IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A CIV NO/63/2014

In the matter between:

RABUKA CHALATSE	**1st APPELLANT**
KOKOTO MATHABA	**2nd APPELANT**

AND

THE ACTING CHIEF JUSTICE	**1st RESPONDENT**
THE CHIEF MAGISTRATE	**2nd RESPONDENT**
MINISTER OF LAW, PARLIAMENTARY AND CONSTITUTIIONAL AFFAIRS	**3rdRESPONDENT**
MINISTER OF JUSTICE, HUMAN RIGHTS AND CORRECTIONAL SERVICES	**4thRESPONDENT**
ATTORNEY GENERAL	**5thRESPONDENT**

CORAM: K.E. MOSITO P

S.N. PEETE JA

M. CHINHENGO, AJA

HEARD : 29 JULY 2015

DELIVERED: 7 AUGUST 2015

SUMMARY

Administrative Law (a) Whether Rule 2B and 2E (1) (c) of the Subordinate Court (Amendment) Rules, 2013 (Legal Notice N0. 150 of 2013) ultra vires the powers conferred by section 81 of the Subordinate Courts Act (N0.9 of 1988), Sections 2 and 4 of the Judicial Commissioners Proclamation, 1950 (N0. 25 of 1950) as amended and the Administration of the Judiciary Act, 2011 (N0. 16 of 2011).

Held: *Rules 2B and 2E (1) (c) of the Subordinate Court (Amendment) Rules 2013 ultra vires section 81 of the Subordinate Court Act 1988, section 2 and 4 of the Judicial Commissioners Proclamation, 1950 section 34 of the Central and Local Courts Proclamation 1938 and the Administration of the Judiciary Act 2011.*

Respondents to pay costs of suit.

JUDGMENT

CHINHENGO AJA

[1] This is an appeal from the judgment of the High Court dismissing with costs an application by which the appellants had sought orders that –

(a) rule 2(b) 2A and 2E(1) (c) of the Subordinate Court (Amendment) Rules, 2013 (Legal Notice No 150 of 2013) be declared *ultra vires* the powers conferred on the 1st respondent by s 81 of the Subordinate Courts Act (No. 9 of 1988), sections 2 and 4 of the Judicial Commissioners Proclamation, 1950 (No.25 of 1950) as amended; and

(b) rule 2(b) 2A and 2E(1) (c) of the Subordinate Court (Amendment) Rules, 2013 (Legal Notice No 150 of 2013) are null and void for being in contravention of the provisions of the Administration of the Judiciary Act, 2011, (No 16 of 2011)

[2] The appellants are judicial commissioners appointed in terms of s 5 of the Judicial Service Commission Act, 1983, (No. 7 of 1983) to preside over courts of Judicial Commissioners established by the Judicial Commissioners' Proclamation 25 of 1950. They are thus assigned to the court of Judicial Commissioners only, see s 3(1) as inserted by s 3 of the Judicial Commissioners (Amendment) Order, 1988, (No.19 of 1988). This amendment also appointed resident magistrates as ex-officio judicial commissioners in areas under their jurisdiction. The courts of Judicial Commissioners have appellate jurisdiction only. Appeals lie to these courts from the Central Courts and from them to the High Court. A judicial commissioner is therefore not a magistrate and the court over

which he presides is not a magistrate's court but a court with its own jurisdiction as set out in section 2 (2) of Proclamation 25 of 1950, as amended.

