ABEDNICO TSAMWISE
versus
MINISTER OF LANDS, AGRICULTURE,
WATER, CLIMATE AND RURAL SETTLEMENT
and
WELLINGTON MARUMA
and
ZIMBABWE LAND COMMISSION

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 16 November, 2011 & 12 October 2022

Opposed Application for Review

S Chinawadzimba, for the applicant
N Mapora, for 2nd respondent

CHITAPI J: The applicant has petitioned this court to review the decision of the second respondent to issue the first respondent with an offer letter for land called subdivision 33 of Triangle Ranch 3 (s 13) measuring 22.87 hectares situated in Chiredzi, Masvingo Province. The offer of the landholding was made under the Land Reform and Resettlement Programme (Model AZ Phase 11). The letter is dated 29 July, 2020. The applicant moves the court to grant him the relief which he expressed in his draft order annexed to the founding affidavit in the following wording;

> **"IT IS ORDERED THAT**:
> 1. The decision of the first respondent to grant an offer letter to the second respondent be and is hereby set aside.
> 2. The first respondent be and is hereby ordered to issue an offer letter in favour of the applicant in respect of Plot 33 Triangle Ranch 3 (s 13) in Chiredzi District of Mavingo Province measuring 22.87 hectares in extent
> 3. The first respondent to bear costs of suit."

Upon reading the draft order, para 2 immediately raised my eye brows and the question that came to my mind was, by what power does the court order the first respondent to offer land

to the applicant? I then read the application papers whilst on the lookout of whether the basis of the power of the court to make such an order had been pleaded by the applicant. It was not pleaded. At best, the applicant averred that s 4(2) of the Administrative Justice Act provided for the relief sought. The applicant stated as follows in para 3.13 of his heads of argument.

> "3.13. In terms of s 4 the Administrative Justice Act, this Honourable court is given a wide powers in providing relief to an aggrieved person. Amongst such powers, is that of setting aside the decision that is concerned. Section 4(2)(e), the court is empowered to give such directions as the High Court may consider necessary or desirable to achieve compliance by the administrative authority with s 3 of the Act. Therefore it is submitted that this court does have the powers to grant the relief that is being sought by the applicant, that is, to set aside the decision of the first respondent in his issuance of an offer letter to the second respondent and further order that in respect of the farm, an offer letter be issued to the applicant instead."

The applicant is clearly misinformed in relation to the power of the court to issue an order that the first respondent should issue the applicant with an offer letter. Section 4 of the Administrative Justice Act, provides as follows;

> "4. **Relief against Administrative Authorities**
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> 1) Subject to this Act and any other law, any person who is aggrieved by the failure of an administrative authority to comply with s 3 may apply to the High Court for relief.
> 2) Upon an application being made to it in terms of subsection (1), the High Court may, as may be appropriate-
> a) Confirm or set aside the decision concerned,
> b) Refer the matter back to the administrative authority concerned for consideration or reconsideration,
> c) Direct the administrative authority to take action within the relevant period specified by or, if no such period is specified, within a period fixed by the High Court,
> d) Direct the administrative authority to supply reasons for its administrative action within the relevant period specified by law, if no such period is specified, within a period fixed by the High court,
> e) Give such directions as the High Court may consider necessary or desirable to achieve compliance by the administrative authority with s 3.
> 3. Directions given in terms of subsection (2) may include directions as to the manner or procedure which the administrative authority should adopt in arriving at its decision any directions to ensure compliance by the administrative authority with the relevant law or empowering provision.
> 4. The High Court may at any time vary or revoke any order or direction given in terms of subsection (2).

The applicant places reliance on para e of subsection 2 of s 4 of the Administrative Justice Act which provides that the High Court may give directions as it considers necessary or desirable

to achieve compliance by the administrative authority with s (3). At the expense of lengthening this judgment, I reproduce section 3 of the Act.

> **3 Duty of administrative authority**
> (1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall—
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> (*a*) act lawfully, reasonably and in a fair manner; and
> (*b*) act within the relevant period specified by law
> or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and
> (*c*) where it has taken the action, supply written reasons therefor within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned.
>
> (2) In order for an administrative action to be taken in a fair manner as required by para (*a*) of subsection (1), an administrative authority shall give a person referred to in subsection (1)—
> (*a*) adequate notice of the nature and purpose of the proposed action; and
> (*b*) a reasonable opportunity to make adequate representations; and
> (*c*) adequate notice of any right of review or appeal where applicable.
> (3) An administrative authority may depart from any of the requirements referred to in subsection (1) or (2)
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> if—
>
> (*a*) the enactment under which the decision is made expressly provides for any of the matters referred to in those subsections so as to vary or exclude any of their requirements; or
> (*b*) the departure is, under the circumstances, reasonable and justifiable, in which case the administrative authority shall take into account all relevant matters, including—
> (i) the objects of the applicable enactment or rule of common law;
> (ii) the likely effect of its action;
> (iii) the urgency of the matter or the urgency of acting thereon;
> (iv) the need to promote efficient administration and good governance; (v) the need to promote the public interest.
> (v) the need to promote the public interest.

