MILTON MUNODAWAFA
versus
DISTRICT ADMINISTRATOR MASVINGO
and
PROVINCIAL ADMINISTRATOR MASVINGO
and
DIRECTOR, TRADITIONAL LEADERS SUPPORT SERVICES
and
THE MINISTER OF LOCAL GOVERNMENT RURAL AND URBAN DEVELOPMENT
and
EPHIAS MUNODAWAFA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 18 May & 24 June 2015

Trial Cause

J Samkange, for plaintiff
T Zhuwarara, for 5th defendant

TSANGA J: This matter which concerns the removal of a chief was placed before me for trial. Section 283 of the new Constitution,[1] now deals comprehensively with the appointment and removal of chiefs as well as with any disputes pertaining thereto. With the leave of the court heads of argument were submitted by counsel for plaintiff and the fifth defendant in order to determine if the trial could proceed in light of this provision.

By way of a brief background, the plaintiff's claim is for an order:

"1. Declaring that the customary principles of succession to the Murinye chieftainship were not observed nor given due consideration in the appointment of the 5th defendant as Chief Murinye.
2. Directing the 4th Respondent[2] (*sic*) to forthwith make a recommendation to the President for the removal of the 5th Respondent (*sic*) from chieftainship of the Murinye clan.
3. Directing the 1st, 2nd, 3rd and 4th Defendants to cause a meeting of the eligible elders of the Murinye clan to be convened to elect the most eligible candidate from the MUNODAWAFA house for appointment as the next Chief Murinye.
4. Directing the 1st, 2nd, and 3rd Defendants to record the conclusions of the meeting of the eligible elders of the Murinye clan and forward to the 4th Defendant and form the basis for a recommendation to the President on the appointment of the next Chief MURINYE.
5. For the payment of costs by the Respondents (*sic*), jointly and severally, the one paying the other being absolved."

[1] Constitution of Zimbabwe Amendment (No.20) Act 2013
[2] Plaintiff appears to use Defendant and Respondent interchangeably although this matter was brought by way of action.

The new Constitution provides as follows in s283

"**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**; (My emphasis)
(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;** (My emphasis)
(iii) the Act must provide measures to ensure that all these matters are dealt with fairly and without regard to political considerations;
(iv) the Act must provide measures to safeguard the integrity of traditional institutions and their independence from political interference."

THE PLAINTIFF'S ARGUMENT

The plaintiff's position is that s283 (c) (ii) does not take away the jurisdiction of the court to hear the case. He draws strength from the provisions contained in the 6th Schedule of the new Constitution, in particular s18 (9) which provides as follows:

"All cases, other than pending constitutional cases, that were pending before any court before the effective date may be continued before that court or the equivalent court established by the Constitution, as the case may be, as if this Constitution had been in force when the case were commenced, but-

a) The procedure to be followed in those cases must be the procedure that was applicable to them immediately before the effective date;
b) The procedure referred to in subparagraph (a) applies to those cases even if it is contrary to any provision of Chapter 4 of this Constitution."

Plaintiff further relies on subsection 18 (10) (b) which provides that:

"For the purposes of subparagraph (9)
(a)…….
(b) a civil case is deemed to have commenced when the summons was issued or the application was filed, as the case may be."

As such, the plaintiff therefore points out that it initially issued summons on 23 September 2009 under HC 4455/09, and, following an application for joinder, summons were reissued again on 16 September 2011 under the present matter as case no. HC 8352/11. The plaintiff's point therefore is that these summons essentially precede the new constitution.

According to the plaintiff, the matter therefore falls to be dealt with in terms of the procedure laid out in s18 (9) & (10) of the 6th Schedule since the Constitution came into full effect on the 22 August in 2013.

The plaintiff further relies on the case of *Gurta* v *Gwaradzimba NO* HH 353-13 for illustrating the constitutional point that the procedure to be adopted in such cases is that which was applicable at the time.

THE 5TH DEFENDANT'S ARGUMENT

The essence of fifth defendant's argument is that the new Constitution clearly uses the word MUST in directing that such disputes be resolved by the President. It is argued that the word is peremptory rather than directory and requires strict compliance. The first defendant cites the cases of *Sutter* v *Scheepers* 1932 AD 165 at 173-175 and also that of *The Minister of Environmental Affairs and Others* v *Pepper Bay Fishing (Pvt) Ltd* 2003 All SA 1 SCA for its point on the peremptory nature of the word. Also put forward by fifth respondent's counsel is the incompetency of the relief sought in light of the principles provided for in the Constitution. It is pointed out this court is being asked to make a recommendation for the removal of the fifth defendant, when the Constitution clearly stipulates how such recommendation is to be made to the President. It is also pointed out that neither the Provincial Assembly of Chiefs nor the National Council of Chiefs are cited in this action yet their role is central in the Constitution in facilitating the recommendation.

The emphasis by the fifth defendant's counsel is therefore that it being clear that applicable principles, are those in the new Constitution, it is the President according to these principles who has original jurisdiction in resolving any disputes relating to a chief. It is therefore maintained that this court cannot hear this matter in preference to the President who is so mandated by the Constitution. It is the fifth defendant's position that in the absence of his pronouncement, it will be premature for this court to step in. Legal doubt is further expressed as to whether even if such pronouncement were made, this court could still review the President's decision.

