TENDAYI CHITINHE
versus
CORNELIUS CHIVESANI CHENGERA
and
THE DISTRICT AMINISTRATOR, CHEGUTU
and
PROVINCIAL ADMINISTRATOR, MASHONALAND WEST
and
THE MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS AND NATIONAL HOUSING
and
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 11 February, 7, 8 and 9 March 2022

K Maeresera, for the applicant
T. Matiyashe, for the 1st respondent
R.B Madiro, for the 2nd and 3rd respondents

Opposed application

CHIRAWU-MUGOMBA J: This application was initially set down for hearing on the 8th of February 2022. The applicant, then a self-actor, made an application for a postponement on the basis that he had engaged a legal practitioner but had not yet finalised with him. Although the application was opposed, the court granted the application and indicated to him that the matter would proceed on the 11th of February 2022. On that date, the applicant's legal practitioner appeared and indicated that the Advocate whom they had engaged had advised him that morning that she was unavailable due to ill-health. The court indicated that the matter would be stood down to 2:00pm so that the applicant's legal practitioner would prepare to argue the matter. This was influenced by the fact that the applicant whilst self-acting had filed comprehensive heads of argument and had covered even the points *in limine* raised by the respondents.

The applicant seeks the setting aside of the appointment of the first respondent as the substantive Chief Chivero and that he be declared as the substantive Chief. He also seeks an order for payment of costs on a higher scale. In his affidavit, he narrates a long history of the appointment of the first respondent and cites what he considers are irregularities.

At the hearing, Mr *Matiyashe* and Mr *Madiro,* took points *in limine* as follows.

i. Material disputes of fact

There are material disputes of fact which cannot be resolved on paper. The applicant ought not to have proceeded by way of application but action. It is evident that the 1st respondent disputes each and every allegation. The court cannot make a determination without hearing evidence. The applicant should have seen such conflict coming.

ii. General court application vs application for review

The applicant filed a general court application instead of one for review. The relief sought can only be granted through an application for review and not a general court application.

iii. Incompetence of order sought

The applicant is calling upon the court to deal with issues of substantive customary law. It is evident from the whole founding affidavit that each and every allegation refers to issues of substantive customary law. This court does not have jurisdiction to deal with such issues especially on succession and ascendency. The order sought is also incompetent in so far as it seeks that the applicant be declared the substantive chief because courts cannot make such appointments. The appointment can only be done by the 5th respondent upon recommendation from the Chief's Council.

iv. Lack of jurisdiction to hear matter

In terms of s283 of the Constitution, matters of appointment, removal and suspension of chiefs lies within the purview of the fifth respondent. A specific process is done and there are specific remedies provided. The courts cannot interfere with such processes. The applicant has failed to exhaust the remedies provided in s283 and therefore the court must decline jurisdiction. Even ss 35 and 36 of the Traditional Leaders Act also support the same notion.

Mr *Maeresera* had nothing to state in response as he insisted that the applicant reserved his right to be represented by a legal practitioner of his choice. Nonetheless, the court was guided by the heads of argument filed and also by the fact that the preliminary issues raised were more matters of law than facts and they would determine whether the matter ought to proceed on the merits or not.

I will proceed to deal with the issue of jurisdiction of this court to hear the matter. Section 283 of the Constitution reads as follows:-

> **"283 Appointment and removal of traditional leaders**
> An Act of Parliament must provide for the following, in accordance with the prevailing culture, customs, traditions and practices of the communities concerned—
> (*a*) the appointment, suspension, succession and removal of traditional leaders;
> (*b*) the creation and resuscitation of chieftainships; and
> (*c*) the resolution of disputes concerning the appointment, suspension, succession and removal of traditional leaders; but—
> (i) the appointment, removal and suspension of Chiefs must be done by the President on the recommendation of the provincial assembly of Chiefs through the National Council of Chiefs and the Minister responsible for traditional leaders and in accordance with the traditional practices and traditions of the communities concerned;
> (ii) disputes concerning the appointment, suspension and removal of traditional leaders must be resolved by the President on the recommendation of the provincial assembly of Chiefs through the Minister responsible for traditional leaders."

In interpreting s283, in *Munodawafa vs. The District Administrator Masvingo and ors*, 2015(1) ZLR 957, it was held as follows (as per headnote)

> "that as regards disputes, s 283(c)(ii) makes it clear that the President must deal with such disputes and that the recommendation must come to him through the Provincial Assembly of Chiefs and the Minister responsible for chiefs. In other words, the Provincial Assembly of Chiefs actively plays a role in the resolution of the dispute in accordance with the traditional practices and traditions of the communities concerned. It is their efforts or recommendations which are then communicated to the Minister who in turn communicates with the President for action. As regards the appointment, removal and suspension of a chief, as distinct from any dispute, s 283(c)(i) stipulates that the President is again the one who must act, on the recommendation of the provincial assembly of chiefs through the National Council of Chiefs and the Minister responsible for chiefs. The starting point is therefore at the provincial level. Among the duties of the national and provincial councils of chiefs, as stipulated in s 286(1)(f) is "to facilitate the settlement of disputes between and concerning traditional leaders".
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> further, that in cases such as this, where the President has the ultimate discretion on whom he appoints as chief in terms of both the Constitution and the Traditional Leaders Act [*Chapter 29:17*],what is reviewable by the courts is not how the President exercises his discretion but whether those who formulate their advice to him acted on sound principle. The Minister's advice, which he relays to the President, is reviewable on three grounds: illegality, irrationality and procedural impropriety. What would thus be reviewable in the present matter

would be the Minister's advice in accordance with the channels stipulated in s283(c)(i) and (ii). *Held*, further, that constitutionally, as provided for by s 171, the High Court has inherent jurisdiction to hear all civil and criminal matters throughout Zimbabwe. The High Court is therefore always a forum of jurisdiction that can be selected by the parties and the court will exercise its jurisdiction where it is clear that it should do so. Critically, however, where domestic remedies for resolving the issue are provided, as here, the court will want to know why it should exercise its inherent jurisdiction if such remedies have not been exhausted. There was no reason why the remedies provided in s 283 of the Constitution should not be exhausted first."

