ZVIDZAI DZOMA MARANGE
versus
BERNARD MURWIRA MARANGE
and
MINISTER OF RURAL DEVELOPMENT, PROMOTION AND PRESERVATION OF NATIONAL CULTURE AND HERITAGE
and
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 17 July, 2017 and 28 August 2017

Opposed Matter

C Warara, for the applicant
Ms *T Pfigu,* for the 1st respondent
Ms *M Gezera*, for the 2nd & 3rd respondents

MANGOTA J: Chikwavadombo Mastick Marange ["Chikwavadombo"] died on 8 September 2005. He was the substantive Chief Marange. Two persons acted in his place and stead, each in turn, after his death. These were one Ringisai Noah Marange and one Gilbert Marange. The first respondent eventually succeeded him as Chief Marange.

The process of selecting Chikwavadombo's successor was long and arduous. It commenced at about the time of Chikwavadombo's funeral. It remained in place for some eleven (11) years running. It ended with the installation of the first respondent as Chief Marange. The installation took place on 27 October, 2016.

The installation of the first respondent triggered the present application. The applicant alleged that the first respondent was irregularly and improperly appointed to the position of Chief Marange. He said the incumbent Chief ["incumbent"] was imposed upon the people of Marange. The incumbent was, according to him, not the people's preferred candidate for the positon. He stated that the people had chosen him, and not the incumbent, to be their Chief. He averred that the second respondent hand-picked the first respondent and imposed him on the people against the latter's wishes. He moved the court to review the work of the second

respondent and set the same aside and, by implication, remove the first respondent from his position of Chief for the people of Marange.

The respondents opposed the application. They agreed with the first respondent's *in limine* matter. They submitted that the court lacked jurisdiction to hear and determine the application. They anchored their argument on section 283 of the Constitution of Zimbabwe. They stated that disputes which related to the appointment, removal and suspension of a Chief should be resolved by the third respondent on the recommendations of the Provincial Assembly of Chiefs through the second respondent. They insisted that the applicant should have taken that route instead of approaching the court. He should, they said, have referred his grievance to the Provincial Assembly of Chiefs for dealing. They moved the court to dismiss the application.

The application is, in my view, against the second, more that it is against the third, respondent. The third respondent was not involved in the selection process which culminated in the nomination of the first respondent as the substantive Chief Marange. He was, in fact, presented with a *fait accompli*. The second respondent who commenced the selection process and drove it through to the nomination stage of the first respondent presented the third respondent with a recommendation upon which the latter had to, and did actually, act. He had no choice but to endorse his signature upon the recommendation of the second respondent. The third respondent operated upon the premise that the second respondent to whom he assigned the Traditional Leaders Act would not mislead him.

The respondents missed the point when they submitted that the court lacked jurisdiction to hear and determine the application. The court does have the requisite jurisdiction to inquire into the conduct of the second respondent. It is, at law, permitted to scrutinise the process which the second respondent commenced and drove right through to the nomination by him of the first respondent as the people of Marange's preferred choice. It should ascertain if the process which brought about the result which the applicant complains of was within, or outside, the law.

The view which the court takes of the matter finds fortification from a reading of s 26 of the High Court Act [*Chapter 7:06*] ["the Act"]. The section confers power, jurisdiction and authority on the court to review all proceedings and decisions of inferior courts of justice, tribunals and administrative authorities within Zimbabwe. Section 27 of the Act spells the grounds for review. It reads:

"(1) subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be -

a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
c) gross irregularity in the proceedings or the decision." [emphasis added]

It is mentioned in passing that the application was based on sections 26 and 27 of the Act. The application lays criticism on the manner in which the second respondent went about discharging his duties as the Minister to whom the President of Zimbabwe assigned the Traditional Leaders Act.

The work of the second respondent is, to all intents and purposes, an administrative act. He dealt with that work in his capacity as an administrative authority. That work is, therefore, reviewable by the court. It is reviewable to ascertain if it did not offend any of the above mentioned grounds for review.

