

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 1358/2022

In the matter between:

GCWETHA MAGAGULA

1ST APPLICANT

THULI MAGAGULA

2ND APPLICANT

SAMSON MAGAGULA

3RD APPLICANT

SAKHE MAGAGULA

4TH APPLICANT

MBUSO MAGAGULA

5TH APPLICANT

NJABULO KUNENE

6TH APPLICANT

And

MAGISTRATE MR D MAVUSO

1ST RESPONDENT

ATTORNEY GENERAL

2ND RESPONDENT

SIPHIWE MAGAGULA

3RD RESPONDENT

NEUTRAL CITATION:

**GCWETHA MAGAGULA AND 5
OTHERS V MAGISTRATE MR D
MAVUSO AND 2 OTHERS – 359
(1358/2022) SZHC - (07/12/2023)**

CORAM: BW MAGAGULA J

HEARD: 13/10/2023

DELIVERED: 07/12/2023

SUMMARY: *Civil Law – Review of a judgment by a Senior Magistrate
– Grounds for review re-stated.*

HELD: *There is no evidence that the learned Senior Magistrate
committed any acts of gross irregularity.*

HELD FURTHER: *The Applicant's application is dismissed with costs.*

JUDGMENT

BW MAGAGULA J

BACKGROUND FACTS

[1] This is a review application whereby the Applicants seek to review a decision by the learned Magistrate D. Mavuso as he then was. He has been cited as the 1st Respondent in the present Application. The basis of the review is that the learned Magistrate issued an adverse order without affording some of the Applicants a hearing. In particular, the Applicants which were allegedly not afforded a hearing are Sakhe Magagula (4th Applicant) Mbuso Magagula (5th Applicant) and one Fano who appears not to be a party in the current proceedings before court.

- [2] The facts of the matter project a very sad and inhumane practice that is now common in our society. It is now becoming common that after the death of family member, those remaining behind engage in nasty fights over either ownership or possession of the assets of the deceased. Usually, the extended family is involved. All of a sudden grown up adults become such close relatives to the deceased to the exclusion and detriment of the widow and the deceased own children. Usually, this blatant abuse is perpetrated under the guise of custom.
- [3] The 3rd Respondent was married to the late Muzikayifani Sam Magagula. The 1st and 2nd Applicants are siblings to the late Muzikayifani Sam Magagula. The 3rd, 4th and 5th Respondent are children of the late Muzikayifani Sam Magagula. The Applicants' are step children to the 3rd Respondent. The 6th Applicant is a son to the 2nd Applicant.
- [4] The deceased owned a house which he build within the family compound at Ntandweni area in the Lubombo District. There is a debate as to who owns the compound. The Applicants argue that, it is the parental home of the deceased Muzikayifani Sam Magagula, while the 3rd Respondent says it is her home.
- [5] There are conflicting statements from the traditional authority of Malindza Chiefdom. It appears that, the Indvuna of Malindza is of the view that the home belong to the deceased Sam Magagula. The Sibondza of Ntandweni area

state that the deceased never built his own home, but resided at his parental home with his wives including the 3rd Respondent.

[6] The 3rd Respondent approached the Siteki Magistrate's Court, where she was granted an interdict against the Applicants.

[7] One of the contentious orders that was granted relate to the Applicants being interdicted from setting foot at the homestead of the 3rd Respondent. The 3rd, 4th and 5th Applicants have their houses within the family compound. It is alleged it is the only house they live in.

THE LAW

[8] Under the common law, the following has always been regarded as grounds for review:

- a) Absence of jurisdiction on the part of the court,
- b) Interest in the cause, bias, malice or corruption on the part of the presiding officer,
- c) Gross irregularity in the proceedings,
- d) Issuing an order which the lower court has no power to make and
- e) Making an order against a party without giving him an opportunity to be heard in opposition. The list is not exhaustive.

[9] In the case of **Atlas Motors (Pty) Limited v Roberto Machava: High Court Case No. 77/2003** it was held by **Mamba AJ**;

*“The grounds upon which this court may review a decision or order of any subordinate court or tribunal were comprehensively stated by Corbett CJ (as he then was) in the case of **Hira and Another v Booysen and Another, 1992 (4) SA 69** at page 93 as follows;*

“The present day position in our law in regard to common law review is, in my view, as follows;

- 1. Generally speaking, the non-performance or wrong performance of a statutory duty or power by the person or body entrusted with the duty or power will entitle persons injured or aggrieved thereby to approach the court for relief by way of common law review.”*

[10] In the case of **Takhona Dlamini v The President of the Industrial Court; Court of Appeal Civil Appeal No. 31/1997** it was held that,

“A mistake of laws per se, is not an irregularity. But its consequences amount to a gross irregularity, where a judicial officer, although perfectly well-intentioned and bona fide does not direct his mind to the issue before him and so prevents the aggrieved party from having his case fully and fairly determined”.

APPLICANTS ARGUMENTS

[11] The Applicants are complaining that the decision of the Senior Magistrate has caused prejudice to them. Some of the Applicants have been rendered homeless as they have been barred from setting foot at their home, yet it is the only home they have.

