**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C OF A (CIV) NO. 27/2018**

**LC/CIV/APN/03/2012**

**In the matter between:**

**MAFA MOSHOESHOE** **APPELLANT**

**AND**

**DISTRICT FOOTBALL ASSOCIATION–LERIBE** **1ST RESPONDENT**
**LESOTHO FOOTBALL ASSOCIATION** **2ND RESPONDENT**
**LAND REGISTRAR** **3RD RESPONDENT**
**COMMISSIONER OF LANDS** **4TH RESPONDENT**
**LAND ADMINISTRATION AUTHORITY** **5TH RESPONDENT**

**CORAM:** DAMASEB AJA
CHINHENGO AJA
MTSHIYA AJA

**HEARD:** 18 JANUARY 2019
**DELIVERED:** 01 FEBRAURY 2019

**SUMMARY**

*The Land Court is a creature of statute, not clothed with inherent jurisdiction and so judges are required to exercise their powers as granted under the Land Act, 2010 and the Land Court Rules, 2012 – Land Court setting the matter down for purposes of determining reason for delay in prosecution and when legal practitioners absent, court dismissed the matter in terms of rule 54(1) – Court on appeal holding that the hearing contemplated in rule 54(1) is not an administrative hearing but a hearing on the merits and such order therefore ultra vires court's power. Appeal succeeds.*

**JUDMENT**

**DAMASEB AJA**

Damaseb AJA (Chinhengo AJA and Mtshiya AJA concurring):

[1] The Land Act 8 of 2010 creates the Land Court as a Division of the Lesotho High Court.[1] The Chief Justice is empowered, in consultation with the minister responsible for land, to make rules for the 'practice and procedure' in the Land Court.[2]

[2] Unlike the High Court of Lesotho[3], the Land Court is a creature of statute[4] and is not clothed with inherent jurisdiction, which

[1] Section 73(a), read with s 74.
[2] Land Acts, s 76.
[3] Which in terms of s 119 (1) of the Constitution is a court of 'unlimited original jurisdiction' in both civil and criminal proceedings. Section 119 (3) of the Constitution states that the High Court 'shall be a superior court of record and, save as otherwise provided by Parliament, shall have all the powers of such a court.' It is trite that a court of unlimited general jurisdiction enjoys inherent jurisdiction to determine its own procedure.
[4] Section 73 of the Land Act 8 of 2010 is created 'with jurisdiction…to hear and determine all disputes, actions and proceedings concerning land'.

includes the power to make procedure for the conduct of the court's proceedings. The consequence of this statement is that judges of the Land Court may only exercise powers specifically granted under the Land Act and the rules duly made by the Chief Justice in terms of s 76 of that Act.

[3] To put it conversely, judges of the Land Court will be exceeding their jurisdiction if they exercise powers and make orders not sanctioned by the Land Act or the rules made in terms of s 76 of that Act.

[4] On 24 February 2012, the Chief Justice made the Land Court rules. The rules make provision for what powers the court enjoys in circumstances where one or both parties fail to appear in court.[5]

[5] The present appeal raises the question whether it is competent for a judge of the Land Court to dismiss a duly instituted claim[6] of an applicant on account of his failure to appear at a 'hearing' scheduled by the judge of that court for the purpose of determining the reason for a delay in prosecuting a cause pending before that court.

**The factual background**

[6] The material facts are common cause and are succinctly summarized by the judge *a quo* in her ruling of 2 May 2018. The

[5] Rule 51: non-appearance of respondent; rule 54: applicant failing to appear; rule 56: several parties failing to appear.
[6] In terms of Part IV of the land Court Rules.

appellant obtained a *rule nisi* against the first and second respondents on 16 July 2013, interdicting them from carrying on some construction work on a disputed piece of land, until the finalisation of the main dispute which should resolve the ownership of the land in question.

[7] The appellant, as the *dominis litis* party, thereafter failed to set the matter down for over four years whilst the respondents remained interdicted. The judge to whom the matter was allocated directed the parties to attend court in order to establish the reason for the non-prosecution of the matter and to move it forward. The case was therefore set down for that purpose for 26 September 2014.

[8] It is common ground that both the appellant and his counsel did not appear on that date although fully aware that the court might dismiss his application for their non-appearance. The court then proceeded to dismiss the application with costs.

[9] In dismissing the claim, the court below proceeded from the premise that the failure to appear implicated rule 54(1) of the Land Court Rules which states:

> *'Where the respondent appears and the applicant does not appear when the application is called on for hearing, the court shall make an order that the application be dismissed.'* (My emphasis)

[10] Where the court dismisses an application in terms of rule 54(1), an applicant may approach the court to set aside the dismissal:

> *'within one month of such dismissal, and if he satisfies the court that there was good cause for his non-appearance, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks just, and shall fix a day for proceeding with the application.'*[7]

[11] In the wake of the dismissal of his claim, the appellant brought an application to set aside the dismissal on the ground that the default was not willful and was due to the fact that his practitioner of record had fallen ill and could not attend. The application was opposed by the first and second respondents who took the view that the appellant failed to satisfactorily explain the default and also did not establish that he had good prospects of success on the merits.

[12] Not only had the appellant brought the setting aside application more than one month (in fact two years) after the dismissal order, but he also provided no explanation whatsoever why he did not personally appear.

[13] In the event, the court *a quo* dismissed the application to set aside the dismissal of his application with the consequence that, in terms of rule 55(1), 'the applicant shall be barred from bringing a new application in respect of the same claim'.

