happened, people were being removed from Chinyai village, as well as from other areas. They were told to go away, others were told to go into the compound if they were working for the company, and some were sent to live in rocky areas like Rusitu and Biri Iri. The whites justified this while they were taking all the cattle, as they said that when we moved to other areas we were not allowed to take our cattle with us.

When the nursery got to the transplanting level, they told people to go and slash all the indigenous trees. And afterwards, they said now, everybody go away, and that’s when they started pegging the lines for the pine plantations. When the seedlings were being planted, they told us, get into the compound, and those that were refusing were told, go out. I saw the events, though I was young. At that time I was working in Ball’s kitchen.

How much of the area of Chinyaieni was affected by the planting of trees?

All of it, except for the area, Makotowe. That area, in the mountains, remained untouched. That is where my father stayed when he refused to leave Chinyaieni. He was told, you can stay, but do not light any fires. Some of the Chinyai clan went into the compound, working for John Ball. But some stayed up in the mountains.

What was the compound like? What were the conditions?

It was quite miserable. There were houses, some were thatched, some were brick houses. Once they were there, people were supposed to work. People had used to stay in a relaxed manner, but in the compound, people were crowded together. And everyday you need to look for where you get relish, but you do not have a field. Where do I get the millet meal? There is no field. So, in other words, the money that was being paid [to workers], that was the very money that was supposed to go again to the shop of the very same white farmer, as it was the only place for people to buy their millet meal and their vegetables or whatever.



If you lived in the compound, you had to work for the company?

Only workers and their immediate families were found in the compound.

BTL was incorporated in 1979. Today its plantations comprise nearly 50,000 hectares.⁶ When the plantations on Chinyaieni were first established, some of the Chinyai – including the present headman’s father – refused to abandon their ancestral territory and continued to live and farm in an area of the mountains known as Makotowe.⁷ In November 1999, a group of Chinyai people returned to live on Chinyaieni.⁸ Pre- and post-independence Zimbabwe has a long history of such land occupations. Without formal title, occupiers have often been cast as “squatters.” In 2000, in cooperation with other indigenous clans, the Chinyai proposed to manage the plantations jointly with the company and the state.

Were you aware of the changes in the company, for instance its transfer from the British South Africa Company to Border Timbers Limited?

Yes, I identified a change, because with the BSAC, workers were considered to be permanent workers. But under BTL, workers were considered contractors to do most of the work.

In the 1990s and 2000s, there were attempts to negotiate between the Chinyai and BTL over access to land. What happened?

At the inauguration of Headman Joseph Hlebani Chinyai, BTL was very much responsible in assisting in the inauguration and its preparation. It was almost showing an acknowledgement that he was headman of this area. We were considered a people, we thought, because when they helped in the celebrations, we thought they are actually saying, we can work well together. But to our surprise, they do not want to work with us. They called us “squatters,” saying that not even a square inch would be ceded to us. And up to today, this confuses us.

In the 2000s, Zimbabwe’s government adopted legal and constitutional amendments enabling large-scale land expropriation for resettlement and refuting any obligation to compensate former owners for land. This was explicitly justified as a response to the legacy of colonialism. Britain – as the former colonial power – was identified as being responsible for any compensation due for land.

The scale of land redistribution in this period was dramatic: prior to 1999, some 3.4 million hectares were redistributed. Between 2000-09, over ten million hectares were formally transferred to at least 169,000 beneficiary farmers.⁹ Two categories of redistribution were

⁶ Border Timbers Ltd.

⁷ 20 May 2009 Affidavit of Simon Masodzi Chinyai, paras 22-35.

⁸ June 2002 Affidavit of Joseph Hlebani Chinyai para 4a, 3 May 2007 Affidavit of Mbiri Chinyai para 6.

⁹ There is some variation in official and unofficial figures, which also do not take into account land occupations that never led to formal transfer of land to beneficiaries. The cited figures are based on the following sources: Moyo, S “Land Reform and Redistribution in Zimbabwe Since 1980” in Moyo, S and Chambati, W (eds), *Land and Agrarian Reform in Zimbabwe. Beyond White-Settler Capitalism* (Dakar: CODESRIA & AIAS, 2013) 42;



established: the A1 scheme for the allocation to smallholder producers and the A2 scheme for the transfer of large-scale agricultural land for commercial use. Nearly 20 years later, many questions concerning redistribution and compensation remain unsettled.

What impact did the state’s expropriations have on the ground?

We were quite happy with the intervention by the government, because the government ceded the whole piece of Chinyai village to us, saying we could settle on it. We were happy, because actually we thought that it is now bringing us to our real traditional ground, being able to practice our traditional ceremonies, without fear, knowing that we are respecting our ancestors.

Was the Chinyai’s land allocated to the Chinyai clan or allocated to others?

