

REPORTABLE (35)

RUTSATE RUTSATE

v

**(1) NDAVENI WEDZERAI (2) MUDYANADZO CHIMOMBE (3)
JOHN MUDYANADZO (4) ABIAS BOTE (5) SHAMU
MUDYANADZO (6) TSAURAI MUDYANADZO (7) MINISTER OF
LOCAL GOVERNMENT (8) DISTRICT ADMINISTRATOR, GUTU**

**SUPREME COURT OF ZIMBABWE
GUVAVA JA, BHUNU JA & KUDYA JA
HARARE: 27 OCTOBER 2020 & 29 MARCH 2022**

T. Tandi, for the appellant

S. Mushonga, for the respondents

GUVAVA JA:

1. This is an appeal against the whole interlocutory judgment of the High Court (the court *a quo*) sitting at Harare dated 5 June 2019. The court *a quo* found that it had jurisdiction to hear and determine the appeal involving a chieftainship dispute. Leave to appeal was granted by the court *a quo* on 4 October 2019.

FACTUAL BACKGROUND

2. The dispute in this matter revolves around the question of the right to rule the Chimombe clan. The wrangle highlights the issue which has been vexing the court *a quo* for some time. Various decisions have emanated from the High Court on whether or not they have the jurisdiction to determine matters relating to chieftainship disputes.

3. The appellant was appointed as Chief Chimombe in terms of the Traditional Leaders Act [*Chapter 29:17*]. The date of his appointment is not apparent from the papers. He is currently the substantive Chief Chimombe. In 2010, following the appellant's appointment as Chief, a dispute arose between the appellant and the first to sixth respondents ('the respondents') concerning his appointment. The respondents instituted legal proceedings under HC 8077/10 challenging the appointment of the appellant as the chief. They alleged that the appellant's appointment as Chief Chimombe was wrong, illegal and against the customary practice of the Chimombe family and the Karanga clan. They asserted that as members of the Mudyamadzo dynasty, they were the rightful heirs to the chieftaincy.
4. The respondents based their argument on the contention that the Chimombe Chieftainship devolves only in the Mudyamadzo family and does not extend to descendants of his brothers. They contended that the appellant, not being a direct descendant of Mudyamadzo-Chimombe clan, was not eligible to the throne of Chief Chimombe. The respondents argued that the installation of the appellant by the seventh and eighth respondents was wrong, unprocedural and contrary to the Chimombe Clan or generality of the Karanga Tribes of Masvingo. They further contended that the appellant's chieftainship violated the provisions of the Traditional Leaders Act [*Chapter 29:17*] ('the Traditional Leaders Act'). As such the respondents sought an order nullifying and setting aside the appellant's appointment as chief.
5. The seventh and eighth respondents opposed the application and filed a special plea to the effect that the High Court had no jurisdiction to deal with the matter as the sole discretion to deal with chieftaincy matters rested with the President in terms of the

Traditional Leaders Act as read with s 31K of the Constitution of Zimbabwe (1980) ('the old Constitution'). The court under HH 413/12 upheld the special plea in bar and dismissed the first to sixth respondents' claim.

6. The respondents consequently appealed to this Court under SC 362/12. This Court allowed the appeal, set aside the judgment under HH 413/12 and made an order for continuation of the trial.
7. Upon remittal of the matter, the appellant raised a point of law relating to whether or not the High Court had jurisdiction to hear the matter. The appellant contended that the jurisdiction of the High Court to hear the matter was ousted by s 283 of the New Constitution of Zimbabwe Amendment (No. 20) Act, 2013 ('the Constitution'). His argument was that the new provision in the Constitution provides that any dispute concerning chieftainship is now dealt with by the President.
8. The respondents on the other hand maintained that the High Court had jurisdiction to hear the matter on the basis that the matter had commenced prior to the coming into effect of the Constitution. As such, they argued that it is a principle of statutory interpretation that the legislature will not take away existing rights in retrospect unless the law specifically states the same.

The parties agreed that the matter would proceed by way of a Stated Case.

9. After hearing the parties' submissions, the court *a quo* determined that it had jurisdiction to deal with the dispute concerning the chieftainship of the appellant. It reasoned that

since the summons in the case had been issued in 2010 before the coming into effect of the Constitution which now provides that the mandate to handle such disputes is in the office of the President, it had jurisdiction to hear the matter.

10. Aggrieved by the court *a quo*'s findings the appellant noted an appeal to this Court on the basis of the following grounds:

- “1. The court *a quo* grossly erred in finding that it had jurisdiction to determine the matter.
2. The court *a quo* committed an error in law in its interpretation of paragraph 18(9) of the sixth schedule of the Constitution of Zimbabwe which led it to come to a wrong conclusion.”