It is pertinent to stress that administrative acts are subject to review. The court has the power, authority and jurisdiction to ascertain whether or not the acts are compliant with the law. Where they are, they remain undisturbed. Where they are not, the court has the power and authority to revisit them by either setting aside the result of the acts or by correcting them so that they remain *in sync* with the law.

On the merits, the applicant gave a clear and concise narration of the events which led to the appointment of the first respondent to the positon of Chief Marange. His version was easy to follow. He made every effort to show that he was the preferred candidate for the position of Chief Marange. He attached to his application the supporting affidavits of nine (9) persons. He also attached to the same a letter which the second respondent allegedly addressed to the Office of the Attorney General on 21 April, 2015 and a Cabinet Minute which the second respondent purportedly drew on 4 May, 2016. He produced no further evidence which supported his averments apart from the supporting affidavits of the nine (9) persons, the letter and the purported Cabinet Minute. His case was, therefore, akin to a still birth.

The supporting affidavits of the nine persons were deposed to on 1 November, 2016. Four (4) of the nine (9) persons did, on 10 January 2017, depose to affidavits in which they denied having ever deposed to affidavits in support of the application. They stated that the signatures which appeared on the supporting affidavits of 1 November, 2016 did not belong

to them. They denied having ever appeared before any commissioner of oaths to sign the affidavits. Two (2) of the four (4) did, on 26 February 2017, depose to affidavits stating that their depositions to the affidavits of 10 January 2017 were made by them under duress. They said they were taken from their rural home to Harare where they were accused by an unidentified physically imposing man of undermining the authority of the government by supporting the applicant. They said they were told to make amends and were given drafted affidavits which they were made to sign and they signed those. Three (3) of the four (4) did, on 14 March 2017, depose to affidavits in which they dissociated themselves from the applicant's case and cause.

It is evident, from the foregoing, that the deponents were used as a means to an end. They were, no doubt, at the mercy of the applicant and the first respondent. They went along with whoever approached and sought their support. No weight can be attached to affidavits of persons who swang from one party to the other like a pendilum. The affidavits told a lie about themselves. In telling the lie as they did, they revealed the pressure to which the deponents were subjected in the parties' respective effort to ascend to the throne. The supporting affidavits which the applicant attached to the application do not, therefore, support anything let alone his case.

The letter which the second respondent allegedly addressed to the Office of the Attorney General and the purported Cabinet Minute do carry very little, if any, weight. Neither the letter nor the Cabinet Minute was signed by anyone. Their origin was not clarified.

The applicant did not tell the court what method he used to access the two documents. They were not for his attention or consumption. They are privileged documents which are for the attention of no one else but Cabinet.

The net effect of the above analysed matters is that the applicant's case stood on nothing. He made allegations which he failed to substantiate. He said he was the people of Marange's choice for the position of Chief. He, however, produced nothing which supported his claim(s). It is trite that he who alleges must prove. The applicant alleged. He did not prove.

The applicant's case would have been more convincing than it currently is if he attached to his application minutes of meetings which members of the house of Marange held in their effort to select the next Chief Marange. The minutes would have shown the members'

deliberations as well as the person who emerged as the people's preferred choice for each meeting which was held. These would have constituted concrete evidence which would have left the court with little, if any, doubt as to the members' preferred choice.

Whilst the applicant could not show that he was the people's favourite, he was able to show the existence of a dispute which reared its ugly head in the selection process. The dispute remained in the process from the time that the second respondent became alive to it to date. It could not be, and was not, wished away. The nomination of the first, by the second, respondent did not put it to rest. It, if anything, escalated it resulting in the present application wherein the applicant moves the court to scrutinise the second respondent's work.

The first respondent, in his wisdom, attached to his opposing papers some minutes of meetings of members of the house of Marange. He attached minutes of the meeting of 1 March 2013 as well as those of 15 February 2013. He called them Annexures B and C respectively.