No. Some A2s were pegged. This was done by the District Land Committee, which is responsible in the allocation of the A2s in the area. The A2 offer letters remain with the A2 plot holders right now, but it is in our memories that those A2 offer letters were later cancelled. No Chinyai clan members received such an offer letter. Of course, we have our own way as headmen. The A2s are like forcing a nut when it does not fit.

Have any of the A2 offer letter holders approached you as headman?

Very few. Two or three. Those people – we are staying with them and have explained the situation and they are complying with us. They have accepted to take four or five hectares that we are distributing to the others. But A2s are getting more, they get 40 or 50 hectares per person.

In 2010, BTL and the von Pezolds initiated joint claims against the Zimbabwean government under two bilateral investment treaties. Claiming that their properties were protected against expropriation, the investors sought the full restoration of their property rights or, alternatively, full market-value compensation. In cooperation with Headman Chinyai and three other clans, ECCHR applied in 2012 as amicus curiae to the arbitral tribunal, constituted under the rules of the International Court for the Settlement of Investment Disputes, demanding that the indigenous population’s collective rights under international law to their ancestral territories be protected. Their petition was rejected and in 2018, the ICSID tribunal confirmed a compensation award against Zimbabwe of nearly 200 million US dollars.¹⁰ The tribunal cast the indigenous population as “invaders” and encouraged the state to effect their forced removal in order to restore the investors’ property rights.

also Hanlon, J Majengwa, J and Smart, T *Zimbabwe Takes Back Its Land* (Virginia: Kumarian Press, 2013) 7-12.

¹⁰ *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15 Award, 28 July 2015. The case was conjoined with *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25.



What have been the developments since we submitted the petition to the ICSID tribunal?

I remember when BTL and von Pezold reported all these things. But here in Zimbabwe we have our own courts. We are still waiting for our own case in our own High Court, to see how it is going to go. This [ICSID] case was between BTL and the government of Zimbabwe, and the government lost. And because it lost, it created a negative impact on us. We feel we are being somehow threatened, as we are the people on the ground. The judgement was tough. They say we should be able to pay them back, we need to pay for the land, we need to pay them money. But what money? Compensation? If we don't compensate, they need to take the whole land. To take whose land? It is our land. What is happening outside there? I don't know whether that is going to apply to us. Because they are outside Zimbabwe, but when they come to Zimbabwe, really what they're saying is what they've decided out there.

Before the colonial period, we fought with Soshangane, with Mzilikazi, for our land. But we did not really fight with the whites for our land. At first they came to stay with us, we thought we would stay with them in a nice way. But we found that later, they took our land, they took our cattle, and we remained without. That's what we remember. Now we wonder what is going on. It looks like they are saying that we don't have power over our ancestral land.

The Chinyai have endured many domestic legal challenges from BTL seeking to evict them and other indigenous communities from the plantations. Community members have also proactively reached out to the judiciary in order to assert their rights and continue to seek a resolution in a class action brought against the company and the Minister of Lands and Rural Resettlement. In ongoing proceedings in the High Court and Supreme Court, the Chinyai – together with other indigenous communities of Chimanimani – are demanding the recognition of their traditional land rights, their rights to consultation and their rights to usufruct.¹¹

How has BTL responded to the rights of the community in the proceedings in national courts? And to the community's proposal for a Joint Forest Management scheme?

It is very tricky, because the relationship actually became sour when they said that not even an inch of land would be ceded to us. That pains us a great deal. They said that us people, we would remain without the land. The JFM, we thought, could link BTL and ourselves but it failed, because BTL themselves refused. We thought through the JFM we would build a relationship with them, but BTL said no.

How do you see the courts in Zimbabwe?

We are very happy with the work of the Zimbabwean courts, because it seems that they are intervening and assisting us, up to now. Though we are assessing challenges here and there,

¹¹ High Court of Zimbabwe, Harare, Case No. 7213/15, HH 556-16.



we are within our area and we are staying with our people and people are giving us the respect that we are expecting from them.

What do you feel about the future of your struggle over land?

We are wondering whether we will lose. All these court proceedings that we have been undergoing, we anticipate the promises of winning and it is looking now to reach the High Court and the Constitutional Court. We are hoping that we are going to win. But also now looking into the future, there are a lot more settlement patterns. I prefer an “Institutional Offer Letter” approach, by which I can regulate the land on behalf of our clan, and through which we can use and control the whole of the Chinyai area. It is a big area and thinking about things like productivity, that’s where JFM can be thought about and used to strategize to go into the future, also to contribute to the needs of the country and the economy. I need to have something in my hands that will guarantee me that I am the headman of the Chinyainei with my people and am staying well with my people.

Questions by Christian Schliemann and Ciaran Cross.

Note: A German translation of the interview can be read in the anthology *Dekoloniale Rechtskritik und Rechtspraxis* (Nomos, 2020), edited by Karina Theurer, director of the Institute for Legal Intervention at ECCHR, and Wolfgang Kaleck, ECCHR’s general secretary.