

**REPORTABLE (1)**

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

**SUPREME COURT OF ZIMBABWE**  
**GWAUNZA DCJ, PATEL JA & BERE JA**  
**HARARE: JUNE 4, 2018 & MARCH 11, 2021**

*T. Magwaliba*, for the appellant  
*E. Mubaiwa*, for the first respondent  
No appearance for the second and third respondents (in default)

**PATEL JA:** This is an appeal against the whole judgment of the High Court setting aside the appointment of the appellant to the Marange chieftainship in 2016. It is a matter concerning the procedure to be followed in the appointment of chiefs in Zimbabwe pursuant to the advent of the current Constitution in 2013.

**Background**

The substantive Chief Marange died on 6 September 2005. Two of his relatives acted in his place and stead following his death. Following a long and arduous selection process, the appellant was eventually installed as Chief Marange on 27 October 2016.

The first respondent challenged this appointment as having taken place irregularly and improperly. In particular, he averred that he was the people's preferred candidate for the position and that the second respondent (the Minister) had hand-picked the incumbent and imposed him on the people against their wishes.

The first respondent moved the court *a quo* to review the conduct of the Minister and to set aside the appointment of the appellant as Chief Marange. The appellant, together with the other respondents *a quo*, opposed the application on the basis that the court lacked jurisdiction to hear and determine the application by reason of the provisions of s 283 of the Constitution.

#### Judgment of the High Court

The court *a quo* rejected the point *in limine* taken by the respondents before it. It found that it did have the jurisdiction, by virtue of ss 26 and 27 of the High Court Act [*Chapter 7:06*], to inquire into the conduct of the Minister, as an administrative authority, and to ascertain whether that conduct fell within the law. The court further found that the people chosen by the Minister to advise him on the selection process were not conversant with the customs and traditions of the Marange people.

The court took the view that the chieftainship dispute should have been resolved by the Minister in terms of s 283(c)(ii) of the Constitution. He should have referred the dispute to the provincial assembly of Chiefs to consider the matter and report back to him as provided by s 42(3) of the Traditional Leaders Act [*Chapter 29:17*]. Instead, he

acted outside the law in accepting the recommendation of one of the commissions that had been illegally set up by him to identify a suitable candidate for the chieftainship. Consequently, he acted *ultra vires* the Constitution in appointing the appellant as Chief Marange.

As regards the first respondent's claim to the chieftainship, the court *a quo* found that the documents that he had produced did not substantiate his allegations. He did not produce anything to support his claim to be the people's choice. On the other hand, the court held that the first respondent had proved his case, for the setting aside of the appellant's appointment, on a balance of probabilities. The court accordingly ordered that the appointment of the appellant as the substantive Chief Marange be set aside. Additionally, the appellant and the Minister were ordered to pay the costs of the application. In effect, the third respondent (the President) was entirely absolved of any responsibility for the Minister's unlawful conduct.

#### Grounds of appeal and relief sought

The four grounds of appeal herein impugn the judgment of the court *a quo* on the following bases. The first is that the jurisdiction of the court to deal with chieftainship disputes was ousted by s 283 of the Constitution. The second is that the dispute in this case arose when the first respondent challenged the appellant's appointment and it is at that point that the Minister should have referred the dispute for resolution by the President. The third takes issue with the court, having found that the first respondent had not proven his case, but nevertheless granting the relief sought by him setting aside the appellant's

appointment. The fourth attacks the implied finding of the court to the effect that the appellant's appointment was not in accordance with the custom and practice of the people of Marange.

The relief sought by the appellant is that the appeal be allowed with costs and that the judgment *a quo* be set aside and be substituted with an order dismissing the application with costs.

The governing provisions

Section 280 of the Constitution recognises the institution, status and role of traditional leaders under the Constitution, while s 281 underscores the principles to be recognised by traditional leaders. Section 282 spells out the functions of traditional leaders within their respective areas of jurisdiction.