The contents of the annexures showed that the applicant was at same point kicked out of the race. The relevant portion of the first annexure reads:

> "It was agreed that if the *Zibaba* is unclean then he is not eligible to become chief. The chairperson confirmed about the houses that are unclean … The houses came out as Dzoma and Manjengwa houses (sic) committed incest ….
>
> As a way forward the houses agreed that they will continue the selection process using the *Zvipomerwa* method. The house found to be unclean will be out of the race---."

Minutes of deliberations of the meeting of 15 February 2013 read, in part, as follows:

> ".. they said those Madzibaba should be clean… of which the houses like Dzoma, Manjengwa and Muchisi were alleged to have some incest cases."

The first respondent was wise enough to produce evidence which tended to show that the applicant fell out of the race. He selected what he believed would damage the applicant's claim. He left out any minutes which he considered to have been supportive of the applicant's case. I say so because the members held more than two meetings in their effort to select, from among them, a person who should have become chief Marange. Any minutes, therefore, which supported the applicant's cause would have assisted him to substantiate his claims.

That the applicant was a serious contender in the race to the chieftainship of Marange requires little, if any, debate. He stated as much. The second respondent supported his statement in the mentioned regard. He made a concession in paragraph 40 of his opposing

affidavit. He said "*it is admitted that at some point during this lengthy selection process applicant was nominated but rejected before appointment owing to infractions stated above*."

The second respondent held not less than five (5) meetings with the people of Marange. He held those in an effort to find a candidate whom the people would accept as their chief. He held the meetings through his representatives.

The meetings did not produce a clear candidate whom the second respondent could recommend to the third respondent for appointment to the position of chief Marange. The second respondent's next move was to establish commissions of inquiry. Three such commissions were set up, each in turn. The first one's work took place in June 2014. The second one's work was in August 2014. The third one did its work on an unnamed date but after August 2014.

The second respondent's assertions were that the June 2014 commission of inquiry was set up owing to the inconclusive nature of the nomination of the applicant as chief. He said the August 2014 commission was established because the previous commission was inconclusive and did not produce a candidate.

It was evident to the second respondent that the position of chief Marange was a hotly contested matter. He stated as much. He said the Marange chieftainship was bitterly contested. He stated that Government had, therefore, to be certain on the right candidate before making the appointment.

The second respondent's effort was, to some extent, commendable. Its shortcoming was that the people whom he chose to drive the process were not in any way conversant with the customs, cultures and traditions of the people of Marange. Both of them - Mukwaira and Felix Chikovo – had to inquire from the Marange families the latter's succession customs with regard to the issue of chieftainship. As inquirers, they did what they thought was best for the people. They, in the process, cooked a raw deal which the people of Marange, or at least some of them, refused to accept.

The dispute which should have been effectively resolved centred on two contenders. These were the applicant and the first respondent. The dispute could easily have been conclusively resolved if the second respondent had acted in terms of s 283 (c) (ii) of the Constitution of Zimbabwe. He should, in other words, have referred the same to the provincial assembly of chiefs. It is one of the functions of the provincial assembly of chiefs to

consider and report on any matter which the second respondent refers to it. Reference is made in this regard to s 42 (3) of the Traditional Leaders Act.

The Provincial Assembly of Chiefs comprises all chiefs of a given province. That provincial assembly is better qualified than anyone else to know the customs, traditions and cultures of the people of their province. They know what is and what is not taboo. They are, after all, the recognised custodians of the cultures and traditions as well as customs of all persons who inhabit their province.

The work and recommendations of the provincial assembly of chiefs for the province of Manicaland would properly have guided the second respondent on the best course of action for him to take. The provincial assembly of chiefs would have looked at the contenders' profiles, each in turn, the infractions they were alleged to have committed and any other matter which was relevant to the resolution of the dispute. It would have made its recommendations upon which the second and third respondents would have properly acted in a conclusive manner.