[3] On 24 March 2014 the 1st appellant received a letter from the Chief Magistrate - Northern Region and Acting Chief Magistrate – Central Region to the effect that, following changes introduced by the Chief Justice, he should have assumed a new role as a resident magistrate with effect from January 2014. The relevant part of the letter reads –

> *"YOUR ASSUMPTION OF DUTY IN THE MAGISTRATE COURTS*
> *Following the changes which have been implemented by the Honourable Acting Chief justice we had thought that you would assume your new role in the Magistracy commencing January 2014, we are now in March and you have not made any move.*
> *This is to humbly advise you that we have seen it proper that you assume your new role from 1st April, 2014 which is conveniently also the beginning of the Fiscal Year. All workshops which we may from time to time invite you to attend are intended to refresh your memory and to empower you with skills necessary for the handling of litigation before the Magistrates Courts.*
> *....*
> *We wish you all the best in your new role."*

[4] The 1st appellant did not favourably view his transfer from the office of the judicial commissioner to that of resident

magistrate. The 2nd appellant, also a judicial commissioner, shared his view of the illegality of his transfer. The two of them joined forces to challenge the change brought about by the Acting Chief Justice. They lodged an urgent application in the High Court for the following relief:

2.1. That the operation of Rule 2 (b) 2A and 2E (1) (c) of the Subordinate Court (Amendment) Rules – Legal Notice No. 150 of 2013 shall not be stayed pending finalisation of this matter.

2.2. That the promulgation of rule 2 (b) 2A and 2E (1) (c) of the Subordinate Court (Amendment) Rules – Legal Notice No. 150 of 2013 by the 1st respondent shall not be declared *ultra vires* the statutory powers conferred upon the 1st respondent by section 81 of the Subordinate Courts Act No. 9 of 1988, sections 2 and 4 of the Judicial Proclamation No. 25 of 1950 as amended by Act No. 19 of 1988 and/or Administration of the Judiciary Act No. 16 of 2011.

2.3. That the provisions rule 2 (b) 2A and 2E (1)(c) of the Subordinate Court (Amendment) Rules – Legal Notice No. 150 of 2013 shall not be declared null and void *ab intio* as they are in contravention of the Administration of the Judiciary Act No. 16 of 2011.

2.4. Directing the Respondents to pay the costs of suit herein.

2.5. Granting applicants such further and/or alternative relief as it may deem just.

[5] This is the application that was dismissed by the High Court (**S.P. Sakoane AJ**), a decision now appealed to this Court. The appellants' grounds of appeal are set out thus –

> *"1. The Honourable Court a quo erred in not finding that the promulgation of rule 2(b) 2A and 2E(1)(c) of the Subordinate Court (Amendment) rules, Legal notice No. 150 of 2013, by the first respondent is ultra vires the statutory powers conferred upon the 1st respondent by section 81 of the Subordinate Courts Act No. 9 of 1988, sections 2 and 4 of the Judicial Commissioners Proclamation No. 25 of*

1950 as amended by Act No. 19 of 1988 and/or Administration of the Judiciary Act No. 16 of 2011.

2. The Honourable Court a quo erred in not finding that the provisions of rule 2(b) 2A and 2E(1)(c) of the Subordinate Court Amendment) Rules, Legal Notice No.150 of 2013 to be null and void ab initio as they contravene the Administration of the Judiciary Act No. 16 of 2011.

3. The Honourable Court a quo erred in misinterpreting the principle ejusdem generis.

4. The Honourable Court a quo erred in misinterpreting the functions of the Registrar in terms of the Administration of the Judiciary Act No.16 of 2011."

[6] The appellants averred that the Chief Justice is empowered by s. 81 of Act No. 9 of 1988, s **34 of the Central and Local Courts Proclamation, 1938 (No. 62 of 1938)** and sections 2 and 4 of Proclamation 25 of 1950 to make rules of court. Section 81 of Act No. 9 of 1988, for instance, provides that –

"(1) The Chief Justice may from time to time, by notice in the Gazette, make rules –

(a) regulating the practice and procedure of subordinate courts in all matters before such courts;

(b) prescribing the time within which any requirement of the rules is to be complied with;

(c) prescribing the fees payable in, the costs and charges of, and incidental to, any proceedings in subordinate courts;

(d) prescribing the forms required to be used under this Order;

(e) regarding any other matter which appears to the Chief Justice to be necessary and suitable."

