CIV/APN/89/2014

IN THE HIGH COURT OF LESOTHO
(Land Court Division)

In the matter between:

'MATAU MOSOEUNYANE **APPLICANT**

AND

MOSIUOA LIKOTSI	**1ST RESPONDENT**
HIS WORSHIP MR. BALE	**2ND RESPONDENT**
CLERK OF COURT (DISTRICT LAND COURT BEREA)	**3RD RESPONDENT**
THE ATTORNEY GENERAL	**4TH RESPONDENT**

JUDGMENT

CORAM: The Hon. Acting Justice Keketso Moahloli

SUMMARY

Land Law – Grounds for review of decision of District Land Court – whether grounds listed in Land Court Rule 85 exhaustive – whether Rule 85 is intra vires – If a Rule of Court is not a rule of procedure but a substantive rule of law, it is ultra vires the enabling Act and consequently of no legal force and effect – The common law grounds for review of inferior courts applicable – Presiding Officer who pressurizes parties to conclude a settlement agreement on making such an order of court committing a reviewable gross irregularity – Importance of reducing a settlement agreement into writing and having it signed by the parties emphasized.

ANNOTATIONS

Cases:

Anglo Platinum Ltd v Commission for Conciliation, Mediation and Arbitration and Others 2009 ILJ 2396 (LC)
Chalatse and Another v The Acting Chief Justice and Others [2015] LSCA 4
Connolly v Ferguson 1909 TS 195
Ex parte Christodolides 1953 (2) SA 192 (TPD)
Fey and Whiteford v Serfontein 1993 (2) SA 605 (A)
Glen Anil Finance (Pty) Ltd v Joint Liquidators, Glen Anil Development Corporation 1981 (1) SA 171 (A)
Gordon v Standard Merchant Bank 1983 (3) SA 68 (A)
Gross v Commercial Union Assurance and Another 1974 (1) SA 630 (A)
Harmony Caterers (Pty) Ltd v Ford 2002 (5) SA 536 (WLD)
Hydromar (Pty) Ltd v Pearl Oyster Shell Industries (Pty) Ltd 1976 (2) SA 384 (C)
Johannesburg Municipality v Cohen's Trustees 1909 TS 811
Karpakis v Mutual and Federal Insurance Co. Ltd 1991 (3) SA 489 (OPD)
Mathope v Soweto Council 1983 (4) SA 287 (W)
Minister of the Interior and Another v Harris and Others 1952 (4) SA 769 (AD)
Minister of Safety and Security v Kekana and Others [1996] 2 All SA 324 (WLD)
Moetsana v Tsikoane 1981 (2) LLR 378 (HC)
Nkwinti v Commissioner of Police 1986 (2) SA 421 (E)
Notsi v MacPherson 1981 (2) LLR 268 (HC)
Palvie v Motalie Bus Service (Pty) Ltd 1993 (4) SA 742 (A)
Seluka v Suskin and Salkow 1912 TPD 265
Ulster v Standard Bank of SA Ltd and Another 2013 ILJ 2343 (LC)
United Reflective Converters (Pty) Ltd v Levine 1988 (4) SA 460 (WLD)
Universal City Studio Inc v Network Video 1986 (2) SA 734 (A)
Van Niekerk v Bethlehem Municipality 1970 (2) SA 269 (0)

Statutes:

District Land Court Rules 2012 [Legal Notice No.2 of 2012]
Land Court Act No.8 of 2010
Land Court Rules 2012 [Legal Notice No.1 of 2012]

Books and articles:

Cilliers, Loots and Nel. 2009. Herbstein and Van Winsen's The Civil Practice of the Superior Courts of South Africa
Feehily.2013. "The Legal Status and Enforceability of Mediated Settlement Agreements", Hibernian Law Journal, 1, 1-21
Grogan. 2014. Labour Litigation and Dispute Resolution
Van Heerden and Crosby.1996. Interpretation of Statutes

Moahloli AJ

BACKGROUND

[1] The applicant in these review proceedings, 'Matau Mosoeunyane ("'Matau") and the 1st Respondent, Mosiuoa Likotsi ("Mosiuoa") lived together at Lekokoaneng Ha Shemane in the district of Berea. 'Matau avers that they lived as husband and wife after the Mosiuoa's wife died and 'Matau divorced her husband for Mosiuoa. She avers that she was accepted in Mosiuoa's family and given the name 'Malehlohonolo Likotsi. *Koae* and all other customary rituals were observed, even though no *bohali* was paid. 'Matau further avers that a child, Lehlohonolo Likotsi, was born out of their "marriage" in 2006.