It will be apparent from the provisions of subsection (2)(e) of s 4 that the powers of the court relate to the giving of directions to the administrative authority aimed at ensuring compliance with s (3). In short the court at best can make an order that the administrative authority complies with or acts in terms of the law in substance and procedurally in order that the authority acts in compliance with s 3. The question then becomes, "does the order of a directive that orders the first respondent, to issue the applicant with an offer letter fall within the purview of the matters listed in s 3 of the Administrative Justice Act?" If the order sought does not fall within the purview of s 3, then the order cannot be made. The order sought in para 2 of the draft order *in casu* clearly

does not fall within the purview of the matters raised in s 3. It follows that para 2 of the draft order is beyond the scope of s 3 of the Administrative Justice Act.

I proceed to deal with the matter on the issue of whether or not the decision of the first respondent must be set aside. The applicant listed the grounds of review as follows:

"**FURTHER TAKE NOTICE THAT** the grounds for review are as follows:

1. The first respondent did not act in a manner that was lawful; reasonable nor fair in that:
   1.1 By granting an offer letter to the second respondent for a farm that had already been recommended for allocation to the Plaintiff, first respondent showed a disfavor to the Applicant on irrational grounds.
   1.2 The first respondent did not supply reasons, whether written or otherwise, for the decision he took in granting an offer letter to the second respondent ahead of the applicant.
   1.3 The first respondent did not give a reasonable opportunity to the applicant to make adequate representations.
   1.4 The first respondent did not give adequate notice of the nature and purpose of the proposed of the proposed action."

It is appropriate at this stage to relate to salient facts. They are not in dispute or if so they are not materially divergent. The applicant occupies the plot or property in issue. His occupation of the plot was through an unidentified method of occupancy. This issue is not necessary to determine. However, it appears that the Chiredzi District Land Committee listed the applicant and 50 others under recommendation for land allocation in 2018. The applicant attached as annexure A to the founding affidavit a list of names of persons and noted the subdivisional areas which they were in occupation of. The list was signed by the local district administration, Chisema; Makuni P described as a war veteran and Mapfumo, the lands officer.

The applicant averred that he occupied the plot in 2017 and has been farming thereat since then. He stated that he was a successful sugar cane farmer who produced *inter alia* produce in the form of sugar cane using his resources for three seasons and sold the cane to Tongaat Hullet, the sugar manufacture in Hippo Valley, Chiredzi. The applicant attached as annexure (D), a copy of a letter from the office of the President and Cabinet dated 14 November 2019 wherein the Minister of State for Provincial Affairs, Masvingo Province recommended payment by Tongaat Hullet to the applicant and others listed in the letter. The letter stated that a verification exercise carried out by that office had confirmed that the applicant and others listed had "maintained farms and delivered sugar cane to Tongaat Hullet," for the 2018-2019 season.

The applicant averred that he invested on the plot by purchasing farm equipment and provided employment for his employees. He attached as annexure B, a list of three permanent employees whose combined wages he paid in the total sum of $4908-00 for the period January to December, 2018. The applicant also attached as annexure C copies of statements of account prepared by Tongaat Hullet showing deliveries of cane made by the applicant to Tongaat Hullet. It was not contested that the applicant was productive on the plot.

The applicant averred that the recommendations made by the Provincial Affairs Minister that the applicant should be paid and also by the District Lands Committee gave him a legitimate expectation that upon formal offer letters of land being issued by the first respondent, the applicant and others listed would be allocated. However to the applicant's dismay, the plot he occupies was offered by the first respondent to the second respondent by offer letter dated 29 May, 2020. The second respondent accepted the offer letter in writing on 5 June 2020.

The applicant lodged a complaint with the third respondent. The written complaint is attached to the founding affidavit and marked annexure G. The applicant set out his dispute as briefly that he was always in occupation of the plot on which he productively farmed and that there was an undue preference of the second respondent by the first respondent who allocated the plot under offer letter to the second respondent instead of the applicant. The date of the complaint is not clear on the copy attached. In this regard it is noted that it is the duty of the party who produces a document as evidence to ensure that it is legible, otherwise it will not have evidential value and or weight. The applicant averred that the complaint to the third respondent was still pending at the time that this application was filed.