[7] It must be noted that the power to make rules given to the Chief Justice by s 81 of Act No. 9 of 1988 relates to the magistrates courts only and not to courts of judicial commissioners. The latter courts are not governed by Act No. 9 of 1988 but by Proclamation 25 of 1950. The exercise of any rule making power under **Act No. 9 of 1988** cannot therefore extend to judicial commissioners courts.

[8] The important point arising from s 81 of Act No. 1988, s 34 of the 1938 Proclamation and sections 2 and 4 of the 1950 Proclamation, however, is that the Chief Justice's rule making power relates to the making of rules of the court. The Chief Justice purported to make LN 150 of 2013 in the exercise of powers in terms of the above provisions and amended Rule 2 of the Subordinate Court Rules, 1996, by inserting new Rules 2A, 2B, 2C, 2D and 2E. It seems to me that the objective of the amendment was to fuse the magistrates' courts and the courts

of the judicial commissioners at the level of resident magistrate. This must have been based on the understanding that since resident magistrates are ex officio judicial commissioners, judicial commissioners are also resident magistrates. Section 3 of the Judicial Commissioners Proclamation does not go this far. For the sake of completeness, it is important to reproduce the said section as introduced by s 3 of the 1988 amendment order. It provides that-

> *"3(1) the Judicial Commissioners appointed under section 5 of the Judicial Service Commission Act, 1983, shall be assigned to the courts of Judicial Commissioners.*
>
> *(2) Resident Magistrates shall be ex officio Judicial Commissioners in the areas of their jurisdiction."*

[9] The above amendment only increased or expanded the jurisdiction of resident magistrates by appointing them *ex officio* judicial commissioners in the areas under their jurisdiction. This means that resident magistrates, by virtue of their offices as such, became judicial commissioners in their respective areas of jurisdiction. That however did not mean

that judicial commissioners also became resident magistrates. That is the clear meaning of the provision.

[10] The Acting Chief Justice must have misconstrued the meaning of s 3 of the 1988 amendment. This is supported by the fact that L.N. 150 of 2013, through new Rule 2A, brought judicial commissioners under the administrative and supervisory authority of the chief magistrate thereby making the former a subordinate of the latter for those purposes. The Rule went further and empowered the chief magistrate to assign to a judicial commissioner to any subordinate court, presumably on a permanent basis, such that the judicial commissioner concerned ceased to be a judicial commissioner and became a magistrate. In procuring this result the Acting Chief Justice went beyond the powers conferred on him by the rule making empowerment provisions of the three Acts referred to above. Whilst the new Rule 2A is anomalous, new Rules 2B and 2C are not. They merely govern the procedures for regulating the appeals before a resident magistrate acting in his capacity as an *ex officio* judicial commissioner. So also does the new Rule

2C. It merely provides for the dismissal of appeals that are not prosecuted timeously as provided in Rule 2B.

[11] I am aware that the appellants have not complained about new rule 2D but the logic of their complaint against the other rules should have constrained them to complain about this rule also. Rule 2D provides that a judicial commissioner shall be an *ex officio* resident magistrate in his area of jurisdiction and further that he shall, in addition to his judicial power under the 1950 Proclamation, hear all matters within the jurisdiction of a resident magistrate. The effect of this provision, based as it is on s 3 of the 1988 amendment is to convert a judicial commissioner into a resident magistrate. Read together, these two provisions have procured that whilst a resident magistrate is *ex officio* a judicial commissioner in his area of jurisdiction, the judicial commissioner is also an *ex officio* resident magistrate in his area of jurisdiction, and both are accountable to the chief magistrate, the former by virtue of the hierarchy of the magistrates' court as provided in s 5(3) of Act No. 9 of 1988 and the latter by virtue of Rule 2D. It must

not be lost sight of that a resident magistrate is an *ex officio* judicial commissioner by virtue of an enactment of Parliament whereas the judicial commissioner has become an *ex officio* resident magistrate by virtue of rules made by the Chief Justice. This cannot be correct or right. This conclusion brings me back to a consideration of the grounds of appeal in this case.