[2] Likotsi denies that the two of them were ever married. He says that 'Matau was just her concubine. He also denies that a child was born out of their relationship.

[3] 'Matau claims that during the subsistence of their "marriage" they jointly built a two-roomed house on a site she was allocated in 2003. She attached a duly executed Certificate of Allocation (Form CC2)

issued in her name to her Originating Application. She further claims that in 2009, when Mosiuoa would seldom come home, she added a further three rooms to be house and electrified it.

[4] Mosiuoa, on the other hand, avers that the site in dispute belongs to him, as he inherited it from his uncle. He has not furnished any documentary proof of this.

[5] In 2013 Mosiuoa lodged a case in the District Land Court for Berea, for, *inter alia*, (a) an order that the allocation of the site to 'Matau by the Thupa-Kubu Development Council was unlawful and wrongful; (b) cancellation of the Certificate of Allocation (Form CC2) issued in favour of 'Matau; (c) eviction of 'Matau from his site.

[6] The parties and/or their legal representatives appeared before the presiding Magistrate on several occasions. The matter was postponed without hearing the merits. The Magistrate kept persuading the parties to settle the matter out of Court. Below is the learned Magistrate's transcript of what transpired:

> "On 11/02/14 Miss Nkhahle for the Applicant and Miss Matheka for the 1st Respondent are before Court.
>
> Miss Nkhahle says they are only being given receipts for negotiation of settlement.
>
> **ISSUES**
>
> - Does co-habitation for 12 years where both parties have left their respective marriages constitute marriage?

- Where such a union separates what takes place with the property accumulated and developed therefrom?

- Can the 80% be justified? If not why not strike a reasonable balance on question of compensation.

Parties especially Applicant are directed to consult further towards settlement based on tangible evidence. Adjourned to 13/03/14 for mention.

On 13/03/14 both counsel are before Court. Miss Nkhahle and Miss Nkhasi. Miss Nkhahle says they have failed to reach settlement and she only got receipts on the 10/03/14. She only consulted with client today. The court had ordered

Miss Nkhahle says her client has conceded to settle on basis of the receipts, which totaled M18,000.

Miss Nkhasi says there are additional receipts which make roughly M4 000. Miss Nkhahle's client concedes that the amount be included.

Court having heard both parties settlement is hereby made by consent of parties at rate of M22 000. This is made an order of Court to be paid by end of July 2014. As for the other unsupported claims which the Plaintiff alleges could be otherwise by viva voce evidence, the Plaintiff had ample time to prepare and to furnish such. The Court for the sake of finality and expediency disallows such.
No order as to costs

Matter hereby closed."

[7] As a consequence, the Clerk of Court issued a Court Order o the effect that the learned Magistrate Mr. T. Bale, on the 13th March 2014, having read papers filed of record, and having heard Adv. L. Nkhahle for the Plaintiff and Adv. L. Nkhasi for the 1st Respondent, ordered that (1) Respondent should vacate Applicant's property; (2) The Applicant should pay the 1st Respondent the sum of M22,000.00 on or before the 31st July 2014; (3) No order as to costs.

[8] 'Matau lodged a review application to this court on the ground that the judgment of the court *a quo* is irregular and bad in law for the following reasons:

> "6.1 The Honourable court did not have jurisdiction to award compensation in the amount of M22, 000.00 in terms of the monetary ceiling.
>
> 6.2 The Honourable Magistrate deprived Applicant with (sic) the opportunity to call *viva voce* evidence to support and establish that Applicant's compensation would exceed the said M22, 000.00. Applicant ought to have been given an opportunity to lead evidence especially when she was prepared to and that evidence was relevant and could not be discovered then, but for the evidence.
>
> 6.3 The compromise settlement was not done in accordance with the District Land Court Rules in that:
>
> (a) The said settlement agreement was not signed by the parties and it was without the Honourable Court having satisfied itself that it was not contrary to the law and/or public morality.
>
> 6.4 The 2nd Respondent gave judgment without stating reasons for his judgment.
>
> 6.5 The 2nd Respondent made judgment without give (sic) Applicant or her legal representative an opportunity to address the Court (a fair hearing).
>
> 6.6 2nd Respondent proceeded with the matter and compelled the parties to settle out of Court despite the fact that the 1st Respondent was a South African and in essence did not have title to acquire and, hence lack of *locus standi* per annexure "MM2" that is herein attach (sic) and marked as such."

