THE HIGH COURT OF SWAZILAND

Held at Mbabane — Civil Case No. 2783/2003

In the matter between

MESHACK MAKHUBU

And

THE CHIEF ELECTORAL OFFICER & OTHERS

Coram — Annandale, A C J

For Applicant — Mr. M. Simelane

For 1st Exponder. — Mr. P.R. Dunseith

For 2nd and rd Respondents — Mr. Vilakazi

JUDGMENT

(5 December, 2003)

The outcome of the 2003 parliamentary elections has been the source of a spate of litigation in the High Court, mostly based on a series of irregularities alleged to have been committed by candidates and their agents, by the electoral officials and by voters in the various constituencies. In the latest of these, the present applicant also seeks the outcome of the elections to be set aside and be conducted afresh, this time in the Motshane Inkhundla.

A rule nisi is sought for an order to scrutinise and amend the voters roll; to suspend or set aside all steps taken pursuant to the election; to order "the Elections" to be

conducted de novo to ensure that only validly registered voters are allowed to vote; and to order the swearing in of the first respondent to be stayed, pending the outcome of the proceedings.

From he onset it was clear that at least some of the prayers for relief could not be considered as the proverbial horse had already bolted from the stable by the time the matter was brought to court, as the first respondent had already been sworn in as member of Parliament by then.

At the hearing , various points in limine were raised, also two applications to strike out affidavits, the first in the usual manner by way of notice, the second raised from the bar by applicant's attorney during the hearing as "it had slipped (his)mind" to do so timeously and notifying the respondents. All the respondents have filed opposing affidavits in addition to the legal points wherein the issues at stake are comprehensively answered, but with no reply thereto. The merits of the matter has not been argued, pending the outcome of the points in limine, and I record my appreciation for the whiten heads of argument filed by the respective attorneys.

The matter was brought to court as an application seeking the relief set out above, with the annexed papers being in the form of a petition, with verifying affidavits by the petitioner and another, stating that the High Court has jurisdiction by virtue of Section 7(1) of the Parliament Petitions Act, 1968 (Act 16 of 1968), which petition is to be presented to court requesting that the election be declared void and which Act further provides in section 8(a) for such petition to be brought by a person entitled to vote in the election to which the petition relates, where the question relates to the valid election of an elected

Member of the House of Assembly.

In his petition, the applicant relies on locus standi by referring to section 8(a) as entitlement to present his petition, but without averring that he is indeed a person who is entitled to vote in the election to which the petition relates. A further omission is compliance with the requirement of section 25(2)(b) and Rule 12 of the Act under which applicant approaches the court, which require security for payment of costs to be given. Rule 12(4) reads:

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"If security is not given by the petitioner no further proceedings shall be had on the petition, and the respondent may apply to the court for an order dismissing the petition ".

A further aspect on which the petition falls foul, in the event that it be found to be a matter brought in terms of the 1968 Parliament (Petitions) Act, as it is, but which is not found to be so as set out below, is compliance with Rule 8 under the Act. This Rule (repealed or not) required of a respondent wishing to oppose the petition to file his reply within 28 days, with the Registrar or within such further time as the court may allow.

Although the matter was brought to court as one of urgency, which in any event is doubtful given the existing circumstances but on which I do not pronounce, the Notice of Application dated the 28th October was served on the second and third respondents on the 29th October 2003 and on the first respondent on a date unknown. It purports to give the respondents until the 29th October 2003 to notify applicant's attorneys of their intention to oppose, and to file their answering (or opposing) affidavits by "4.30 p.m. on the 30th October 2003."

The Notice of Application only seeks to dispense with the usual forms and procedures relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency. It does not further seek condonation of or dispensing with the Rules relating to time limits by which answering or opposing papers are to be filed.

As said, this is in flagrant disregard of the stipulated period of 28 days, or more, in which such affidavits may be filed, if the 1968 Rules are to be applied, Rules made under the Act which the petitioner seeks to be applied.