Sections 285 and 286 of the Constitution provide for the establishment and functions of the National Council of Chiefs and provincial assemblies of Chiefs. In terms of s 285(2), a provincial assembly of Chiefs must be established for each province by an Act of Parliament. By virtue of s 286(1)(f), one of the functions of a provincial assembly is "to facilitate the settlement of disputes between and concerning traditional leaders" within its province.

The critical provision for consideration *in casu* is s 283 of the Constitution relating to the appointment and removal of traditional leaders. It is necessary to set it out in full as follows:

“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;
- (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.” (My emphasis)

Turning to the Traditional Leaders Act, s 3(1) of this Act empowers and obligates the President to appoint chiefs to preside over communities inhabiting Communal Land and resettlement areas. In performing this function, the President is enjoined by s 3(2) to give due consideration to the prevailing customary principles of succession and, wherever practicable, to appoint a person nominated by the appropriate persons in the community concerned in accordance with those principles. In the event that such nomination is not made within two years after the chieftainship became vacant, the responsible Minister is then required, in consultation with the appropriate persons, to

nominate a person for appointment as chief. Section 3(3) of the Act enables the President, where he is of the opinion that good cause exists, to remove a chief from office. This power is subject to s 7 which prescribes the disciplinary procedures to be followed where a chief commits or is alleged to have committed a specific offence or act of misconduct.

Part IX of the Act provides for the establishment and functions of provincial assemblies and the Council of Chiefs. In terms of s 35(1), there is constituted a provincial assembly for each province of all the chiefs of that province. Section 35(2) requires every provincial assembly “to meet at least twice a year at such time and place as the Minister may from time to time determine”. One of the principal functions of a provincial assembly, as stipulated by s 36(b), is “to consider and report on any matter which is referred to it by the Minister, the Council or a member of such provincial assembly”.

Following exchanges with the Court, it was accepted by both counsel that s 283 of the Constitution does not constitute the actual code that governs the appointment and removal of chiefs or the resolution of disputes in that connection. What s 283 does is to enunciate the template to be applied in the formulation and implementation of that code. It is also common cause that the Traditional Leaders Act, duly modified so as to fully conform with the Constitution, provides the requisite legislative framework contemplated by s 283 of the Constitution.

Thus, even without having been exactly aligned to the Constitution, the Act makes it clear that it is the President who is vested with the power to appoint and remove

chiefs from office and that he must do so in accordance with the prevailing customary principles of succession, following nominations by the local community and/or the responsible Minister. To a significant extent, therefore, the provisions of the Act that I have alluded to are perfectly capable of being applied in accordance with the requirements of s 283 of the Constitution. I am amply fortified in adopting this approach by having regard to para 10 of the Sixth Schedule to the Constitution, which dictates the continuation in force of all existing laws to be construed in conformity with the Constitution.

#### Jurisdiction to entertain chieftainship disputes

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.

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”.

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.

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.

Appointment to substantive chieftainship

The court *a quo* proceeded on the basis that the commissions of inquiry established by the Minister were not provided for in the current Constitution or in the Traditional Leaders Act. One such commission identified the appellant as a suitable candidate for the position of Chief Marange. This, according to the learned judge, offended s 283 of the Constitution. Both the commission and the Minister acted *ultra vires* the Constitution. Their actions were nullities and therefore could not be allowed to stand. The Minister was called upon to revisit the matter “properly guided by s 283 of the Constitution of Zimbabwe as read with s 42(3)(b) of the Traditional Leaders Act”. In the event, the court was satisfied that the applicant (the first respondent herein) had proved his case on a balance of probabilities. It accordingly ordered that the appointment of the first respondent (the appellant herein) as the substantive Chief Marange be set aside.

Both counsel are in agreement that the court *a quo* relied upon and applied the wrong provisions in setting aside the decision of the Minister and the appointment of the appellant. As I have concluded earlier, s 283 of the Constitution is not directly applicable to the resolution of the dispute *in casu*. As for s 42(3)(b) of the Traditional Leaders Act, which was referred to by the court *a quo*, there is no such provision in the Act. This provision simply does not exist. It is clear, therefore, that the learned judge *a quo* misapprehended and misapplied the law governing the appointment of chiefs. He

consequently set aside the decision of the Minister and the ensuing appointment of the appellant as Chief Marange on the wrong legal bases.