[14] In the view I take of the *vires* of the order made by the judge dismissing the application upon the default of the applicant to attend the scheduled proceeding of 26 September 2014, it is unnecessary to

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[7] Rule 55(2).

consider whether the appellant showed *good cause*[8] for the failure to attend proceedings on 26 September 2014.

**Status of the hearing of 26 September 2014: dismissal roll call**

[15] The status of the proceedings of 26 September 2014 was described as follows by the judge *a quo*.

> 'As is common practice in this Court, where there are applications which are not being attended to or followed up, the Court [directs] that a dismissal roll be prepared so as to notify parties, whose applications were not being prosecuted and neglected, that such applications will be dismissed for want of prosecution. Such a roll was duly issued…in terms of Rule 55(2) of the Rules of this Court…This particular application appears [on the dismissal roll of 26 September 2014] as item 36'.

[16] I propose to consider whether the dismissal roll call scheduled by the docket judge for 26 September 2014 brought it within the scope of rule 54(1). That is so because a defended application lodged in terms of Part IV of the Land Court Rules can only be dismissed under rule 54(1) where the applicant failed to attend a 'hearing' as contemplated in that rule.

[17] Under the rules of the Land Court, after a claimant had launched proceedings in terms of Part IV of the rules, the court is

[8] As contemplated by rule 55(2).

required to bring the respondent before it by notice in order to answer to the claim[9]. Rule 36(1) states that:

> *'when a claim has been duly instituted, the court shall issue notice [on Form 3[10]] to the respondent to appear to answer the claim on a day to be specified therein'.*

[18] Rule 50(1) decrees that:

> *'On the fixed hearing day, the parties shall be in attendance in the court in person or through their agents or legal representatives and the application then shall be heard.'* (My underlining)

[19] The clear intent of the rule-maker is to provide for an expedited procedure for the resolution of land disputes in the Kingdom. What is plain from the provisions I have so far set out is that when a duly instituted application is called on the date set down, the court is expected to determine the matter on the merits. That much is reinforced by the terms of rule 50(2) which state that:

> *'Where neither party appears when the claim is called for hearing the court shall make an order that the application be struck out…'* (Underling provided for emphasis).

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[9] Once a claim is duly instituted in terms of part IV of the rules, Part V of the rules finds application.

[10] Form 3 commands the respondent to appear at court on a stated date personally or through a representative to 'to answer all material questions pertaining to the application'. The respondent is also commanded to come prepared to produce its 'answer' to the claim, the list of witnesses of the respondent and the documents to be relied upon by the respondent be they under its possession or that of a third party.

[20] In addition, it bears mention that the various scenarios of non-appearance by parties which I previously referenced not only appear in Part V of the Land Court Rules where the rule maker provides for 'hearing' on the merits, but also spell out the consequences of non-appearance depending on the identity of the party that fails to attend: The respondent's failure to attend results in the hearing of the application on the merits if it is proved that he had notice of the set down.[11] Where the applicant fails to appear and the respondent is present, the court 'shall' dismiss the application.

[21] In none of the scenarios that I have set out has the rule-maker made provision for the 'dismissal roll' scenario which is the subject of the present appeal. The dismissal contemplated by the scheme of Part V is that where a date had been determined by the court for the hearing of the claim on the merits; not an administrative hearing such as was scheduled for 26 September 2014.

[22] It was therefore *ultra vires* the powers of the Land Court to dismiss the claim on 26 September 2014 because the appellant failed to appear to show cause why he had delayed to prosecute the matter.

[23] The parties were *ad idem* at the hearing of the appeal that in the way the 'dismissal roll' notice was sent out to the parties in the present case, it was clear that had both parties been present the application could only have been scheduled for a hearing on a future date on the merits. The matter could not have been heard on the

[11] Rule 51(a).

merits as contemplated in rule 50(1). Such an administrative hearing, as I have shown, is not one contemplated in rule 54(1).

[24] No doubt, it would have been competent for the court at the administrative hearing of 26 September 2014 to proceed, in the absence of the appellant, to give a date for the hearing on the merits and since the appellant had notice of the hearing and did not attend, it would have laid ill in his mouth to say that the date was determined without his consent.

[25] Besides, and as in this case, the court would also have been entitled to discharge the *rule nisi* if it was still in force on the basis that it is a discretionary remedy and a failure to comply with a court order intended for the effective management of the business of the court would disentitle the appellant to such an order. I do confirm the judge *a quo*'s observation that the rule nisi granted to the appellant on an urgent basis has since lapsed and is of no force and effect. If it was still in force, this would have been a proper case for discharging it.

[26] The conclusion I come to is that the Land Court's order dismissing the claim in terms of rule 54(1) cannot be supported. It becomes unnecessary in that event to consider whether the appellant had shown good cause for his non-appearance on 26 September 2014. The appeal must therefore succeed.

**Order**

[27] I make the following order:

1. The appeal succeeds and the order of the Land Court be and is hereby set aside and substituted for the following order:

   '1. The application to set aside the dismissal of the claim on 26 September 2014 is granted.
   2. There shall be no order as to costs'.

2. There shall be no costs in the appeal.

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**P.T DAMASEB**

**ACTING JUSTICE OF APPEAL**

I agree:

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**M CHINHENGO**

**ACTING JUSTICE OF APPEAL**

I agree:

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**M MTSHIYA AJA**

**ACTING JUSTICE OF APPEAL**

**For the Appellant**: Adv. N B Pheko

**For the 1ST and 2ND Respondents**: Adv. Q Letsika