IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) No 24/2016

CIV/APN/91/2016

DANIEL RANTLE **Appellant**

and

METHODIST CHURCH OF SOUTHERN AFRICA **First Respondent**

ZIPHOZIHLE DANIEL SIWA, PRESIDING BISHOP **Second Respondent**

CHARMAINE MORGAN, EXECUTIVE SECRETARY **Third Respondent**

MESSENGERS OF COURT (MR MATHATA & MR MOKHOTHU) **Fourth Respondent**

THE CHIEF JUSTICE **Fifth Respondent**

MINISTER OF JUSTICE & CORRECTIONAL SERVICES **Sixth Respondent**

ATTORNEY GENERAL **Seventh Respondent**

CORAM : CLEAVER AJA
CHINHENGO AJA
GRIESEL AJA

HEARD : 19 OCTOBER 2016

DELIVERED : 28 OCTOBER 2016

Summary

Ex parte application to the High Court to stay execution of an order of the District Land Court brought notwithstanding similar application filed in the District court - District Court

application withdrawn after interim relief granted in high court-High Court application dismissed on return day as also appeal against that decision-punitive costs award as mark of court's disapproval of procedure adopted.

JUDGMENT

CLEAVER AJA

[1] This an appeal against a decision and order of the High Court which discharged a rule issued in motion proceedings which had suspended, pending finalisation of the relief sought, an order issued in the District Land Court.

[2] On the 16th of March 2016 the District Land Court issued an order in terms of which, inter alia, the first appellant was ordered to hand over to the first respondent full possession and control and use of the property more fully described the records of the Registrar of Deeds as 'Certain Ecclesiastical and Educational site described as Site number 81, Stadium, Maseru Reserve.'

[3] On the 16th of March 2016 the Appellant served a notice of appeal against the decision and judgment of the District Land Court on the Registrar of that court and on the 17th of March served on the attorneys for the respondents a notice of appeal to the the Land Court. Attached to this was a copy of the notice to the District Land Court which had been filed on the previous day. The grounds of appeal related solely to a challenge to the right of the respondents to hold title to the land referred to in the previous paragraph.

[4] The arrival of the messenger of the court at the premises referred to in the order with instructions to evict the appellant in terms of the order resulted in correspondence passing between the attorneys for the parties. On the 22nd of March the appellant's attorneys addressed a letter to the attorneys for the respondents in which they recorded-

> *"We confirm that we communicated to you our client's desire to apply for stay of execution in the present matter and that the said application is already being prepared.*
> *As requested, we shall provide reasonable time so as to allow you to oppose the matter.*
> *We also hope that in the light of this information and of the contemplated application, you will hold any processes in relation to the execution of the order in the matter, and inform the messenger of the court accordingly."*

The respondents' attorneys replied promptly on the same day saying that they would not hold any processes in relation to execution of the order.

[5] At 14:30 on the same day the appellant's attorneys served on the respondents' attorneys a notice indicating that application would be made to the District Land Court at 3:30pm on that day for an order to stay execution of the order made on 16 March. The notice recorded that the application was to be made to her Worship Banyane.

[6] What happened next, was that on the same day, the 22nd of March, the appellant secured an urgent order from the High Court, without notice to the respondents, which issued a rule *nisi*, returnable on the next day, the 23rd of March, calling on the respondents to show cause why-

> 1. The messenger of the court should not be restrained and prohibited from executing the order of the District Land Court granted on the 16th of March pending the final determination of the matter, and

2.The order of the 16th of March should not be stayed pending the final determination of the matter.

The following orders, inter alia, were also sought-

3.Declaring Rule 109(3) of the District Land Court Rules 2012 invalid, null and void *ab initio*, for being inconsistent with the common law or principle that where a party notes an appeal, the notice of appeal automatically stays the order or judgment appealed against.

4. Declaring Rule 109(3) of the District Land Court Rules 2012 invalid, null and void *ab initio* for being *ultra vires* the statutory power of the Chief Justice.

5. Declaring that the decision and/or judgment of the Maseru District Land Court on the 16th March 2016 against the Applicant had been stayed automatically by the noting of Appeal against that decision and/or judgment by the Applicant on the 17th March 2016."

[7] The motivation for the urgent hearing of the application in the High Court, as set out in the certificate of urgency filed of record, included the averments that the applicant was likely to be evicted from the property pursuant to the order granted in the District Land Court and that the *"District Land Courts do not require an application for stay in order to have the effect of staying the judgment or order of the court below."*

The matter was not heard on the 23rd of March, but only on the 15th and 18th of May 2016.