[9] Mosiuoa opposed the review application, contending that 'Matau "is not entitled to the relief sought because there is no procedural irregularity the court *a quo* committed".

[10] Subsequently, 'Matau obtained an interim order staying the execution of the judgment of the court *a quo* pending finalization of the review application.

THE POINT IN LIMINE

Arguments:

[11] Mosiuoa raises a point *in limine* that the application should be dismissed because the grounds for review raised by 'Matau are outside the permissible grounds for review set out in rule 85 of the Land Court Rules which states:

> **"Grounds for review**
> 85. An application for review may be made by any interested person on one of the following grounds:
> (a) where the judgment sought to be annulled or varied was made based upon or substantially influenced by fraudulent or fabricated documents or subornation of perjury or other inappropriate and misleading conduct on the part of either party in the course of the proceedings or
> (b) the party moving is prepared to adduce relevant and essential evidence which was unknown to, and could not reasonably have been discovered by him before the judgment was pronounced."

[12] He argues that as 'Matau's reasons for review set out in paragraph 8 above do not fall within rule 85 (a) or 85 (b), they cannot be considered because this court's review jurisdiction is restricted to the four corners of the relevant statute.

[13] 'Matau concedes that her grounds for review fall outside rule 85 (a). She however contends that they are within the purview rule 85 (b) because she was not given the chance by the court *a quo* to adduce certain oral evidence to substantiate the building expensed she incurred.

[14] Mosiuoa retorts that this is a flawed interpretation of rule 85 (b), which only refers to evidence which a party did not know about and could not reasonably have been discovered by him before the judgment was pronounced.

[15] 'Matau further argues that the list of grounds in rule 85 is not exhaustive, and a party is permitted to rely on the common law grounds of review. She contends that the irregularities she is raising fall within the common law grounds. If the law-maker had intended that the common law review grounds should be excluded it could have said so explicitly.

[16] Mosiuoa refutes the correctness of this interpretation. He maintains that the maker of the rules intended rule 85 to be exhaustive, and that the court can not be asked to go beyond the four corners of the statute in question.

[17] Lastly, 'Matau asks the court to have regard to the provisions of rule 87 (2) when deciding the point *in limine*. This sub-rule provides that "where the court, having regard to any of the grounds provided by rule 85, is satisfied that if the judgment complained of is made to stand, a substantial wrong, or miscarriage of justice, which cannot by any other process be so conveniently remedied or set right, is likely to be thereby occasioned, it may grant a reviewing of the application, in whole or in part, in such manner and on such terms and conditions as it shall deem appropriate."

Analysis:

[18] The Land Court was established by section 73 of the Land Act of 2010 ("the Act") "to hear and determine disputes, actions and proceedings concerning land". According to section 74 of the Act the Land Court is a division of the High Court.

[19] Section 76 gives the Chief Justice delegated legislative authority to "make rules for the practice and procedure in the land courts" (emphasis added). Acting pursuant to this, the Chief Justice made the Land Court Rules 2012 ("the Rules"), which came in to operation on 24 February 2012. Reviews are dealt with under rules 84 to 88 of these Rules.

Is rule 85 exhaustive?

[20] The grounds for review stipulated in rule 85 are very narrow and limited. Moreover, surprisingly, although they purport to be grounds for judicial review, they are not at all directed at the conduct of the presiding Magistrates in the District Land Courts, but rather at inappropriate and misleading conduct of the parties themselves in the course of the proceedings and on discovery of relevant and essential evidence after judgment. It is therefore, highly unlikely that rule 85 was meant to supplant the common law grounds for review. Such an interpretation would lead to the untenable result that the Land Court, a division of the High Court, had no supervisory role over the conduct of Magistrates in proceedings before the District Land Court. This would mean the Land Court Division of the High Court, unlike the mainstream High Court, does not have the inherent power

to monitor presiding Magistrates of the District Land Court on the grounds of gross irregularity, *mala fides*, prejudice or bias[1]. This would seriously undermine the administration of justice in our land courts.