[12] The Applicants have premised their application for review on the grounds of gross irregularity on the part of the court *aquo*. The Applicants argued that the irregularity that was committed by the court is that, Magistrate Mr D. Mavuso issued an order without affording some of the Applicants an opportunity to be heard, yet they stood to be adversely affected by the order. The 3rd, 4th and 5th Applicants currently have an adverse order against them, despite the fact that they were not parties to the proceedings. It is further argued that he exercised powers he did not have. He reviewed a decision of the Principal Magistrate.

[13] The Applicants further argue that the Learned Senior Magistrate exercised powers that he did not have. The Applicants are complaining that the Magistrate issued an adverse order against some of the Applicants without giving those Applicants an opportunity to be heard. The issuance of an adverse order without affording the Applicants the opportunity to be heard is a gross irregularity. An adverse order cannot in law be against a party who is not a party to proceedings in court. It cannot be issued without affording that party an opportunity to be heard; it is on that basis that a court will at all times be enjoined *ex mero*

motu to order the joinder of a party who is not part of the proceedings. In the case of **Sikhatsi Dlamini v The Mayor: City Council of Mbabane & 13 Others: High Court Case No. 1904/2019** it was held at paragraphs 12 and 13 that;

“In **John Roland Rudd v Rex Criminal Appeal Case No. 26/2012**, His Lordship M.C.B. Maphalala J.A stated the right to fair hearing as follows;

*“The court a quo was obliged to hear the Appellant before cancelling his bail and discharging the surety in accordance with the principle of natural justice, the **audi alterma partem**; literally it means “hear the other party. It is implicit in this principle that no person shall be condemned, punished or have any of his legal right compromised by a court of law without being heard.” In the English case of **Doody v Secretary of State for The Home Department and Others Appeal [1993] 3 ALL E.R. 92**, Lord Mustill observed as follows: “Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representation on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken with a view to procuring its modification, or both.”*

THE 3RD RESPONDENT’S ARGUMENTS

[14] The 3rd Respondents argues as follows;

- [14.1] The Applicants do not have a direct and substantial interest in the matter, save to frustrate the 3rd Respondent and her young children who have all been displaced from their home. The main issue herein is that the 3rd Respondent is due to receive compensation for the home that was demolished to pave way for the Malindza – Sikhuphe Highway.
- [14.2] The Applicants have not been specific as to who was not heard or was supposed to be heard by the Senior Magistrate prior to the pronouncing of the order. The Applicants are therefore not prejudicially affected by the order made by the 1st Respondent.
- [14.3] The Applicants are approaching the court with dirty hands, since like the 3rd Respondent, were summoned to appear before the Malindza Royal Kraal for the adjudication of the dispute. The Royal Kraal ruled in the favour of the 3rd Respondents. The Applicants have refused to comply with the order of the Royal Kraal.
- [14.4] In the application itself they failed to bring to the courts attention that the matter pertaining to the ownership of the homestead has been adjudicated to and finalized by the Malindza Royal Kraal. This letter from Umphakatsi was brought to the court's attention through the 3rd Respondent's answering affidavit.

[14.5] The Applicants did not bring it to the court's attention that they refused and or neglected to abide by summons and/or orders of the Malindza Royal Kraal, as well as the summons by the Siteki Magistrate Court.

[14.6] The matter was before the 1st Respondent as a result of a protection order that was sought by the 3rd Respondent against the Applicants. The 1st Respondent simply confirmed the protection order applied for by the 3rd Respondent against the Applicants.

ADJUDICATION

[15] The court deems it necessary to commence its analysis by revisiting the basis upon which the 1st Respondent's decision is sought to be reviewed. The foundation can be gleaned from the background of the matter. In the year 2018, Principal Magistrate D. Magagula allegedly issued an order that the 3rd Respondent was to return to her parental home. This order is attached to the Applicant's founding affidavit marked GM3. When the referred annexure considered, it appears to be the court order issued by Senior Magistrate D.B. Mavuso on the 17th June 2022, not Principal Magistrate D. Magagula.

[15] It therefore appears to be incorrect that GM3 is the order issued by Principal Magistrate D Magagula ordering the Applicant to return to her parental home. The question that then begs an answer is, where is the order that was issued by the Principal Magistrate Magagula? On perusal of the annexures, there is

a letter (my own underlining) not an order marked GM1. It is in that letter authorized by the Learned Principal Magistrate where an order is referred to. Otherwise, there is no order that has been attached as aforesaid. It is mind boggling that if the main gravamen of the application is that the 1st Respondent had no authority to review a Principal Magistrate through the granting of a contrary order. Then an annexure GM3, should have been the order of court referred to. What has been annexed as “GM1” is not an order but a letter.

