



NOT REPORTABLE
CASE NO: SA 29/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

DANIEL SIBOLEKA MUSWEU

Appellant

and

CHAIRPERSON OF THE APPEAL TRIBUNAL

First Respondent

HENRY MUHONGO

Second Respondent

ZAMBEZI COMMUNAL LAND BOARD

Third Respondent

MASUBIA TRADITIONAL AUTHORITY

Fourth Respondent

Coram: SHIVUTE CJ, DAMASEB DCJ and FRANK AJA

Heard: 9 November 2020

Delivered: 12 November 2020

Summary: This matter concerns a dispute between the appellant and the second respondent over customary land rights in respect of a piece of land situated at Nsundwa, Zambezi Region. The appellant and second respondent are both headmen of their respective villages in Nsundwa area.

During 2011, a dispute arose between the families of the appellant and the second respondent with each party alleging that they held certain customary land rights

over the land in question. The third and fourth respondents on the recommendation of a committee established to investigate the dispute, resolved to advise the parties that each would be allowed to register their respective rights to residential and farming units over the land.

Aggrieved by this decision, the second respondent successfully appealed to the first respondent, with the latter overturning the decision of the third and fourth respondents. That decision, was subsequently taken on review by the appellant. The review proceedings were instituted in terms of rule 65 of the Rules of the High Court. Rule 65 deals with general applications whereas rule 76 deals with applications brought for the review of administrative actions.

The respondents, in opposition to the review application, raised several points of law, among them, that the application be dismissed on the basis that it had been brought under a wrong rule. The respondents contended that a party seeking to review an administrative action was required to bring such application under rule 76 and not 65. The respondents also raised the issue of the appellant's alleged unreasonable delay in prosecuting the review proceedings.

Faced with these *in limine* objections, the appellant filed a notice in terms of rule 52 seeking leave to amend his notice of motion. The court *a quo* subsequently granted leave to the appellant to amend his notice of motion. The court gave further directions regarding the exchange of pleadings, including the filing of the parties' heads of argument.

The court thereafter set the matter down for hearing. After hearing arguments, the court delivered its judgment embodying an order striking the matter from the roll.

The appellant is appealing against that judgment as well as the order made therein. The grounds of appeal are narrow. The appellant contends that the decision of the court is based on matters not argued by the parties. The appellant further contends that on the basis of the *functus officio* principle, the court

committed an irregularity by re-visiting matters it had already considered and decided.

On appeal, it was *held* that, on the record of the proceedings and the reading of the judgment *a quo*, the court *a quo* inadvertently considered and decided matters that were no longer live between the parties. As a result, the appeal succeeded and the judgment and order of the court *a quo* was set aside. The matter was referred back to the High Court for the determination of the review application on the merits.

APPEAL JUDGMENT

SHIVUTE CJ (DAMASEB DCJ and FRANK AJA concurring):

Introduction

[1] This appeal concerns a dispute between the appellant and the second respondent in respect of a portion of land situated at Nsundwa, Zambezi Region. The appellant appeals against the judgment¹ and order of the court *a quo* striking the matter from the roll with costs.

[2] The appellant, Mr Daniel Siboleka Musweu, is the headman of Munitongo Village, Nsundwa area, Zambezi Region. He was the applicant in the proceedings before the High Court.

[3] The first respondent is the Chairperson of the Appeal Tribunal. The second respondent, Mr Henry Muhongo, is the headman of Muhongo Village, Nsundwa area, Zambezi Region. The Zambezi Communal Land Board (the Land Board)²

¹ Reported as *Musweu v Chairperson of the Appeal Tribunal & others* 2019 (3) NR 748 (HC).

² Established in terms of section 2 of the Communal Land Reform Act 5 of 2002.

and the Masubia Traditional Authority (the Traditional Authority)³ were cited as third and fourth respondents because of the interest they have in the dispute; the Traditional Authority has jurisdiction over the land in question.