[21] Another factor which militates against rule 85 being regarded as exhaustive is the cardinal presumption of statutory interpretation that a statute must be construed in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the course of the common law[2]. *In casu*, the so-called alteration of the existing common law has not even been effected by the legislature, but by delegated subordinate legislation. But even these Rules do not explicitly say that it was the intention of the Chief Justice to alter the common law, neither do they do so by necessary implication.

[22] Another applicable presumption is that legislation must be interpreted so as to not restrict, eclipse or oust the jurisdiction of the courts[3]. In this instance, the review jurisdiction of the Land Court.

[23] A further matter of concern is whether section 76 of the Act gives the Chief Justice authority to prescribe specific grounds for review. In my opinion section 76 gives the Chief Justice delegated legislative authority to make rules of practice and procedure applicable to judicial review, but not to prescribe the substantive grounds for judicial review themselves. A distinction has to be drawn between the two. Substantive laws are the part

[1] The common law grounds for review of inferior courts, as per Notsi v MacPherson; Moetsana v Tsikoane
[2] Per Solomon J in Johannesburg Municipality v Cohen's Trustees at p.823; Gordon v Standard Merchant Bank; Palvie v Motalie Bus Service; Seluka v Suskin and Salkow; Fey and Whiteford v Serfontein; Glen Anil Finance v Joint Liquidators, Glen Anil Development Corporation
[3] Van Niekerk v Bethlehem Municipality; Mathope v Soweto Council; Nkwinti v Commissioner of Police

of the law that creates, defines and regulates the rights, duties and remedies of the parties. Whereas rules of procedure, in the present context, regulate the general conduct of litigation and relate to the enforcement of rights, duties and remedies[4].

[24] In our Land Court Rules, rule 84, 86, 87 (1) and 88 deal with the procedure applicable to judicial review, whereas rule 85 is concerned with the substantive grounds for judicial review.

[25] Generally, if a rule does not fall within the scope of the enabling provision it is *ultra vires*[5]. More specifically, "if a Rule of Court is not a rule of procedure, i.e. a rule regulating the conduct of proceedings in the [courts], but a substantive rule a law, it is *ultra vires* the enabling Act and consequently of no legal force and effect and liable to be struck down".[6] In *casu*, rule 85 is not a rule of procedure. It is therefore, *ultra vires* the Land Act and as a result of no legal force. The grounds of review to be applied in this instance are the common law grounds set out in paragraph [20] above.

[26] In the premises the 1st Respondent's point *in limine* fails.

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[4] Cilliers, Loots and Nel (2009) Vol. 1 at p.3; Minister of the Interior v Harris at p. 781; Universal City Studios Inc. v Network Video at p. 754; Karpakis v Mutual and Federal Insurance Co. at p.492A-C

[5] Ex parte Christodolides; United Reflective Converters v Levine; Gross v Commercial Union Assurance; Harmony Caterers v Ford; Chalatse and Another v The Acting Chief Justice and Others at para 15-21

[6] Karpakis v Mutual and Federal Insurance at p. 491J to 492A; In Minister of Safety and Safety and Security v Kekana (at p. 325J to 326A) Goldblatt J held: "I am satisfied that the drafters of the rule had no right to change the laws of evidence by way of a rule of court. The Uniform Rules of Court relate only to matters of procedure and cannot be used to vary either a substantive rule of law or of evidence."

THE REVIEW

[27] I will now consider whether, in view of the factors listed in paragraph [8] above, the judgment of the court *a quo* is irregular and bad in law. As I have already stated previously, the common law grounds for review of inferior courts are gross irregularity, *mala fides*, prejudice or bias.

[28] Whether the court exceeded its monetary ceiling: This ground of review is a non-starter. As the District Land Court is a creature of statute, it's jurisdiction must be deduced from the four corners of the statute under which it is constituted[7], viz, the Land Act 2010. This law puts no monetary restrictions or limitations on the court's jurisdiction whatsoever, in relation to causes of action or kinds of relief sought.