[12] The appellants complained about new Rule 2E (c) only for the reason that it requires the judicial commissioner to present an annual report and recommendations on the progress and sittings of all judicial commissioners' courts in the country to the Chief Justice through the chief magistrate thereby subordinating him to the chief magistrate as foreshadowed by new Rule 2A(1).

[13] The source of the appellants' displeasure with the rules made by the Chief Justice is that, whereas the court of the judicial commissioner is recognized by the definition of "judiciary" in s 3 of the Administration of the Judiciary Act, 2011, (No. 16 of

2011) as a court distinct from other courts mentioned therein and also a judicial commissioner is recognized as a judicial officer distinct from a magistrate, LN150 of 2013 has not only blurred that distinction but has in effect brought the judicial commissioner directly under the administrative control of the chief magistrate, placing him in the same position as a resident magistrate. The appellants also contest the result that whereas under **Act 16 of 2011** the judicial commissioner's court like any other court of which the judiciary is composed, is under the administrative control of the Registrar, LN 150of 2013 places it under the administrative control of the chief magistrate.

[14] There is merit in the argument advanced by the appellants. Section 6(1) of Act No. 16 of 2011 provides that the Registrar shall be the chief administrator of the judiciary and shall be assisted by the Deputy Registrar and the Judicial Administrator, respectively appointed under sections 7 and 9 of the Act. The Registrar is, in terms of s 6(3), the chief

accounting officer of the judiciary and in terms of s 6(5) he is not subject to the control of any person, institution or authority in carrying out his functions except to the extent provided in that subsection. He also exercises administrative and day-to-day control over members of staff of the judiciary, which exclude judicial officers. According to the appellants, the scheme of things under Act No. 16 of 2011 and all the legislation on the judiciary is this. The courts of judicial commissioners are established by Parliament in terms of the 1950 Proclamation as separate and distinct courts from the magistrates' court, with appellate jurisdiction from the Local and Central Courts and subject to the appellate jurisdiction of the High Court. They are not part of the structure of the magistrates' courts, which are governed by Act No. 9 of 1988. The administration of these courts, just as with the administration of other courts, is vested in the Registrar to the exclusion of any other person except his assistants, the Deputy Registrar and the Judicial Administrator. The Deputy Registrar is responsible for the day-to-day administration and case management of the courts and other duties of a semi

adjudicative nature as set out in s 8 of Act 16 of 2011. The Judicial Administrator is, in terms of s 10 of Act No. 16 of 2011, responsible for the day-to-day administration of non-adjudicative work of the judiciary, the preparation of the budget for the judiciary and overall supervisory responsibilities over the staff of the judiciary, among other things. The administrative function of the Registrar, assisted by the Deputy Registrar and the Judicial Administrator, may not be assigned to anyone else. This scheme is designed to ensure that while the running of the courts is the business of the Registrar and his staff, judicial officers are free to carry out the adjudicative work independently but subject to the rules of their respective courts as may be made by the Chief Justice.

[15] The appellants challenged the judgment in the court *a quo* on the ground that the learned Judge should have determined that the new Rules 2A and 2E are not within the purview of the rule making power given to the Chief Justice by Parliament. The learned Judge correctly identified the main issues for decision as being (a) whether the impugned rules

are ultra vires s 81 of **Act No.9 of 1988**; whether the 2nd appellant had no power or authority to direct the 1st appellant to assume duties as a magistrate, and (c) whether the Registrar had administrative and supervisory power over the appellants.