SUBMISSIONS BEFORE THIS COURT

11. In motivating the appeal, counsel for the appellant Mr *Tandi* argued that the gravamen of the matter was that the court *a quo* had no jurisdiction to hear the matter. Counsel submitted that s 283 of the Constitution sets out the procedure relating to resolution of chieftainship disputes. Counsel further argued that the position of the law is that chieftainship wrangles must now be resolved by the President on the recommendations of the Provincial Assembly of Chiefs. It was his submission that the section is unambiguous as it is expressed in clear terms. He further submitted that the legal position is that the power to appoint, remove or suspend a chief is a responsibility exclusively bestowed upon the President of Zimbabwe. Counsel thus contended that the court *a quo* misdirected itself in finding that it had jurisdiction to hear the matter when its jurisdiction was ousted by s 283 of the Constitution. Counsel subsequently sought to have the appeal allowed coupled with an order setting aside the court *a quo*'s judgment.

12. Counsel for the respondent Mr *Mushonga*, *per contra* argued that, from the record it was clear that the matter had commenced before the court *a quo* in 2010. This was before the advent of the Constitution and as such the law could not apply with retrospective effect. He submitted that there was nothing in the language of the section that would imply an intention to have retrospective application. He contended that para 18(9) of the Sixth Schedule to the Constitution provides that all cases that were pending before any court before the effective date shall continue before that court and the procedure to be applicable to those cases must be the procedure that was operating before the effective date.
13. He thus argued that the court *a quo* had correctly found that it had jurisdiction to deal with the matter considering the fact that the first to sixth respondents' rights under s 31K of the old Constitution were not taken away by the coming into effect of the new Constitution which has no retrospective application.
14. Only one issue arises for determination from the appellant's grounds of appeal and submissions made by counsel before this Court. We are also indebted to the appellant's counsel for filing supplementary heads of argument. The issue for determination by this Court is whether or not the court *a quo* erred in finding that it had jurisdiction to hear and determine the application before it.

APPLICATION OF THE LAW TO THE FACTS

15. Section 283 of the Constitution, which has triggered this dispute provides as follows:

“**283** 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.”

16. Section 283(c)(ii) of the Constitution thus provides for the settlement of disputes concerning the appointment, suspension and removal of chiefs. Such disputes must be resolved by the President on the recommendation of the Provincial Assembly of Chiefs through the Minister responsible for traditional leaders. The above provision was introduced in order to provide a domestic resolution mechanism for disputes on the appointment and removal of chiefs which had become rampant. It should be noted that s 283 further provides that an Act of Parliament must provide for the above mechanism.

17. In dealing with a matter that called for the interpretation of s 283 of the Constitution, Patel JA (as he then was), had this to say in *Marange v Marange & Others* SC 01/21:

“..section 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 s283 does is to enunciate the template to be applied in the formation and implementation of that code..... 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.”

18. It appears from the above case that s 283 cannot be construed as a substantive provision. It merely allows the Legislature to craft a law that will operationalize the Constitutional provision. The Traditional Leaders Act which deals with such issues has not been amended following the coming into effect of the Constitution. It is however of note that para 10 of the Sixth Schedule of the Constitution provides that existing laws must be construed in conformity with the Constitution.
19. It seems to me that, even if it is accepted that s 283 may be construed as a substantive provision, there is nothing in its wording that seems to indicate that it has retrospective application or that it ousts the inherent jurisdiction of the High Court. The Traditional Leaders Act which is the legislation in force for the appointment and removal of Chiefs does not appear to oust the jurisdiction of the High Court in any way.
20. Section 283 was introduced in the Constitution and only came into operation in May 2013. This was after summons had been issued in this matter in 2010. The principles applicable in order to determine the question of whether or not a statute is intended to operate retrospectively and take away accrued rights have been stated in numerous cases.

In *Curtis v Johannesburg Municipality* 1906 TS 308 at 311 INNES CJ said:

“The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation.”

In *Bell v Voorsitter Van Die Rasklassifikasieraad En Andere* 1968(2) SA 678(A) which is in Afrikaans the head note states that:

“It is clear that our law accepts the rule that, where a statutory provision is amended, retrospectively or otherwise, while a matter is pending, the rights of the parties to the action, in the absence of a contrary intention, must be decided in accordance with the statutory provisions in force at the time of the institution of the action.”

In *Agere v Nyambuya* 1985 (2) ZLR 336 (S) at 338 G – 339A GUBBAY JA (as he then was) stated the general rule as follows:

“It is a fundamental rule of construction in our law, dating probably from Codex 1:14:7, that there is a strong presumption that retrospective operation is not to be given to an enactment so as to remove or in any way impair existing rights or obligations unless such a construction appears clearly from the language used or arises by necessary implication. For instance, where it is expressly retrospective, or deals with past events, or concerns a matter of procedure, practice or evidence. The supposition is that the Legislature intends to deal only with future events and circumstances.”

Lastly, in *Nkomo and Anor v Attorney-General and Ors* 1993 (2) ZLR 422 (S) GUBBAY CJ at 429 C said:

“Care must always be taken to ensure that retrospectivity is confined to the exact extent which the section of the Act provides.”

21. From the above authorities, it seems to me that, the guidance emanating from the jurisprudence of our courts is that, firstly, where the Legislature intends that a provision should have retrospective effect it states so in clear and unequivocal terms. (See also Craies on Statute Law (Seventh edition) p 388). Secondly, s 283 of the Constitution does not have retrospective application. There is nothing contained in s 283 of the Constitution or the Traditional Leaders Act that shows an intention to oust the jurisdiction of the High Court in determining disputes relating to the appointment and removal of traditional leaders that had already commenced before the effective date.

