IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

Case No: LCC199/2010

Decided: 07 April 2014

In the matter between:

REPORT MGEMA	First Applicant
XOLANI MNTWAPI	Second Applicant
PHELIWE MGEMA	Third Applicant
NOKUKU MGEMA	Fourth Applicant
NOMHLOPHE MGEMA	Fifth Applicant
WEDRIDGE MGEMA	Sixth Applicant
NGXEKE MGEMA	Seventh Applicant
NTOMBIZANELE MGEMA	Eighth Applicant
XOLISA MGEMA	Ninth Applicant
ZUZILE MGEMA	Tenth Applicant
ZANELE MGEMA	Eleventh Applicant

and

MARIUS POTGIETER	Respondent

JUDGMENT

A. INTRODUCTION

1. Since the judgment of Sidlova AJ was handed down on 5 March 2013, a dispute has arisen between the parties regarding the interpretation of the order. Ex facie the judgment, the order does not appear ambiguous nor does it contain a patent error.

2. The order reads as follows: -

   "The following order is accordingly made –

   a) The application is dismissed.

   b) The counter-application in as far as it was not disposed of by agreement is dismissed.

   c) There is no order as to costs."

3. The applicants now seek an order varying certain findings in Sidlova AJ's judgment on the basis that those findings constitute "a patent error as there was no basis on the papers or during argument upon which those findings could or should have been made." Consequently, so the applicants allege, the judgment remains ambiguous on the issues that were up for determination. The applicants also seek condonation for the late filing of their application.

4. The respondent opposes the application and contends, inter alia, that the relief sought was incompetent. The applicants should, in the view of the respondent, have sought leave to appeal and not a variation order.

5. Before I consider the issue raised for determination in this matter, it is necessary to deal with preliminary issues; whether application for condonation should be granted; whether the respondent, not having filed a notice in terms of Rule 25, is properly before this court and because no application for condonation of the late filing of the Rule 33(4)(c) notice was made by the respondent, it is pro non-scripto.

B. CONDONATION

6. The applicants sought condonation for the late filing of this application. The judgment which the applicants seek to vary, as stated above, was handed down in March 2013 and this application was lodged on 19 November 2013. The reason given for the delay was that, until receipt of the respondent's 7 October 2013 letter demanding, *inter alia*, the removal of the applicant's cattle, the applicants did not consider it necessary to seek the relief they were now asking for, as there was relative peace between them and the respondent.

7. Having had regard to the explanation offered for the delay and the absence of any prejudice to the respondent, I am of the view that condonation should be granted.

8. The applicants raised for the first time, in their heads of argument, the respondent's failure to comply with the provisions of Rule 25(1) and his failure to seek condonation for the late filing of its Rule 33(4)(c) notice.

9. It is common cause that:

   (1) The respondent failed to file a notice of appearance advising that he wished to participate in this matter, thereby contravening Rule 25(1) of this Court;
   (2) The respondent's erstwhile legal representative failed to file a notice of withdrawal complying with Rule 8.
   (3) The respondent failed to seek condonation for the late filing of its Rule 33(4)(c) notice.

10. Mr. van der Merwe, who appeared for the respondent, did not really address the respondent's failure to file the Rule 25(1) notice but, in response to a question by this Court, advised that the participation of the respondent's attorney in the pre-trial conference effectively placed the respondent's participation on record. He also argued that the applicants had not alleged any prejudice the late delivery of the Rule 33(4)(c) notice would cause them. Furthermore, he submitted that the applicant had, in fact, dealt with the import and legal contentions therein in their heads of argument.

11. Although this Court takes a dim view of legal practitioners who flout its rules, it will not easily deny a person his right of access to court granted by Section 34 of the Constitution. The applicants have not shown what prejudice they will suffer should this Court, in the

exercise of its discretion, allow the respondent to participate in the proceedings[1].

12. I consequently find that justice would be better served if the respondent's failure to comply with Rule 25(1) is condoned and that he be allowed to participate in this matter. Similarly, with regard to the failure to apply for condonation of the late filing of the Rule 33(4)(c) notice, I find that this should not prevent me from considering the contents thereof given that the applicants have dealt with the import and legal contentions thereof in their heads of argument.

C. BACKGROUND

13. The facts peculiar to the granting of the order are set out in Sidlova AJ's judgment and it is not necessary, for purposes of this judgment, to give a detailed account of all the facts that have led to the launch of this application.