The applicant took strong objection to the offer of the land to the second respondent. The applicant expressed himself in para 15.2 and 16 of the founding as follows:

> "15.2 when the land audit hat was carried out, it confirmed that I was the farmer who was confirmed to be in occupation of the farm. I was verified, qualified, vetted, confirmed and recommended during the process of the land audit. There could be no valid reason why I, as an indigenous farmer who qualifies for allocation under the land reform program and who has been fully utilizing the farm, would be dispossessed of my farm in favour of another indigenous farmer. In this case it is particularly puzzling because the offer letter was granted in favour of a family which already possesses another farm. I submit that it is not Government's policy to strip one indigenous farmer of land in favour of another, and certainly not government policy to give two farms to one family while taking away from a farmer who only possesses one farm. I further submit that a disfavour has been shown to me with no rational grounds whatsoever."

The applicant also complained that he was deprived of his "farm" without the first respondent giving him an opportunity to be heard. The failure to give the applicant an opportunity to be heard was so the applicant asserted, a violation of s 3 of the Administrative Justice Act. The applicant also complained that the second respondent had been unduly preferred over him, despite the fact that the second respondent was not recommended by the lands committee for the allocation. He complained that the takeover of his "farm" and the deprivation of its use impacted negatively and adversely on his life because all his hopes had been built or anchored on the expectation that the issuing of the offer letter would be a routine issue.

The first and third respondents did not file opposing papers. They were automatically barred. Only the second respondent opposed the application. He averred that the court should decline its jurisdiction because the applicant did not exhaust local or domestic remedies. In particular, the second respondent averred that the applicant had by his own admission lodged a written complaint against the first respondent's decision and that the second respondent was constitutionally mandated to deal with land dispute issues arising from circumstances as present themselves in this application.

The Zimbabwe Land Commission which is the third respondent is created by virtue of s 296 of the Constitution. The Commission's functions are set out in s 297 of the Constitution. The functions which are apposite, s 297 in the relevant part read as follows:

> "297: Functions of Zimbabwe Land Commission
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> (1) The Zimbabwe Land Commission has the following functions –
> (a) To ensure accountability, farmers and transparency in the administration of agricultural land that is vested in the State.
> (b) ……
> (c) ……
> (d) To investigate and determine complainants and disputes regarding the supervision, administration and allocation of agricultural land
> (2) – (6) ……"

There is no gainsaying that the applicants' complaint relates to the allocation of the plot which he considers should have been lawfully offered or allocated to him. The third respondent is in existence and functional. The applicant petitioned it in relation to the disputed lot which the applicant considers that it should have been offered to plot. The third respondent is created specifically to deal with disputes of allocation of agricultural land. It is its function to deal with such disputes by law which designates that the function to determine disputes on agricultural land

allocation is given to the third respondent, not by any other enactment but by the Supreme Law of the land, the Constitution.

The question is whether or not the court should take over a function explicitly reposed in a constitutional body by the Constitution which creates the body concerned. Should the court in such an instance exercise a discretion to determine a matter in which there is a statute which reposes a certain power in a designated body which is functional and has received the complaint. It is not a function of the court to promote the circumvention of determination of matters provided for determination by a created statutory body in this case the third respondent. It would perhaps be an exception were the third respondent not be in existence or was disfunctional. The applicant would then in such a case rely on the inherent jurisdiction of this court to deal with any matter wherein the court's jurisdiction is not excluded by any other law.

In relation to the need to exhaust domestic remedies first, the applicant submitted that the third respondent did not have power to reverse the decision of the first respondent and that therefore, there was no remedy which was available to him other than by invoking of the provisions of the Administrative Justice Act. I do not agree. The third respondent operates in terms of the Land Commission Act, [*Chapter 20:29*]. In terms thereof, the provisions of s 297(1)(d) of the Constitution were imported into s 9(1) of the Act which provides as follows:

> "**9 Jurisdiction of Commission to conduct investigations**
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> (1) Any person having a complaint or affected by a dispute regarding the supervision, administration and allocation of agricultural land may make a written complaint to the Commission requesting it to investigate such complainant or dispute …
> (2) – (3) ……."

In relation to the powers of the third respondent after audit or investigation, the powers are set out in s 14 of the Act. The provisions of s 14 provides as follows:

> "**14 Proceedings after audit or investigation**
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> 1. If, after conducting an audit or investigation, the Commission considers that the action or omission which was the subject-matter of the audit or investigation constitutes grounds for a criminal prosecution or delictual action, or involves any sanctionable breach of a constitutional right or statutory duty, and that – delictual action, or involves any sanctionable breach of a constitutional right or statutory duty, and that –
>
> a) the action or omission relates to any decision or practice on the part of any public authority which needs to be abolished, cancelled, reversed, varied or altered; or
> b) the issue giving rise to the complaint should be given further consideration by the public authority against whom or which the complaint was made; or

c) the action or omission should be rectified; or
d) any law on which the act or omission was based should be reconsidered; or
e) reasons should have been given for any decision complained against; or
f) any other steps should be taken in relation to the action or omission complained against; the Commission shall report its finding to the public authority or person against whom the complaint was made and may make such recommendations as it thinks fit and shall also send a copy of its report and recommendations to the Minister.