Equally critically, it would appear that the court *a quo* opted to delve into the substantive merits of the respective positions advanced by the contesting parties. The first respondent's case was that he was the people's preferred candidate for chieftainship and that the appellant had been hand-picked by the Minister and imposed upon the people of Marange against their wishes. In support of his case, the first respondent tendered the supporting affidavits of nine other persons and two seemingly relevant documents. The court *a quo* rejected the first respondent's averments on the basis that he had failed to substantiate them and had produced nothing to support his claims. In short, it was held that he had failed to prove his case.

The appellant's case was that the first respondent was disqualified for appointment as he had seriously violated certain cultural and customary practices. He therefore failed to meet the criteria to become a chief. As for himself, the appellant averred that at the third commission of inquiry he was publicly selected as the only remaining candidate without any violations of the traditions, customs and practices of the Marange clan. He defended his appointment as chief on the basis that he stood in the line of chieftainship of the clan, that he was the oldest surviving father of the clan without any customary or traditional infringements, and that proper consultations had been carried out with the clan leading to his election by the clan as its chief.

In weighing up these opposing positions, the court *a quo* commended the Minister's efforts in setting up the commissions of inquiry. However, the court found that the shortcoming in these efforts was that the people whom the Minister chose to drive the process were not in any way conversant with the customs, culture and traditions of the Marange people. In the event, the court found that the appellant had been irregularly appointed as the substantive Chief Marange and ordered that this appointment be set aside. However, having so concluded, the learned judge did not proceed to decree any corrective measure to rectify the irregularity. He simply left the parties to their own initiatives and devices.

What can be gleaned from all of the foregoing is the implied finding that the appellant's appointment as Chief Marange was not in accordance with the customs and practices of the Marange clan. In this respect, therefore, there is some merit in the appellant's fourth ground of appeal, to the extent that the court itself was ill-equipped to venture into that particular field. In effect, the court appears to have overruled the decisions taken by the Minister and the President without having been possessed of the expertise or qualifications necessary to do so.

It is settled law that the courts should not take over the functions of an administrative authority and interfere with its actions or decisions by substituting them or setting them aside. See *Affretair (Pvt) Ltd & Anor v M.K. Airline (Pvt) Ltd* 1996 (2) ZLR 15 (S), at 21; *Zimbabwe School Examinations Council v Mukomeka & Govhati* SC10/20, at pp. 17-18. I would extend this broad principle to postulate that, in certain limited

circumstances, it might become necessary and appropriate to invoke such judicial restraint, even where the administrative action or decision in question is shown to have been procedurally irregular. This might arise, for instance, where judicial interference would entail serious administrative disruption or result in some grave miscarriage of justice.

In any event, the general principle of judicial non-interference is not immutable and may be departed from in exceptional cases: where the end result is a foregone conclusion and it would be a waste of time to remit the matter for corrective action; where further delay would prejudice the applicant; where the extent of bias or incompetence displayed is such that it would be unfair to force the applicant to submit to the same administrative jurisdiction; where the court is in as good a position as the administrative body or functionary to make the appropriate decision. See the *Affretair* case, *supra*, at 24-25; *Gurta AG v Gwaradzimba N.O.* HH 353-13, at pp. 9-10; *C.J. Petrow & Co (Pvt) Ltd v Gwaradzimba N.O.* HH 175-14, at pp. 8-9.