[29] Whether the court irregularly denied 'Matau the opportunity to call *viva voce* evidence: In its record of proceedings reproduced at paragraph [6] above, the Magistrate, despite claiming that the settlement was made by consent of the parties, makes the damning admission that "as for the other unsupported claims which the Plaintiff alleges could be otherwise by viva voce evidence (sic) the Plaintiff had ample time to prepare and to furnish such. The court for the sake of finality and expediency disallows such". This leads me to the inescapable conclusion that the learned Magistrate, in his eagerness to finalize this matter, brow-beat the parties and forced through this "agreement". It seems that the learned Magistrate exerted undue pressure on their parties and their representatives. 'Matau seems to have

[7] Hydromar v Pearl Oyster Shell Industries, at p. 386 – 387; Connelly v Ferguson, at 198

been the subservient party in these proceedings, even though she was legally represented. In my view, the learned Magistrate did not have any legal justification whatsoever to disallow *viva voce* evidence. His decision was not made according to law or procedural standards of fairness.

[30] Whether the settlement agreement was irregularly concluded: The District Land Court Rules prescribe the following procedure for settling disputes by mutual agreement:

> **"Settlement**
>
> 57. (1) The parties may through compromise, conciliation, mediation, or other alternative dispute resolution mechanism make an agreement pertaining to all or some of the matters in issue to terminate a dispute in respect to which an application has been instituted
>
> (2) A settlement agreement may be made at any time by the parties at the hearing or out of court, of their own motion or upon the court attempting to reconcile them
>
> (3) The court may, upon the application of the parties, give directions as to the lines on which a settlement agreement may be made
>
> **Contents of settlement agreement**
>
> 58. A settlement agreement shall contain:
>
> (a) The name and place of the court in which the application is pending;
>
> (b) The title of the action and the number of the application;
>
> (c) The name, description, place of residence and address for service of the parties; and
>
> (d) The matters to which the agreement relates;
>
> **Recording of settlement agreement**
>
> 59. (1) Where a settlement is made at a court hearing, it shall be recorded and signed by the parties and the court shall thereupon enter it in the case file on being satisfied that its terms are not contrary to the law or public morality
>
> (2) After entering the compromise agreement in the case file, the court may, on the application of the parties, make an order or give judgment in terms of such agreement

> (3) Where a compromise agreement is made out of court, the court shall be informed thereof and the applicant may apply to the court for affirmation of the agreement and permission to withdraw from the legal action."

[31] The reasons why it is necessary (and even imperative) to record and sign settlement agreement are[8]:

- To avoid subsequent problems
- To avoid enforcement complications
- To discourage parties from reneging [i.e. walking out of their agreements]
- To give parties the opportunity to reflect on and confirm it's correctness
- To confirm that parties intend the agreement to be binding and enforceable
- To confirm that parties were not coerced/pressurized into concluding the agreement by the mediator/Magistrate
- To confirm that lay parties understand the terms of the agreement having read or heard them
- To confirm that they understand and agree that the terms are binding and can be judicially enforced
- To confirm that the parties acted voluntarily and exercised their independent judgment in reaching the decision to settle the dispute

[32] In *casu* the learned Magistrate totally ignored the court rules regulating settlement agreements. One is left wondering why the learned Magistrate

[8] R. Feehly. 2013. at p.8-10; J. Grogan. 2014. at p.139

did not reduce the agreement to writing and have it signed by the parties as required by the Rules if indeed there was genuine agreement.

[33] Whether 1st Respondent has *locus standi in judicio*? I do not find it necessary to decide this matter in these proceedings.

CONCLUSION

[34] From the above discussion, I have come to the conclusion that the learned Magistrate committed certain gross irregularities in the conduct of the proceedings, which rendered the resultant settlement agreement invalid. His reviewable conduct impacted on the Applicant to the extent that consensus was vitiated. Proper agreement was prevented by the conduct of the learned Magistrate. He improperly pressurized and induced Applicant to enter into the agreement.[9] This has resulted in the Applicant not being afforded a fair hearing and a fair opportunity to present her case. In the premises the order of the court a quo cannot be upheld.

ORDER

[35] In the result it is ordered:

1. That the judgment granted by 2nd Respondent in CIV/DLC/BEREA/14/13 on 13 March 2014 is set aside as grossly irregular and bad in law

[9] Cf Ulter v Standard Bank of SA Ltd; Anglo Platinum v CCMA;

2. That the proceedings in CIV/DLC/BEREA/14/13 shall commence *de novo* before a different presiding officer
3. That the 1st Respondent must pay the costs of suit

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KEKETSO MOAHLOLI
ACTING JUDGE
18 August 2016

Appearance:

For Applicant: Adv. T. Nyapisi
For 1st Respondent: Adv. L. Nkhahle