THE EFFECT OF S18 (9) OF THE 6TH SCHEDULE

This matter indeed falls within the ambit of a non-constitutional matter which was pending at the time the new Constitution came into force. As such, as exhorted by s18 (9) of the 6th Schedule, it is to be continued "**as if the new constitution was in place when the**

action was commenced". There is no doubt that the principles to be applied to the case are those of the new constitution. The wording of 18 (9) is clearly designed to ensure that such cases commenced prior to the new Constitution coming into force, are subjected to constitutional standards. In this instance the new Constitution provides the channels which must be followed for the appointment, removal and suspension of a chief in s283 (c) (i). It also articulates the channels that must be followed in disputes concerning the appointment suspension and removal of a chief, in s283 (c) (ii).

As regards to ***disputes*** s 283 (c) (ii) makes itclear 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, s283 (c) (i) stipulates that the President is again the one who must action on the recommendation of the following: 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 Council of chiefs as stipulated in s286 (1) (f) of the new Constitution is "to facilitate the settlement of disputes between and concerning traditional leaders". This is clearly a dispute which falls within their mandate in terms of their role in facilitating resolution since it concerns a traditional leader.

THE IMPORT OF S 283 OF THE NEW CONSTITUTION

The next issue for consideration is whether the above provisions therefore oust this court's jurisdictions as argued by the fifth defendant's counsel. In the recent case of *Gambakwe and Ors* v *Chimene and others* HH 465-15 Uchena J discussed the import of s283 (c) (ii) regarding the resolution of disputes. In dealing with an urgent matter placed before him which involved a dispute pertaining to chieftaincy he made the following remarks pertaining to the ambit of this section:

As already said the requirement in s 283 (c) (ii) of the Constitution that disputes concerning the appointment of chiefs "must, be resolved by the President on the recommendation of the provincial assembly of Chiefs through the Minister responsible for

traditional leaders;" imposes a duty on the President, and is indicative of the legislature's intention that only the President should resolve such disputes. Other- wise, how must the President resolve such disputes if the courts can also resolve them. The use of the word "must" means he is obliged to resolve every such dispute…….I therefore agree with Mr Dondo and Ms Hove that the applicants have come to the wrong forum.

Uchena J seems to suggest that the courts have no jurisdiction. 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, as stated in the case of *Chagaresango* v *Chagaresango* 2000 (1) ZLR 99 (S*),* 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 said to be reviewable on three grounds, namely: illegality, irrationality and procedural impropriety. (See *Rushwaya* v *Minister of Local Government & Anor* 1987 (1) ZLR 15 (S) at p 18F-19B and *Gorden Moyo* v *Stephen Mkoba & Ors* SC 35 2013. 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) & (ii).

Constitutionally too as provided for by s171, 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**. Critically however, where domestic remedies for resolving the issue are provided, as in the case before me, the court will want to know why it should exercise its inherent jurisdiction if such remedies have not been exhausted. For the court's jurisdiction to be completely ousted would require a specific provision to that effect.

The key point therefore is that where a remedy is provided, it is indeed within the court's power to insist that the remedy be exhausted before it will intervene in the appropriate manner permissible. It would otherwise make no sense to ignore the fact that remedies are provided and constitutionally so, in this case. The starting point, for coherence and clarity, is therefore to ensure that such remedies have been exhausted as a prelude to the court's intervention so that the court is essentially coming in where it should and in the manner that it should.

The procedural argument put forward by the plaintiff in relation to s18 (9) (a) & (b) of the 6th Schedule takes the matter no further since procedure refers to the manner of

proceeding in terms of prescribed form or format. Such cases would generally be by way of review and not trial more so in this case where the plaintiff's declaration indicates that his complaint is against the manner the procedures were followed or not followed. Furthermore, in terms of Order 33 r259, proceedings by way of review should be instituted within eight weeks of the proceeding in which the irregularity complained of occurred although the court may for good cause shown extend the time. This was clearly not done and in fact a trial action may thus have been lodged simply because the plaintiff realised that he was way of time to bring a review. Equally significant in this case is that the President is not even a party to this action yet he is the one who has appointed the fifth defendant as chief, who the plaintiff alleges has been un-procedurally appointed. He is inseparable from the resolution of the dispute.

The import of the provisions of the new Constitution on issues relating to disputes and the removal of chiefs that were filed before its coming into effect are such that the procedures in s283(c) (i) (ii) are to be applied in the face of a dispute. This is a natural consequence of the mandate to apply the provisions of the new constitution to all cases that were pending. There is no escaping that reality.

There is no reason why the remedies provided in s283 c (i) & (ii) of the new Constitution cannot be exhausted. I therefore decline to hear this matter.

Accordingly, the matter is dismissed with costs.

Venturas and Samkange, plaintiff's legal practitioners
M S Musemburi Legal Practice, 5th defendant's legal practitioners