[8] The main ground for the relief sought in the High Court was an attack on the validity of Rule 109(3) of the District Land Court. The rules reads -

"Where an appeal has been preferred against the judgment of the court, the magistrate shall not order stay of execution, unless execution will likely result in irreversible damage in the event that the judgment is reversed by the appellate court."

The validity of the rule was challenged on the basis that it offended against the

‘so-called’ common law rule or principle that the noting of an appeal automatically stays the judgment or order appealed against. (My parenthesis)

[9] In support of his claim for temporary interdictory relief, the appellant averred, notwithstanding the finding of the District Land Court, that he was a bona fide occupier of the premises, had made huge improvements to it and was entitled to remain in occupation until compensated or to hold the premises as a lien for that purpose. He averred further :

“There are no alternative reasonable ways than to approach the Honourable Court as I have done. While it is true that I have launched an application for stay in terms of the impugned rules, that does not deter me from challenging the same rule before this Honourable Court. This matter involves special and exceptional circumstances which warrant the taking of this step I have taken notwithstanding the said application. This is because, I may not sit on my laurels and wait until the lower court has ruled against me and the respondents having evicted me, and then only come for assistance from this honourable Court. Serious injustice and prejudice of my rights would by then have been occasioned.”

[10] As to the jurisdiction of the High Court, the appellant averred that the matter fell within the ordinary jurisdiction of the court and that the matter did not involve any land issues.

[11] The judge *a quo* considered that on the papers he was called upon to decide four issues, namely-

*Whether the court had jurisdiction to hear the matter.

* Whether it was appropriate to bring the application *ex parte* and on an urgent basis.

*Whether the District Land Court should have first been approached to consider a stay of execution of its order in terms of Rule 109 (3).

*Whether Rule 109(3) was *ultra vires* the rule making power of the Chief Justice.

[12] The High Court found for the respondents on the issue of jurisdiction, holding that the matter fell within the jurisdiction of the District Land Court and that the High Court did not have jurisdiction. The judge also pointed out that prima facie the wording of Rule 109(3) made provision for a stay application to be brought in the District Land Court. As to the challenge to the validity of Rule 109(3), it held that the court had neither original, appellate nor review jurisdiction in land matters.

[13] The appellant now comes on appeal before us. In his notice of appeal three main grounds of appeal were advanced, namely

1. Although the respondents had averred in their answering affidavit that the High Court did not have the jurisdiction to entertain the application, the issue was not raised in argument. In the result the court should not have made its finding without hearing the parties on the issue.
2. The High Court did indeed have jurisdiction to hear the matter.
3. The High Court had the power to issue the declarator sought in respect of Rule 109 (3), while the District Land Court did not.

[14] In Tseliso Motebeli and 'Mampho 'Mazulu Matekase[1] , a decision in the Land Court (a division of the High Court) the court held at para [10] that a court has the power to raise *mero motu* the special pleas of jurisdiction, non-joinder and misjoinder and, if proven valid, must decline jurisdiction whether or not the plea of lack of jurisdiction has been raised by the respondent/defendant. This decision was based, inter alia on the judgment in Attorney General & Others v Kao[2][3]in which it was held that the question of jurisdiction can be properly raised for the first time on appeal.

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[1] LC/APN/152/2014

[2] LAC (2000-2004)656 at 662 para [12] to 663 para [18]

[3] AD 468

[15] The basis for the findings referred to in the previous paragraph stems from cases such as Norwich Insurance Society v Dobbs[3] and Paddock Motors (Pty) Ltd v Igesund[4].

[16] In the former the following appears at 476-

> *"It only remains to refer to one point not made in the court below, but raised for the first time before us. It was suggested that as the jurisdiction of the Provincial Division was not questioned until the argument had proceeded at some length, the respondent must be taken to have submitted to the jurisdiction of that Division, and was debarred from now questioning it. But such a contention is untenable. The respondent's delay in objecting was very properly held to have affected the question of costs. But no delay on the part of one of the litigants in raising such a defence could confer on the Provincial Division jurisdiction over the subject matter of a cause of which the legislature had deprived it."*

And in Paddock Motors the following appears at 23F-

> *"That it would create an intolerable position if a court were to be precluded from giving the right decision on accepted facts merely because a party failed to raise a legal point, as a result of an error on his part, has also been accepted by this court in Van Rensburg v Van Rensburg en Andere 1963(1) SA 505 (A) at p 510A."*

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[4] 1976(3) SA 16 (A)

I am accordingly satisfied that the court a quo was entitled to decide on the question of jurisdiction even though it had not been raised during argument.