*In casu*, I do not perceive any of the above exceptions as having been applicable to the circumstances before the court *a quo*. The remittal of the matter to the Minister for corrective action would not have been a waste of time. Indeed, corrective action was eminently necessary on the facts of the case. Further delay would not have prejudiced the applicant (the first respondent herein) given the genesis of the succession dispute in 2005 and the protracted period of time over which it had remained unresolved. There was no evidence before the court *a quo* that the Minister or the President had displayed such bias or incompetence as would have operated to subject the applicant to any further

administrative unfairness. And lastly, it cannot possibly be said that the learned judge was sufficiently conversant with the requisite criteria for appointment to the Marange chieftainship, to wit, the prevailing customary principles of succession and the administrative needs of the Marange community (*cf.* s 3(2)(a) of the Traditional Leaders Act).

There can be no argument against the finding *a quo* that the Minister acted unprocedurally in establishing and relying upon the recommendations of the various commissions of inquiry that were instituted to resolve the succession dispute over the Marange chieftainship. The most competent body to which this matter should have been assigned, within the broad scheme of s 283 of the Constitution and the Traditional Leaders Act, would have been the provincial assembly of Chiefs responsible for the Marange community. Given the Minister's failure to do so, the most salutary corrective measure would be to remit the matter to him and direct him to consult the provincial assembly with a view to seeking its recommendations on the resolution of the succession dispute.

Additionally, it would also be necessary to address the appointment of the appellant as the substantive Chief Marange. The most obvious remedy in that connection would be to set aside that appointment as having emanated from a gross procedural irregularity. However, this would lead to a *lacuna* in the leadership of the Marange clan and resultant uncertainty in the administration of the clan's affairs. In order to obviate this undesirable contingency, it seems to me that the preferable and less disruptive alternative would be to leave the appellant *in situ* as the clan's chief, albeit in an acting capacity,

pending the final resolution of the chieftainship dispute. In my view, this would serve to ensure administrative continuity in the interests of good governance within the Marange community.

### Disposition

Mr *Mubaiwa*, for the first respondent, submits that there is presently no law providing for the resolution of disputes by provincial assemblies. This position is not entirely correct in light of my earlier interpretation of the continuing applicability, *mutatis mutandis* so as to conform with the dictates of s 283 of the Constitution, of ss 35 and 36 of the Traditional Leaders Act. In any event, Mr *Mubaiwa* accepts that the High Court has inherent jurisdiction to remit the matter to the Minister for onward referral to the provincial assembly concerned.

Mr *Magwaliba*, for the appellant, agrees that ss 35 and 36 of the Act afford suitable mechanisms for the resolution of the dispute *in casu*. He submits that the Minister can lawfully convene the provincial assembly and administratively refer the chieftainship dispute *in casu* to the provincial assembly for its recommendations. I fully concur with that position.

In view of my earlier conclusions and intended disposition of this matter, the third and fourth grounds of appeal are rendered redundant and do not call for further consideration or determination. As for costs, given that both the appellant and the first respondent have enjoyed relative success in relation to the first and fourth grounds of

appeal, I think it appropriate that each party should bear its own costs, both in the court below and herein on appeal.

In the result, I make the following order:

1. The appeal is partially allowed with each party to bear its own costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:
  - “(i) The appointment of the first respondent as substantive Chief Marange be and is hereby set aside.
  - (ii) The matter is remitted to the second respondent who is hereby directed:
    - (a) to convene a meeting of the provincial assembly of Chiefs responsible for the Marange community, at the earliest available opportunity, to consider and report back to him with its recommendations on the resolution of the dispute concerning the appointment of a substantive Chief Marange; and
    - (b) to submit the aforesaid recommendations to the third respondent to enable him to resolve the aforesaid dispute in accordance with the provisions of s 3 of the Traditional Leaders Act [Chapter 29:17].
  - (iii) Pending the resolution by the third respondent of the aforesaid dispute, the first respondent shall perform the functions of acting Chief Marange pursuant to section 4 of the Traditional Leaders Act [Chapter 29:17].
  - (iv) Each party shall bear its own costs.”

**GWAUNZA DCJ:**

I agree

**BERE JA:**

(No longer in office)

*T. Pfigu Legal Practitioners, appellant’s legal practitioners*  
*Warara and Associates, 1<sup>st</sup> respondent’s legal practitioners*  
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