14. The original application was brought by the applicants on 3 November 2010. They sought, *inter alia*, an order interdicting and restraining the respondent from evicting them from N'DIMBA Farm (the farm) on which they claimed to be occupiers in terms of the Extension of Security of Tenure Act [ESTA] and from imposing conditions of residence on the farm which were contrary to those in

[1] See Brenner's Service Station v Milne and Another 1983(4) SA 233(w) at 237G where it was held that, in appropriate cases, the court was entitled to refuse to take heed of a technical irregularity in a procedure which does not cause prejudice to the opposite party.

place at the time the respondent took ownership, pending finalisation of proposed mediation or arbitration proceedings.

15. The respondent opposed the application and brought a counter-application seeking, *inter alia*, an order compelling the applicants to identify the persons claiming to be ESTA occupiers and an order directing the applicants to move their cattle to a camp designated by him. This counter-application was opposed by the applicants.

16. The matter was heard in August 2012 and judgment only handed down on 5 March 2013. The relief sought by the applicants was refused and the respondent's counter-application was similarly dismissed. During the period between the hearing of the application and the delivery of the judgment, relations between the parties deteriorated to the extent that this court was approached for interim relief. This resulted in a deed of settlement between the parties which was made an order of court on 18 February 2013. The deed of settlement contained a number of rules in terms of which the applicants had to conduct themselves by on the farm. The parties agreed that those rules would have an interim effect only, pending the final determination of the issues in the main application, namely, this application.

17. A few months following the handing down of the Sidlova AJ judgment on 5 March 2013, the respondent informed the applicants [via a letter from his attorneys dated 7 October 2013] that the rules of conduct on the farm he had imposed on them in October 2010 were resuscitated, now that their application had been dismissed.

The respondent also demanded that the applicants remove their cattle from the farm, failing which he would impound them.

18. The applicants challenged the respondent's right to re-impose the October 2010 rules. Following correspondence between them, the legal representatives of the parties agreed on 21 October 2013 that, pending the outcome of this application, the rules contained in the order dated 18 February 2013 would remain in place.

D. THE CASE OF THE RESPECTIVE PARTIES

19. Meer AJP, during the pre-trial conference referred to above, asked the parties to address the Court on whether this matter should proceed as an application for variation of the judgement or as an appeal.

20. The applicants' response to the learned Judge's request is set out in their heads of argument as follows:

"Any proposition that the applicants ought to have approached the court by appeal rather than the manner they have elected cannot be correct on the following basis:

No appeal can lie upon the decisions that the applicants seek to have varied or corrected because they amount to mere rulings and not final decisions on the merits."

21. In support of this contention, Mr. Kubukeli, who represented the applicants, cited the following cases: Dickinson v Fischer's Executors 1914 AD 424 at 428-8; Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration 1987(4) SA 569 SA at 580F and Zweni v Minister of Law and Order 1993(1) SA 523(A) at 534H.

22. Mr. Kubukeli then set out the findings of Sidlova AJ that should be varied. The first being found in paragraph 29 of the judgment where the learned Judge states that:

"The applicants initially sought relief that all new rules be suspended until such a time when the parties can agree to such rules after a process of mediation. In the course of the hearing it was discovered that the applicants were no longer seeking this relief therefore it is unnecessary to discuss the effect of the new rules."

23. The applicants contend that this finding was erroneous as*, inter alia*, they could not have abandoned the relief which was central to their application. Consequently, the applicants are of the view that that ruling "ought to be corrected through variation by deleting" the last sentence of the judgment quoted above.

24. The second finding the applicants take issue with is found in paragraph 34 of the judgment where the Court found that:

"The applicants' case changed drastically over in the course of time and by the time the matter came for hearing it became apparent that the applicants were not seeking any of the relief initially sought".

The applicants also want this portion of the judgment deleted given they had not abandoned the relief they had sought from this Court.

25. The respondent's case is simply that the application is anomalous and arbortive. In support of this contention, Mr. Van der Merwe submitted that:

"1.1 the variation is in substance an application seeking a re-hearing of the merits of the application which is res judicata as the matter proceeded on an opposed basis on the merits; and

1.2 The applicants don't address the order sought to be varied but takes issue with the ratio decidendi behind the order (which does not constitute rulings as suggested), the applicants seeking to vary the reasoning leading up to the order, which is incompetent, and

1.3 As the dispute is res iudicata the applicants were obliged to seek leave to appeal and not a variation, which appeal lies against the order itself, the applicants thus being required to base their appeal on where they contend the learned Judge erred on her findings of fact and rulings of law."

E. DISCUSSION

26. The Land Claims Court has, by virtue of Section 35(11) of the Restitution of Land Rights Act, 22 of 1994, the jurisdiction to vary or rescind an order made by it. Rule 64(1) of the Rules state that:

"the court may suspend, rescind or vary of its own accord or upon the application of any party, any order, ruling or minutes of a conference which contains an ambiguity or a patent error or omission, in order to clarify the ambiguity or to rectify the patent error or omission."