2. In particular, the Commission may, where it considers it necessary, recommend-
    a) specific remedial measures in favour of a person aggrieved by an action or omission giving rise to the complaint or dispute; or
    b) that the complainant seek redress in a court of law.
3. The Commission may request the authority or person in relation to whom or which it made any recommendation to notify it, within a specified time, of the steps, if any, that it proposes to take to give effect to its recommendation.
4. If, within a reasonable time after a report is made in terms of subsection (1), no action is taken which, in the opinion of the Commission, is adequate and appropriate, the Commission may, if it thinks fit after considering the comments, if any, made by or on behalf of any authority or person affected, submit a special report on the case to the Minister to present to the President and lay before Parliament.

It is clear from a reading of s 14 that the conduct of a public authority is subject to investigation and this includes the third respondent. Public authority is defined in the interpretation s of the Act as:

> "public authority" in relation to an authority or official against whom or which any complaint has been made in terms of s 10 means any person, body, organ, agency or restitution belonging to or controlled or employed by the State, a local authority or statutory body."

There is nothing in the Act to suggest that the third respondents' allocation of land through offer letters generated by the Minister responsible for the administration of the Act is final and not subject to a complaint which the third respondent may receive, investigate and make recommendations on for a correction. There is also nothing to indicate that the Minister may not adopt the recommendation made which may include that an offer letter is withdrawn or an offer letter is issued. It will be noted that the third respondent may even recommend to the complainant that he or she escalates the dispute to the courts for determination. The argument that the applicant would not obtain relief were he to follow the domestic remedy of referring the dispute to the third respondent was incorrect.

In regard to this application, even assuming that I should agree to exercise jurisdiction as prayed for by the applicant, the issues arising require an investigation of the paper trial

surrounding the applicant's occupancy of the plot from the onset and all developments and processes which have taken place. The third respondent is eminently in the best position to carry out the investigation and answer the applicant's complaint. Further even if it is accepted that there is nothing to stop the court from dealing with the dispute on review, it would be a matter of exercising a judicious discretion whether or not to deal with the dispute or defer to the third respondent. The third respondent would be in the best position to gather facts and reach an informed position and to make recommendations based on verified facts. *In casu*, the applicant did not even withdraw the complaint made to the third respondent. The court thereof would have the discretion to refuse to act on a matter which is properly before a constitutional body mandated to deal with the matter.

It is my decision that this is an appropriate case for the court to decline its jurisdiction because the matter of the dispute is at the applicant's instance, properly before a constitutional body created to *inter- alia* specifically deal with the dispute which is pending before it. The applicant cited the judgment of MAFUSIRE J in *John Makarudza & Anor* v *Cosmas Bingu & 2 others* HH 08/15 to argue that the court should not be bound to refuse to deal with the application on the basis that domestic remedies be exhausted first. The case is distinguishable because the learned judge noted that the Constitution of the voluntary associationat play in that matter did not provide for any domestic remedies.

The applicant also cited the judgment of this court in the case of *Chawasarira Transport (Pvt) Ltd* v *Reserve Bank of Zimbabwe* HH 86/2009. Where it is stated:

> "Whilst it is desirable to that parties should be encouraged to exhaust their domestic remedies before approaching the courts, the mere existence of domestic remedies does not oust the unlimited jurisdiction of this court. The court has therefore a discretion whether or not to interlaw the application. See *Moyo* v *Gwindingwi N.O & Anor* HB 168/2011"

The above *dicta* is correct because this court has unlimited jurisdiction over civil and criminal matters save where its jurisdiction is specifically ousted. Such unlimited jurisdiction is not exercised whimsically. The High court is a court of law first and foremost. Therefore where a law specifically provides for certain procedures them the High Court must take a position which promotes the carrying out of legislated procedures. There is therefore no basis to invoke inherent jurisdiction in this matter because a law is already in place to deal with the dispute and the applicant has not shown that it not in the interests of justice were the third respondent to deal with the dispute.

Consequently the following order is made in the absence of any justification proffered by the second respondent for an award of punitive costs which he seeks.

IT IS ORDERED THAT:

1. The court declines to exercise its jurisdiction as the applicant has not exhausted domestic remedies provided for under the Land Commission Act *[Chapter 20:29]*.
2. The matter is stuck off the roll
3. The applicant to pay wasted costs of the second respondent

Mberi Tagwirei & Associates, first applicant's legal practitioners
Sawyer and Mkushi, second respondent's legal practitioners