[16] The first issue is answered by examining the scope of the power given to the Chief Justice by s 81(1)(e) of Act No 9 of 1988. In terms of subsection (1)(a) to (d), the Chief Justice is empowered to make rules regulating the practice and procedures of the subordinate courts, prescribing the time within which any requirement of the rules is to be complied with, the fees, costs and charges payable in any proceedings in the subordinate courts and the forms to be used under the Act. Subsection (1)(e) further empowers the Chief Justice to make rules "regarding any other matter which appears to the Chief Justice to be necessary and suitable." The question is whether, when the Chief Justice decreed that the chief magistrate should, under the supervision of the Chief Justice,

exercise administrative and supervisory authority over judicial commissioners, he was exercising the rule making power or had gone out of the scope of his power.

[17] It was submitted for the appellants that the Chief Justice is confined by s 81 (1)(e) to making rules for regulating the practice and procedures of subordinate courts. Relying on the *ejusdem generis* rule of statutory interpretation, it was submitted that paragraphs (a) to (d) of s 81 (1) list the class of things in relation to which the rule making power extends and paragraph (e) applies to the same class of things, in other words to things *ejusdem generis*. In **Grobbelaar v. Van der Vyver 1954 (1) SA 248** (A) the point is correctly made that when general words are linked with particular words they must be construed as limited to the same class or genus as the particular words. The one element that is used to fix the category of things in relation to which the Chief Justice may make rules is the classification in s 81(1)(a) to (d) and that is the class to which the general power in paragraph (e) is to be confined. It is helpful to refer to the words of **Wessels J in**

Wade and Acton v Dinsdale 1904 TH 269 at 271 where he stated-

> *"Now the whole of the agreement with the exception of the general terms in clause 14, on which the plaintiff relies, deals specifically and particularly with gold. By clause 14 it is provided that the agreement shall apply to all claims, ground rights or rights which either party to the agreement may acquire within a specified time and radius. These words, taking them as they stand, are sufficiently wide to include almost any kind of right; but by accepting these terms in their widest sense we would arrive at the most absurd conclusions and would read into the contract provisions, which in my opinion the parties never intended should be there. If the defendant, for instance, had acquired a servitude such as a grazing right, it would to my mind have been absurd for the plaintiffs to contend that they were under this contract entitled to a share therein. If the parties had intended that the contract should apply to minerals generally, nothing would have been easier for them than to have inserted a provision to that effect. Where a subject matter of a contract is specific and particular and any general terms such as these must be construed to apply to matter ejusdem generis. In my opinion, therefore, clause 14 was never intended to apply to tin, but to gold only."*

[18] Clearly the **Chief Justice** is empowered to make rules relating to the practice and procedures of the subordinate courts in the matter at hand. It would be improper for him to exercise the rule making power in relation to any other matter not contemplated by s 81. He was confined to making rules of the practice and procedures of the courts and not to use the power to regulate administrative issues as he purported to do. He reasoned that "the *ejusdem generis* rule, otherwise called the

limited class rule, is a rule of interpretation and not a binding rule of law. It is a mere application of a contextual principle that serves as a starting point and not the concluding point of analysis. It can, therefore, be overridden by contextual features or some overriding principle or policy." In this regard he referred to *Dredger on Construction of Statutes*, 3rd ed. p. 209. Departing from a reliance on the *ejusdem* generis rule the learned Judge then went on to say- "The only cognizable restrictions that hedge the Chief Justice's powers must, therefore, be those trite in law, namely that the rules must not contradict or be inconsistent with an Act of Parliament or override the common law." I am satisfied that in abandoning the efficacious use of the *ejusdem generis* rule and relying on the rule as to the requirement that the power must not be exercised contrary to an enactment, the learned Judge erred and quickly jumped to the next submission made by appellants' counsel. The *ejusdem generis* rule, properly applied, did not permit the Chief Justice to address administrative matters when he was by s 81 empowered only

to make rules of practice and procedure of the subordinate courts; in the sense of magistrate courts.