Background

[4] According to Mr Muhongo, during 2011 representatives of the Land Board visited his homestead for the purposes of registering his rights to a residential unit. The registration was to be done in terms of s 28 of the Communal Land Reform Act 5 of 2002 (the Act). Section 28 of the Act empowers a Land Board, upon application to it, to recognise and register customary land rights referred to in the relevant provisions of the Act.

[5] Mr Muhongo further stated that Mr Musweu, the appellant, during the same period also approached the Land Board for the recognition and registration of customary land rights over the same portion of land. A dispute arose between the families of Mr Musweu and Mr Muhongo, with each claiming customary land rights over the contested piece of land. As a result of this dispute, the process of recognising and registering the land rights was halted.

[6] The Land Board established a committee to investigate the disputed claims. The committee investigated the matter and compiled a report. The report was submitted to the Land Board, which after consideration, informed Mr Muhongo in a letter dated 29 August 2013 that the families of Mr Muhongo and Mr Musweu

³ Established and recognised in terms of the Traditional Authorities Act 25 of 2000.

would be 'advised to register your land rights, which is your crop fields and your residential land rights as per your family claim'.

[7] Aggrieved by this decision, Mr Muhongo on 30 September 2013 noted an appeal to the Appeal Tribunal against the decision of the Land Board. The appeal was successful in that, on 16 August 2014, the Appeal Tribunal overturned the decision.

[8] Dissatisfied with the decision of the Appeal Tribunal, Mr Musweu in turn brought a review application in the High Court on 9 November 2017, seeking to assail that decision. The review application was instituted in terms of rule 65 of the Rules of the High Court.

[9] The application for review was opposed by Mr Muhongo who also filed his answering affidavit in response to the averments contained in Mr Musweu's founding affidavit.

[10] The Chairperson of the Appeal Tribunal, the Land Board and the Traditional Authority also opposed the application. Unlike Mr Muhongo, they did not file answering affidavits. Instead, they raised points of law in terms of rule 66(1)(c) of the Rules of the High Court. Also united in opposition to Mr Musweu's application, Mr Muhongo filed subsequent papers in which he associated himself with the points of law raised by the Chairperson of the Appeal Tribunal, the Land Board and the Traditional Authority.

[11] I will, from here onwards, refer to the Chairperson of the Appeal Tribunal, Mr Muhongo, the Land Board and the Traditional Authority collectively as the 'respondents' except where the context requires that they be referred to individually.

[12] The respondents contended – in the nature of a point *in limine* – that an application challenging an administrative action on review could only be instituted in terms of rule 76 of the Rules of the High Court. Mr Musweu's failure to bring the review application in terms of rule 76, according to the respondents, was fatal to his case.

[13] The respondents also took issue with the period afforded to them to file their answering affidavits. In the notice of motion, Mr Musweu had called on the respondents to file their answering affidavits within 14 days of the service of their notice to oppose the review application. The respondents contended that governmental institutions were in terms of the applicable rule afforded not less than 21 days to file their answering affidavits. The respondents thus claimed that the period provided for in the notice of motion fell short of what was provided for in the rules.

[14] The respondents also raised the defence of unreasonable delay, by way of an *in limine* objection. The respondents contended that the purported review application was brought two years after the decision Mr Musweu sought to impugn had been taken. According to the respondents, the period it took Mr Musweu to challenge that decision represented unreasonable delay, which delay should result in the dismissal of the application.

[15] After Mr Musweu was served with the notice in terms of rule 66(1), he filed and served a notice in terms of rule 52, in which he gave his intention to amend his notice of motion. He further called upon Mr Muhongo, the Land Board and the Traditional Authority to serve on him a copy of the record as well as to file their answering affidavits.

[16] After the exchange of pleadings between the parties, the court *a quo* on 7 June 2018 granted leave to Mr Musweu to amend his notice of motion in compliance with rule 76. The court also gave directions for the further exchange of pleadings between the parties.