22. As was stated in the *Marange case (supra)* Parliament is at large, subject to the Constitution, to curtail or oust the jurisdiction of any court. However, any such ouster must be effected in clear and unambiguous terms. In this case, 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 as meant to curtail or oust the jurisdiction of the High Court.
23. There is also nothing contained in the Traditional Leaders Act, which might be taken as effecting any such ouster.
24. It should be noted that s 283 must be read in conjunction with para 18(9) of the Sixth Schedule to the Constitution which provides as follows:
- “(9) 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 this Constitution, as the case may be, as if this Constitution had been in force when the cases 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; and
- (b) the procedure referred to in subparagraph (a) applies to those cases even if it is contrary to any provision of this Constitution.”
25. Paragraph 18 (9) of the Sixth Schedule is clearly a transitional provision dealing with procedure that affects cases which would have commenced before the effective date. It is a common law principle that a statute, dealing with procedure, applies retrospectively to govern all pending and future proceedings, unless it is provided otherwise. (See Craies on Statute Law *supra* at p 401-402). Paragraph 18(9)(a) is such provision which provides contrary to the common law. It thus alters the common law position. Paragraph 18 (9)(a) of the sixth schedule allows a matter which has commenced before the effective date of the Constitution to continue in terms of the old procedure. Paragraph 18 (9)(b) leaves the matter in no doubt and expressly provides that even if the procedure is contrary to the new Constitution the old procedure should be followed.

26. It should also be noted that para 18(10)(b) of the Sixth Schedule, places it beyond doubt that s 283 of the Constitution does not divest the High Court of its jurisdiction. It states that for the purposes of para 9 a civil case is deemed to have commenced when summons were issued or the application was filed before a court as the case may be. *In casu*, summons were issued in 2010 long before the Constitution came into operation. The provisions of s 283 (c)(iii) can only be interpreted as becoming operational relating to matters that arose after the commencement of the Constitution in 2013. For the above reasons the court *a quo* was correct in finding that it had jurisdiction to entertain the matter.
27. I was not persuaded by the appellant's submission that s 283(c)(ii) of the Constitution has retrospective application and has the effect of ousting the jurisdiction of the High Court. I was also not persuaded by the appellant's submission that the interpretation of s 283 of the Constitution which was given in the *Marange* case does not apply to the present facts. I take the view that the interpretation given to s 283 in the *Marange* case (*supra*) is of general application and is not just restricted to reviews. Whilst I accept that in the *Marange* case the court was dealing with a review in terms of s 26 of the High Court Act in my view this does not affect in any way the finding in the *Marange* case that s 283 does not have retrospective application nor does it oust the jurisdiction of the High Court. It is clear from the facts that in the *Marange* judgment, the court was dealing with a matter that had commenced after the promulgation of the Constitution. The court however still found that the jurisdiction of the High Court had not been ousted.
28. It is also important to note that the High Court has original jurisdiction to deal with all civil and criminal matters. Section 171(1) (a) of the Constitution provides:

“171. Jurisdiction of High Court

1. The High Court—

- a. has original jurisdiction over all civil and criminal matters throughout Zimbabwe”

This section must be read together with s 13 of the High Court Act [*Chapter 7:06*]

which reads as follows:

“13. Original Civil Jurisdiction

Subject to this Act and any other law, the High Court shall have full original civil jurisdiction over all persons and over all matters within Zimbabwe.”

29. The original jurisdiction of the High Court is unlimited, that is to say, it can hear and determine any civil dispute, whatever the nature of the claim. Since s 283 of the Constitution and the Traditional Leaders Act both do not expressly oust the jurisdiction of the High Court from determining traditional leadership disputes, it follows that it still maintains its unlimited original jurisdiction over such matters.

DISPOSITION

30. The court *a quo* correctly found that it had the requisite jurisdiction to hear the matter. Section 283 (c) of the Constitution has vested the power to deal with disputes relating to chieftainship in the President as a domestic resolution mechanism. It is not a substantive provision as it requires operationalization through an Act of Parliament. The provision does not have retrospective application. It does not oust the inherent power of the High Court to determine such matters. The matter commenced before the court *a quo* prior to the coming into force of the Constitution in 2013. It was therefore pending when the Constitution was promulgated. That being the case, it must proceed in terms of para 18(9) of the Sixth Schedule of the Constitution.

31. The respondents have been successful and, as is the norm in respect of such a party, they are entitled to their costs.

In the result it is ordered as follows:-

1. The appeal be and is hereby dismissed with costs.
2. For the avoidance of doubt the matter is remitted to the court *a quo* for continuation of trial in terms of the Rules of that Court.

BHUNU JA: I agree

KUDYA JA: I agree

Kantor & Immerman, appellant's legal practitioners

Mushonga, Mutsvairo & Associates, 1st -6th respondents' legal practitioners