[17] The learned judge a quo was of the view that the High Court's jurisdiction in land matters was ousted by the provisions of sections 73 and 89 of the Land Act 2010 which provide respectively:

"73. The following courts were established with jurisdiction, subject to the provisions of this Part, to hear and determine [all] [5] *disputes, actions and proceedings concerning land:*

(a) The Land Court; and

(b) The District Land Court

89. Where a case relating to land was pending before the High Court or Subordinate Court prior to the coming into effect of this Act, the case may continue to be heard by the High Court or Subordinate Court until completion and the ruling emanating therefrom shall have the same effect as if made after the coming into effect of this Act".

While the wording quoted certainly is a strong indication that the jurisdiction of the High Court to hear matters concerning land is ousted, there are also other reasons why the High Court did not have jurisdiction.

[18] The dispute between the parties concerned land, and in particular the land on which the Methodist Cathedral in Maseru is built. It is therefore a dispute which is covered squarely by the wording of S 73 of the Land Act, being a dispute '**concerning** 'land.[6] Furthermore, as pointed out in the judgment of the court below, the affidavits

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[5] The word 'all' was inserted at a later stage

[6] See also Lephema v Total Lesotho (Pty) Ltd [2014] LSCA at para 22

show that the application concerns a stay of execution of an order of the District Land Court, which order is on appeal in the Land Court. That makes it clear that the order which the appellant sought to stay is a land matter.

[19] Counsel for the appellant attempted to overcome this obvious difficulty by submitting that the main purpose of the application was to obtain a declarator as to the invalidity of Rule 109(3). In my view there is absolutely no basis for the declarator to be sought as part of an application brought *ex parte* for interim relief from the operation of an order issued by the District Land Court. It should be sought by means of a substantive application. Contrary to his averment that there were no alternative reasonable ways to approach the court as he had done (see para (10) hereof) both the interim stay relief and the declaratory relief could have been pursued in the Land Court. As pointed out by the judge *a quo* :

> *"It then borders on the absurd for the applicant to suggest that the application does not involve land issues when it seeks a stay of execution of an order of a land court on the assertion of rights as a 'lien holder and the bona fide occupier entitled to compensation or to hold the land' "*

[20] Counsel for the respondents submitted that quite apart from the jurisdictional issue, the appeal should not be entertained because of the manner in which the proceedings were conducted in the court below. In my view there is merit in this submission. A recital of the steps taken by the appellant will reveal why I am of this view-

> * On the 22nd of March the appellant's attorneys advised the attorneys for the respondents that they intended applying for a stay of the order granted by the District Land Court and would give them reasonable notice thereof. Notice of an application for stay, to be heard in the District Court

at 15h30 on the same day, was served on the respondents' attorneys at 14h30.

* On the same day, (the time when this occurred is not apparent from the papers) the appellant secured, without notice to the respondents, a stay of the order of the District Court in the terms set out in para (6) above.

* As soon as the interim relief had been obtained in the High Court, the appellant withdrew his stay application in the district court.

Counsel for the respondents submitted further that the manner and timing of the applications brought by the appellant as set out in this paragraph point to bad faith on the part of the applicant which justified the award of a punitive costs order against him.

[21] A court may order a party to pay his opponent's attorney-and-client costs where he has misconducted himself gravely in the conduct of the case[7] or on the grounds of an abuse of the court process.[8]

[22] The interim stay order in the High Court was not necessary for the declaratory relief which the appellant sought and one is left with the inescapable conclusion that the procedure was designed so as to enable the appellant to 'snatch' the order which he secured in the High Court. This was clearly, in my view, an abuse of the court process which requires this court to express its disapproval of by making a punitive order of costs against the appellant.

I would issue the following order-

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[7] Van Dyk v Conradie and Another 1963(2) SA 413 (C) at 418E-F

[8] Mahomed and Son v Mahomet 1959(2) SA 688 (T) at 692G

The application is dismissed with costs, which costs are to be taxed on the scale as between attorney and client.

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R.B. CLEAVER
ACTING JUSTICE OF APPEAL

I agree _____

M CHINHENGO
ACTING JUSTICE OF APPEAL

I agree _____

B.M. GRIESEL
ACTING JUDGE OF APPEAL

Counsel for the appellant : S.T. Maqakachane
Counsel for the respondents: H.H.T Woker