[17] On 3 October 2018, the court gave further directions as to the filing of the replying affidavit by Mr Musweu and the parties' heads of argument. The court postponed the matter to 14 November 2018 for the purpose of allocating a hearing date of the opposed review application.

[18] After several postponements, the court on 15 April 2018 heard arguments in support of and against the review application. On 12 June 2019, the court delivered its judgment striking the matter from the roll with costs. It is that decision that Mr Musweu seeks to assail in this appeal.

Appellant's contentions

[19] The bare bones of the appeal are that the High Court based its decision on matters which were not argued when the matter was heard on 15 April 2018. Mr

Musweu further contends that arguments on that date were restricted to the merits of the review application. Given this context, so Mr Musweu argues, the court *a quo* committed an irregularity in the proceedings by striking the matter from the roll on issues bearing on a point of law that was not argued.

[20] Mr Musweu also contends that the court below committed a further irregularity by deciding issues that it had already dealt with. He argues further that the court did not have the power, on the basis of the *functus officio* principle, to alter its decision of 7 June 2018 when it granted him leave to amend his notice of motion. On that score, so Mr Musweu contends, the judgment and order *a quo* ought to be set aside.

[21] Three of the respondents, namely the Chairperson of the Appeal Tribunal, the Land Board and the Traditional Authority all have conceded the appeal. They agree with Mr Musweu that the judgment and order *a quo* were tainted by an irregularity and that for that reason the decision should be set aside and the matter referred back to the High Court for it to decide the merits of the review application. Mr Muhongo did not participate in the proceedings in this court.

Decision

[22] The crisp issue for determination is whether the judgment and order of the court below were tainted by an irregularity as contended for by the parties. It is apparent from the record of the proceedings of 15 April 2018 that the arguments advanced on behalf of the parties were limited to the merits of the review

application. It is also clear from that record that the parties did not address the court on the point of law raised in relation to the non-compliance with rule 76.

[23] A reading of the judgment, however, shows that the court below considered and decided the preliminary point taken against the alleged non-compliance with rule 76. This is also borne out by the summary of the judgment as well as by the court's analysis of the issues for determination.

[24] It is self-evident that the court *a quo* inadvertently considered and decided matters that were no longer live between the parties. The point taken about non-compliance with rule 76 was disposed of by the court order of 7 June 2018 granting leave to Mr Musweu to amend his notice of motion. As such, the court was no longer seized with that issue.

[25] It appears that at the time the court heard the matter, there were two different sets of heads of argument filed on behalf of the parties. One set related to the preliminary points taken by the respondents and the other concerned the merits of the review application. It is evident that somewhere somehow a mix-up of the issues for determination occurred. This obvious inadvertent error must be corrected. Mr Musweu was constrained to approach this court to have the error corrected. The court *a quo* could obviously not set aside its own erroneous judgment and order as it was *functus officio*.

[26] The parties are in agreement that once the judgment and order of the High Court have been set aside, the matter should be remitted to the court *a quo* for it

to consider and decide the merits of the review application as arguments thereon have already been heard by it. I agree with this approach as it will curtail delays in the finalisation of the matter and limit the costs the parties are likely to incur.

Costs

[27] The parties very fairly, submitted and I agree that as the error giving rise to the appeal was not caused by any of the parties, but by the court *a quo* inadvertently deciding matters that had already been disposed of, no order as to costs should be made in the appeal. The costs of the review application on the merits will obviously be determined by the court below.

Order

[28] In the event, the following order is made:

- (a) The appeal is upheld.
- (b) The judgment and order of the High Court striking the matter from the roll with costs is set aside.
- (c) The matter is remitted to the High Court for that court to render judgment on the merits of the review application.
- (d) No order as to costs is made.

SHIVUTE CJ

DAMASEB DCJ

FRANK AJA

APPEARANCES

APPELLANT:

P S Muluti

Of Muluti & Partners

Windhoek

FIRST, THIRD AND

FOURTH RESPONDENTS:

J Ncube

Of the Government Attorney

SECOND RESPONDENT:

No appearance