[19] Turning now to the appellants' second ground of appeal, which is that the court a quo erred in not finding that the new Rule 2A and 2E(1)(c) are *ultra vires* the provisions of Act No 16 of 2011. The learned Judge stated that two issues admit of no doubt: that the Registrar's administrative powers and day-to-day control are restricted to members of staff of the judiciary only and, that in carrying out any functions under the Act, the Registrar is subject to the direction and control of the Chief Justice in matters concerning subordinate courts inclusive of the courts of judicial commissioners. This statement is correct but it does not give a complete picture.

[20] **Act No. 16 of 2011** establishes a judicial service consisting of judicial officers and members of staff. These categories of persons are clearly defined in s 3. The Registrar is constituted as the chief administrator of the judiciary. Two other administrators, the Deputy Registrar and the Judicial

Administrator, assist him. The Deputy Registrar is assigned to the day-to-day administration of the courts and the judicial Administrator to the day-to-day administration of the non-adjudicative work of the judiciary and for the implementation of the resolutions of the judiciary and the Judicial Service Commission. Significantly neither the Registrar nor his deputy or the Judicial Administrator is given any power over judicial officers. And this is as it should be. Judicial officers are not under the control of any person in the performance of their judicial work. It seems to me that when it comes to the conditions of service of judicial officers, including their promotion, transfer or re-deployment, it is the Judicial Service Commission that has the power to deal with those issues and its resolutions are then communicated to the judicial officers affected thereby by the Judicial Administrator in terms of s 10(1)(a). There cannot be any argument that the Registrar or any other judicial officer can deal with these matters to the exclusion of the Commission. The Chief Justice is empowered by s 29 of Act No. 16 of 2011 to make regulations for giving effect to the Act but such regulations may not impinge into the

province of the legislature. Parliament has enacted three main pieces of legislation to deal with the separate courts at the level we are concerned here – the **Judicial Commissioners Proclamation 1950, the Subordinate Courts Act, 1988** and **the Administration of the Judiciary Act, 2011**. It is in terms of the first two Acts and the **Central and Local Courts Act, 1938** that the courts are established with their hierarchy of office. What the Chief Justice purported to do through LN 150 of 2013 was to fuse the judicial commissioners' courts and the magistrates' court at the level of judicial commissioner/resident magistrate by subjecting the judicial commissioner to the administrative and supervisory authority of the chief magistrate. This is properly the sphere of Parliament. The point is well taken by the appellants that the Chief Justice overstepped the limits. The new rules 2A (1) and (2) and 2E (1) (c) are ultra vires the enabling legislation.

[21] In passing I may observe that where a power to make rule is granted by statute, such is the case under Act 16 of 2011, Act 9 of 1988 and Proclamation 25 of 1950 as amended, the

proper approach to exercising the power is to make separate rules under each Act and not to take an omnibus approach as was the case in making the rules now impugned.

[22] The appeal is accordingly upheld with costs and the order of the court *a quo* is set aside and substituted with the following-

"1. It is declared that Rule 2A and Rule 2E(1)(c) of the **Subordinate Court Rules, 1996** (Legal Notice No.132 of 1996) inserted by section 2(b) of the **Subordinate Court (Amendment) Rules, 2013** (Legal Notice No.150 of 2013) are *ultra vires* section 81 of the **Subordinate Courts Act, 1988** (Act No. 9 of 1988), section 34 of the Central and Local Courts Proclamation, 1938 (Proc. No. 62 of 1938) and section 2 and 4 of the **Judicial Commissioners Proclamation, 1950** (Proc. No. 25 of 1950) and consequently null and void.

2. The respondents shall pay the costs of suit."

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M. CHINHENGO

Acting Justice of Appeal

I agree _____

DR K.E. MOSITO

President of the Court of Appeal

I agree _____

S.N. PEETE

Justice of Appeal

For Appellant : Advocate P.V.Tšenoli

For Respondent : Advocate R. Motsieloa