See also *Gambakwe* vs *Chimene and ors*, 2015(1) ZLR 710 and *Mlotshwa* vs *DA, Hwange and ors HB-161-16*.

The Supreme Court however put the issue of jurisdiction vis-à-vis s283 beyond doubt in *Marange vs Marange and ors,* SC-1-21 as follows:

> "Jurisdiction to entertain chieftainship disputes
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> As I have already stated, s 283 of the Constitution is not a substantive provision that impacts directly on the law governing the appointment and removal of traditional leaders. Rather, it declares what that law should provide in regulating, inter alia, the resolution of chieftainship disputes. Consequently, it cannot be construed, per se, as ousting the jurisdiction of the courts over such disputes.
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> At common law, the High Court enjoys original review jurisdiction. This jurisdiction is now codified in s 26 of the High Court Act which endows the court with the "power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe". Section 27 of the Act elaborates "the grounds on which any proceedings or decision may be brought on review" and includes "any gross irregularity in the proceedings or the decision". The powers of the court on review of civil proceedings and decisions are spelt out in s 28 which enables the court "subject to any other law, [to] set aside or correct the proceedings or decision".
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> It is trite that Parliament is at large, subject to the Constitution, to curtail or oust the jurisdiction of any court. However, it is equally trite that any such ouster must be effected in clear and unambiguous terms. In the present context, even if s 283 of the Constitution were to be regarded as a substantive provision, I am unable to discern anything in its language that might be construed, whether expressly or by necessary implication, to curtail or oust the review jurisdiction of the High Court. By the same token, there is nothing contained in s 3 of the Traditional Leaders Act, being the relevant substantive provision currently in force, which might be taken as effecting any such ouster.
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> It follows from the foregoing that the court a quo was correct in adopting the stance that it was invested with the requisite jurisdiction to review the acts and conduct of the Minister, in his capacity as an administrative authority, on the recognised grounds of illegality, irrationality or procedural impropriety. More specifically, what is reviewable is not how the President exercises his discretion but whether those who formulate their advice to him acted on sound principle. See *Rushwayo* v *Minister of Local Government & Anor* 1987 (1) ZLR 15 (S), at 18F-19B; *Chigarasango* v *Chigarasango* 2000 (1) ZLR 99 (S); *Moyo* v *Mkoba & Ors* SC 35/2013; *Munodawafa* v *Masvingo District Administrator & Ors* HH 571-15. It further follows that the first

> ground of appeal challenging the assumption of jurisdiction by the court a quo in a chieftainship dispute, as having been ousted by s 283 of the Constitution, is misplaced and cannot be sustained. What remains in issue, however, is the decision made by the court, pursuant to the exercise of its jurisdiction, to set aside the appointment of the appellant as the substantive Chief Marange."

It follows therefore, that the contention by the second to the fifth respondents' legal practitioner that this court has no jurisdiction is misplaced.

I will now turn to the other points *in limine.* Whether or not a litigant should have made an application for review has received attention in *Gwaradzimba N.O vs Gurta AG,* 2015(1) ZLR 402 (S). The fact that the application is not headed 'Court application for review" is neither here nor there.

On the incompetency of the order sought, it is clear that whilst the court cannot appoint a chief, the main relief sought is that of the removal of the first respondent and if that were to be granted, the procedure for appointment would have to be followed. On the customary law applicable, the courts have adjudicated on matters involving appointment of chiefs and as in the *Munodawafa* decision, the issue is whether those that advise the 5th respondent acted on sound principle. The court can also resort to s9 of the Customary Law and Local Courts Act [*Chapter 7:05]* in ascertaining customary law.

Where the application stutters however, is in bringing to this court a matter that is replete with disputes of fact, not only that but material disputes. How the applicant convinced himself that this court would be in a position to decide the matter on paper is beyond comprehension. However instead of dismissing the application, the most prudent legal course to take is to refer it to trial so that the issues can be fully ventilated- see *Gweshe vs. The President of the Republic of Zimbabwe, N.O,* HH-542-16.

The applicant should have foreseen that this matter is not capable of resolution on the papers and he must accordingly pay the costs.

DISPOSITION

1. The application is referred to trial under the same case number.
2. The applicant shall be cited as the plaintiff and the respondents as 1st to the 5th defendants as appropriate.

3. The applicant shall file and serve his declaration on the respondents within ten (10) days from the date of this order.
4. Thereafter the matter shall proceed in terms of the rules of the HC, 2021.
5. The applicant shall pay costs of suit on the ordinary scale.

Chizengeya, Maeresera and Chikumba, applicant's legal practitioners
Matiyashe Law Chambers, 1st respondent's legal practitioners
Civil Division of the Attorney- General's Office, 2nd – 5th respondent's legal practitioners