



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE

Case No. 1396/17

In the matter between:

WILLIAM MALAZA

APPLICANT

AND

MAGISTRATE L. LUKHELE N.O

1st RESPONDENT

VICKY TRUSTY ODENDAAL

2nd RESPONDENT

ATTORNEY GENERAL

3rd RESPONDENT

Neutral citation:

**William Malaza v. Magistrate L.Lukhele & Two
Others (1396/17) [2017] SZH 244 2017 (21st
November, 2017)**

CORAM

J.S MAGAGULA J

HEARD:

27th October 2017

DELIVERED:

21st November 2017

*Summary: review proceedings – amounts claimed for maintenance without
proof of earnings of respondent and in his absence – Respondent's*

earnings only estimated by applicant in founding affidavit – no opposing papers filed – whether court a quo bound to enquire into respondent’s financial position in his absence before fixing maintenance amount.

JUDGMENT

[1] This is an application for review of an order issued by the Manzini Magistrate’s court on the 21st August 2017. The Applicant is seeking for an order in the following substantive terms.

“ 3. Reviewing and/or setting aside the order granted by Magistrate L. Lukhele on the 21st August, 2017.

4. Pending finalisation of the review application, that the order of the 21st August 2017 for the contribution of E3450-00 maintenance and E5200 -00 school fees from the applicant’s salary be stayed.

5. Costs of suit in the event that the application is opposed.”

[2] The matter first appeared in this court before my brother Justice M. Fakudze who issued a rule nisi granting prayers 3 and 4 as interim relief. I had the opportunity to hear full arguments on the matter on the 27th October, 2017 whereafter I reserved any judgment. I now proceed to deliver same.

[3] Applicant alleges in his founding affidavit that on the 18th August, 2017 he received a telephone call from his office advising him that there was court process served at the office

and this process was directed to him. The 18th August was a Friday and he could not obtain the services of an attorney over the weekend. On Sunday the 20th August 2017 he had to take someone to hospital in South Africa. He returned on Tuesday the 22nd August 2017. Meanwhile the maintenance order had been issued on the 21st August 2017. He therefore was not in a position to oppose the application.

[4] The Applicant now seeks an order reviewing and setting aside the Magistrate's order of the 21st August 2017 on the basis that the learned Magistrate committed a gross irregularity in that she did not enquire into his financial position before issuing such order. Applicant maintains that had the Magistrate conducted such inquiry, she would have realised that Applicant was not in a position to pay the amount ordered and be able to support himself and the other members of his family.

[5] The Applicant alleges that he is married to one Khanyisile Cynthia Mabuza and he also has twelve (12) other children to take care of and he lists these children in paragraph 12 of his founding affidavit. Applicant has also attached to his founding affidavit copies of the birth certificates of at least seven of these children. Save for a blanket denial, the 2nd respondent does not specifically dispute that Applicant is responsible for the upkeep of the said wife and children.

[6] Applicant also alleges in paragraph 20 of his founding affidavit that he actually earns a salary of E23, 657-84. After deductions are effected on this gross salary he remains with a net salary of

E5021-77. Applicant has further attached his salary advice slip which confirms this allegation. He accordingly contends that he is not in a position to comply with the maintenance order requiring him to pay an amount of E3450 -00 per month plus E5200-00 per term, to wit, every three (3) months as well E8000 per season which also come at three months intervals.

Save for a blanket denial applicant's alleged financial position is not specifically challenged by the 2nd Respondent.

- [7] The maintenance order issued by the learned Magistrate actually amounts to the Applicant contributing towards the maintenance of the minor child an average amount of E5450-00 per month. This amount is above what Applicant takes home as net pay on a monthly basis. This is clearly unreasonable.
- [8] Apart from the 2nd Respondent's allegation in her founding affidavit before the Magistrate's court that Applicant earns an amount in the region of E12000-00, which allegation has now been shown to be false, the Magistrate had no proof of Applicants' earnings and expenses. It is Applicant's contention before this court that the learned Magistrate misdirected herself in granting the order she granted without first enquiring into the financial affairs of the Applicant herein. There was no evidence forming the basis for the order that she granted and for this reason the Magistrate's order has to be reviewed and set aside. Applicant maintains that this was a procedural irregularity which entitles the court to review and set aside the order

granted by the Magistrate. Mr Khumalo who appeared for the applicant argued that this shows that the Magistrate did not apply her mind to the matter and therefore her actions and decision were grossly irregular.

[9] Mr Khumalo contended that further proof that the Magistrate did not apply her mind to the matter is the content of the record itself, the record does not show that the Magistrate ever concerned herself about the financial position of the applicant; let alone enquire into it. The record only reveals that the court was moved to grant the orders prayed for in the notice of application before it, specifying the amounts prayed for, and the court granted the order as prayed.

[10] From the uncontroverted evidence of the Applicant contained in his founding affidavit filed in the present proceedings it now clear that the amount of maintenance ordered by the court is quite excessive vis – a – vis his income. As shown above the maintenance ordered is in excess of Applicant’s monthly income, this fact alone is evidence of the fact that the learned magistrate did not apply her mind to the matter before her and this fact alone renders the proceedings in the court a quo reviewable.

[11] The common law grounds for review of proceedings of inferior courts are gross irregularity and illegality. Irregularity comes in many forms which include failure of the court to apply its mind to the matter, taking into account factors which should not have been taken into account and failure to take into account

matters which ought to be taken into account. In *casu* the main attack on the procedure adopted by the learned Magistrate is that she did not apply her mind to the matter in that she gave a judgment which was not supported by any evidence. The learned Authors Herbstein and Van Winsen in their work entitled THE CIVIL PRACTICE OF THE SUPERIOR COURTS IN SOUTH AFRICA 3rd Edition state at page 571:

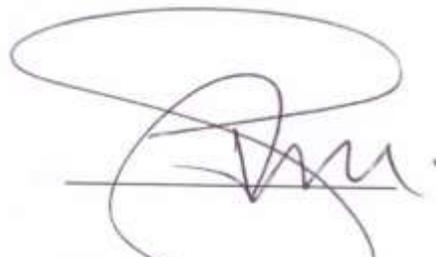
“ On the other hand, giving a judgment in support of which there is no evidence at all is a valid ground for review.”

[12] From the papers filed in this matter particularly the record of proceedings in the court *a quo* and the evidence presented by the Applicant in support of his application and submissions made on his behalf in this court, there is no doubt in my mind that there was gross irregularity in the handling of the matter by the court *a quo*, I am therefore satisfied that this is a proper case in which the decision of the court *a quo* ought to be reviewed and set aside.

[13] There is one issue which is raised in the papers which was however not canvassed during argument before this court. This is the issue of paternity of the minor child in respect of whom maintenance is claimed. Counsel did not deal with this issue at all and in any event there is no order prayed for by the applicant in this regard. I shall not therefore deal with it.

[14] For the foregoing reasons I make the following order:

1. The order granted by the 1st Respondent on the 21st August 2017 is hereby reviewed and set aside;
2. The matter is referred back to the Manzini Magistrate's court to be dealt with and finalised thereat.
3. The Applicant herein is granted leave to file opposing papers in the court *a quo* within seven (7) days from the date of this order.
4. Costs are awarded to the Applicant against the 2nd Respondent only.



J.S MAGAGULA J

For the Applicant: Mr M. Khumalo

For the Respondent: Mr S.K. Dlamini