- [16] The only order issued is a Protection order in favour of the 3rd Respondent, which was an interim order granted by Magistrate L.G. Shongwe on 16th March 2021, returnable on the 30th of March 2021. It was again heard by Magistrate M. Bhembe on the 30th March 2021 returnable on the 13th April 2021 wherein the matter was referred to the traditional authorities and that such a report from the inner council was to be filed in court.
- [17] Then on 10th June the 1st Respondent was seized with the matter and an interim order returnable on the 17th June 2022 was made. Indeed the matter returned on 17th June 2022 and of course with the letter from the Malindza Royal Kraal dated 21st July 2021 and another date 15th June 2022 as order by Magistrate Bhembe.
- [18] I now come to the issue of how the traditional structures dealt with the matter. That is crucial because it appears that the 3rd Respondent and her husband

were married under Swazi Law and Custom, hence their position adds evidential weight.

- [19] When considering the pleading filed before court, it appears the Applicants are approaching the court with dirty hands. Together with the 3rd Respondent, they were all summoned to appear before the Malindza Royal Kraal for the adjudication of the dispute. The Royal Kraal ruled in favour of the 3rd Respondents. Fundamentally the Applicants have refused to comply with the order of the Royal Kraal.
- [20] The Applicants have not brought it to the court's attention that they refused and/or neglected to heed to the summons and or orders of Malindza Royal Kraal as well as the summons by the Siteki Magistrate Court.
- [21] The matter was before the 1st Respondent as a result of a protection order that was sought by the 3rd Respondent against the Applicants. The 1st Respondent simply confirmed the protection order applied for by the 3rd Respondent against the Applicants.
- [22] In the case of **Thomas Investments Corporation and Greans Investments (Pty) Ltd 31/12 [2012] SZSC 58** though a snippet from **Mulligan v Mulligan 1925 WLD 164 at 167** where His Lordship De Waal J held that;

“Before a person seeks to establish his rights in a court of law, he must approach the court with clean hands; where he himself through his own conduct makes it impossible for the process of the court (whether criminal or civil) to be given effect to he cannot ask the court to set his machinery in motion to protect his civil rights and interest ...were the court to entertain a suit at the instance of such a litigant, it would be stultifying its own processes and it would, moreover, be conniving at and condoning the conduct of a person who through his flight from justice sets law and order in defiance.”

[23] The court will now consider the argument by the Applicants that the 1st Respondent committed a gross irregularity by issuing an order without affording some of the Applicants an opportunity to be heard. These parties are listed as the 3rd, 4th and 5th Applicants. It is imperative to first consider if the order issued by the 1st Respondent bars the Applicants from setting foot at the homestead. Also that it has rendered Mbuso, Fano and Sakhe without a place to sleep. Order no. 4 *per verbatim* states as follows;

“The Respondents (1st to 7th) are interdicted and restrained from setting foot at the homestead of the Applicant if not for a good cause.”

[24] A mere reading of the order in it’s entirety shows that there is a rider at the end of the wording of the order. If not for a good cause (underlining my own).

The interpretation appears that the restraint is only applicable if it is not for a good cause. Sight must not be lost that there is a history of violence and harassment between the parties. Hence the learned Senior Magistrate had that background in mind when he carefully worded the order. He must have taken into consideration that the interests of the parties that have residences inside the compound, could come, as long as it is for a good cause.

[25] The order of the 1st Respondent, in my view appears to be in line with the directive from Malindza Royal Kraal. This ruling is contained in annexure GM1 of the 3rd Respondent's answering affidavit. Although it is in siswati, there is no issue regarding the interpretation. Which is that; *the 3rd Respondent is a wife of the Magagulas and lobola was paid for her.* The Royal Kraal further pronounced itself that her late husband died and left the 3rd Respondent residing in that home. There was no reason therefore for her to be evicted. Her late husband had actually built her a house within the homestead or compound. The Applicants actually concede and acknowledge that the 3rd Respondent has her house in the homestead. In the founding affidavit there is a picture attached which clearly identifies the house¹.

[26] In conclusion, the format used for the drafting of court orders as well as its wording is known. At face value, the document purporting to be an order by the Principal Magistrate is a letter as per its format. An order is stamped and

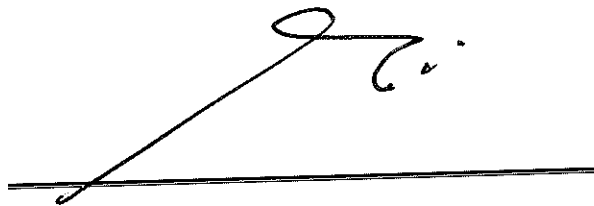
¹ See paragraph 8.2 of the Applicant's founding affidavit and annexure GM2.

signed either the clerk of Court or the Registrar of the High Court pursuant to an entry made by the judicial officer in the Court file.

[27] Due to the foregoing reasons, the Applicant has failed to demonstrate that the 1st Respondent committed any gross irregularity when he conducted the proceeding in the court a quo. To the contrary, this Court finds that he applied his mind carefully to all the issues that were before him. In the circumstances, the Applicant's application is dismissed with costs.

ORDER

- 1) The Applicant's application is hereby dismissed.
- 2) Costs to follow the event.



BW MAGAGULA J
HIGH COURT OF ESWATINI

FOR THE APPLICANTS:

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FOR THE RESPONDENTS:

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