27. Gildenhuys AJ, as he then was, in Combrinck v Nhlapho 2002(5) SA 611 (LCC), cited with approval the general rule that once a court has pronounced a final judgment or order, it becomes *functus officio*, and that its jurisdiction in the case ends. The learned Judge also set out the exceptions to that general rule formulated in Firestone South Africa (Pty) Ltd v Genticuro AG 1977(4) SA 298(A) at 306F–G, namely that:

"(ii) The court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance" of the judgment or order ……

(iii) The court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention …….. This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance."

28. The general rule formulated in the Firestone case above was quoted with approval in Mostert NO v Old Mutual Life Assurance Co (SA) Ltd 2002(1) SA 82 at 86 D where Howie JA, as he then was, held that:

" ……. it has to be borne in mind that the general rule is that a court's final judgment is not capable of being altered or supplemented. However, there is a limited number of exceptions to the rule. The only one which could apply here is that a court may clarify its judgment or order if, on a proper interpretation, the meaning remains uncertain and it is sought to give effect to its true intention. Even then the sense and substance of the order must not be altered."

29. Mr. Kubukeli, in response to a question by me, conceded during argument that the judgment granted by Sidlova AJ, constituted a final judgment and that it could not be varied. However, he persisted with the argument that the rulings leading up to the order could be varied in the manner the applicants had prayed for.

30. Van Zyl J[2], in expounding the legal principles applicable to the setting aside of a final judgment [and a compromise] held that a final judgment must be given effect to even if it is erroneous and that a judgment which is null and void could not be ignored and remained in force until formally set aside.

31. The difficulty with the applicants' submissions is that, in my opinion, they require me to pronounce on the reasoning of Sidlova AJ and supplement that reasoning with my own. Whether the learned

[2] MEC for Economic Affairs, Environment and Tourism v Kruisenga 2008 (6) SA 264 at 277B

Judge's reason for dismissing the application was unsound or not, the order is clear, unambiguous and, *prima facie*, does not contain a clerical or other error which would affect the true intention of the learned Judge. Consequently, none of the exceptions to the general rule referred to above, have been proved to be applicable in this matter.

32. The applicants are attacking the reasons for the judgment, but Nicholas AJA in Administrator, Cape and Another v Ntshwagela and Others 1990(1) SA 705(A) at 716 A-B quoting with approval the Firestone case held that:

"The order with which a judgment concludes has a special function. It is the executive part of the judgment which defines what the court requires to be done or not done, so that the defendant or respondent, or in some cases the world, may know it.

It may be said that the order must undoubtedly be read as part of the entire judgment and not a separate document, but the court's directions must be found in the order and not elsewhere. If the meaning of an order is clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgment."

The learned Judge also held at 716G that it would be permissible to resort to the reasons for judgment in order to resolve it, if there was ambiguity in the order. There is no ambiguity in the order given by Sidlova AJ.

F. CONCLUSION

33. My difficulty with Mr. Kubukeli's argument is fundamental. Counsel for the respondent submitted that, were I to support the applicants' submission to "deal with the issues up for determination and make a final order", I would be varying the reasoning of the learned Judge in arriving at her final order. I agree. It would be inappropriate to vary the findings in the judgment given that the final order is unequivocal and unambiguous. It is only permissible to resort to the reasons for the judgment in order to resolve it, if there is ambiguity in the order. See the Administrator, Cape case cited above.

34. The Zweni case cited by Mr. Kubukeli in support of the applicants' submissions does not assist him. Harms AJA, as he then was, clarified the law in respect of non-appealable decisions. These rulings had three characteristics, namely, that they were not final, because the court of first instance was entitled to alter them, nor were they definitive of the rights of the parties and did not have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. Those are characteristics generally found in interim orders and interlocutory applications and not where a matter is finally disposed of.

35. The decision of Sidlova AJ does not have any of the characteristics mentioned in the Zweni case and consequently her decision is res

judicata between the parties. This court therefore does not have the jurisdiction to reconsider it.

G. COSTS

36. The practice in this Court is not to award costs in the absence of special circumstances. See Hurenco Boerdery (Pty) Ltd v Regional Land Claims Commissioner Northern Province and Another 2003(4) SA 280 (LCC) at 281G – 282D. There is no reason to depart from that practice in this matter.

H. ORDER

37. In the result I make the following order:

1. The application is dismissed.
2. There shall be no order as to costs.

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Canca AJ

Land Claims Court