The contenders' dispute appeared to have surfaced at about the time of the funeral of Chikwavadombo. It, however, became apparent to the second respondent in 2008 and the subsequent years. The method which he adopted for a resolution of the same prior to the birth of the country's current constitution was above board. However, when the dispute spilled into the promulgation of the Constitution of Zimbabwe Amendment [No. 20] Act of 2013 his work became a lot easier than it was during the old constituion. The second respondent should have realised that he could not continue to employ the old method of resolving the dispute. He should have realised that section 283 of the new constitution offered him a clear guide which he could not ignore.

The drafters of the new constitution made every effort to have disputes of the present nature referred to the custodians of people of the province's cultures, customs and traditions. They realised that such custodians are better placed than any outsider in interpreting vague situations which tend to arise on matters of customs and traditions and resolving disputes which, more often than not, tend to arise when a person, or persons, aspire(s) to be appointed to the position of chief of a people. They, therefore, stated in unequivocal terms that such disputes be resolved by the President on the recommendation of the Provincial Assembly of Chiefs through the Minister responsible for traditional leaders, the second respondent *in casu*.

The constitutional provision makes the second respondent's work a lot easier than it was in the past. The moment he realises that a dispute which relates to the appointment to, suspension, succession and/or removal of, a person from, the position of chief is at hand, he should refer such to the provincial assembly of chiefs for its attention. His next move is to receive the provincial assembly of chiefs' recommendation which he will, in turn, forward to the President of Zimbabwe who will act upon the same.

The route which the respondents urged the applicant to take *in casu* is the same route which the second respondent should have taken when he became alive to the dispute which existed between the applicant and the first respondent. Section 283 of the Constitution was already in place when he nominated and recommended the first, to the third, respondent for appointment to the position of Chief Marange.

The commissions of inquiry which the second respondent established in June and August 2014 are not provided for in the Traditional Leaders Act let alone in the current Constitution of Zimbabwe. They were illegally set up and the result of their work was or is a nullity.

It is at one such commission of inquiry that the first respondent was identified as a suitable candidate for the position of chief Marange. The work of the commission which identified him as such offended s 283 of the Constitution of Zimbabwe. The commission acted outside the law and so did the second respondent. He did not have the jurisdiction to act as he did. His work was *ultra vires* the constitution.

The constitution is the supreme law of Zimbabwe. Any law, practice, custom or conduct which is inconsistent with it is invalid to the extent of the inconsistency. The doctrine of supremacy of the constitution is sacrosanct. It is immutable.

The work of the second respondent was frought with an illegality. It is invalid. It is a nullity. It cannot, therefore, stand.

The long and short of the stated position is that the event of 27 October 2016 should be undone. The second respondent who is already alive to the dispute of the applicant and the first respondent will have to revisit the matter which relates to the appointment of substantive Chief Marange. He is, in the mentioned regard, properly guided by s 283 of the constitution of Zimbabwe as read with s 42 (3) (b) of the Traditional Leaders Act.

It is not known when the provincial assembly of chiefs to whom the second respondent will, in terms of the law, refer the dispute will complete its work. Paragraph 2 of

the draft order which places an obligation on the third respondent to appoint a substantive chief within sixty (60) days of the date of the order cannot stand. The paragraph is, therefore, struck out. The matter which relates to that aspect of the process is better left open than closed.

The court has considered all the circumstances of this case. It is satisfied that the applicant proved his case on a balance of probabilities.

It is, accordingly, ordered that:

1. The appointment of the first respondent as the substantive chief Marange be and is hereby set aside.
2. The first and second respondents shall pay the costs of this application.

Warara & Associates, applicant's legal practitioners
T Pfigu, 1st respondent's legal practitioners
Civil Division of the Attorney General's Office, 2nd & 3rd respondent's legal practitioners