Neither of these three points were seriously taken or argued and I shall proceed to deal only with only the points raised in limine, in court.

For the first respondent, Mr. Dunseith argues that the election which is sought to be set aside was an election of members to the House of Assembly in terms of Section 12 of the Establishment of the Parliament of Swaziland Order, 1992 (King's Order - n -

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Council No. 1 of 1992). It is to be noted from the onset that the validity of this Order -in - Council has not been pronounced upon and certainly has not been declared unconstitutional by any competent court of law. I say so as there is a misapprehension that the Court of Appeal by inference declared so a year ago and which inter alia gave rise to a public statement by the Head of Government on November 28 last year to stave off such interpretation by extrapolation.

The Establishment of Parliament of Swaziland Order is to be read with the second and third King's Orders - in - Council of 1992 (the elections and voters Registration Orders) which respectively provide for general elections and the registration of voters.

Before proceeding to determine which legislation is applicable to the matter, it is useful to note that the court itself may not be vested with jurisdiction to determine election questions by virtue of its inherent

jurisdiction (section l04 (1)(a) of the 1968 constitution) but through parliamentary abrogation. In the first edition of Halsbury's Laws of England, Vol. XII, 1910, under the heading "Elections", the developmental process of this jurisdiction is described, since earliest days until the English Electoral Act of 1868. The summary, on pages 135 - 136 is quoted in Mota en andere v Moloantoa en andere 1984(4) SA 761 (OPA) at 798 C - H by M T Steyn J, as he then was.

"In the early beginnings of representative Government the right to vote for members of the great assembly of the nation in Parliament was of a most elementary character, gaining strength as the people from time to time learned more and more to realise the power which they possessed. For a long time the de facto rulers kept a firm hold on the reins. Thus, until comparatively recent years, Parliament decided practically according to its own unfettered will all questions which arose in relation to the franchise and its exercise, to the freedom of voting, and to purity or corruption accompanying an election.

In the reign of King James I, 'certain rules of great outlines of the legal rights of voting' were 'laid down as a guide and direction to the electors and candidates in the country, and as a remembrance of the reasons and grounds upon which the determinations of the House were founded'. It was at that

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time, after some curious instances to the contrary, 'universally known and admitted to be the sole right of the House of Commons to examine and determine all matters relating to the election of their own members, and that neither the qualification of any elector nor the right of any person elected is cognisable or determinable, or will be suffered by that House to be called in question by any other judicature whatsoever (except in such cases where specially provided for by Act of Parliament)'. And it seems that in ancient times Parliament arrogated, or attempted to arrogate, to itself even the power of inflicting punishment for bribery at elections.

Later on the parliamentary committees which decided these matters were constituted, generally in proportion to the strength from time to time of the principal parties in the House of Commons.

Although the committees purported in all cases to act in accordance with definite principles laid down by them, there can be little doubt that their decisions were liable to be, and to some extent 're, influenced by political or personal bias. This proposition, it is true, must not be put too high - first, because the 17 sets of reports of election petitions tried before parliamentary committees from 1624 to 1865 show on the face of them that the questions raised were discussed and determined on legal lines; and, secondly, because the Act of 1868, which first transferred the jurisdiction to a Judge of the High Court, itself adopts (subject to Rules of Court) 'the principles, practice and rules on which committees of the House of Commons had previously acted'.

But after making all due allowance for the credit which is due to the parliamentary committees for setting up and honestly trying to uphold just and equitable standards of decision, the inherent unfitness of non-legal tribunals whose impartiality were not above suspicion to deal with election petitions could not fail to become more and more apparent, and so it was gradually recognised by Parliament itself that judicial knowledge and fairness in dealing with these matters were essential to the freedom and purity of elections, and this led at last in 1868 to the voluntary surrender of the real authority to the Judges."

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It is this abrogation of Parliamentary power to deal with election questions that has also found its way to Swaziland, initially manifesting in the Parliament Petitions Act of 1968, at the time of independence. It is this Act under which the petition is brought, and not the later Establishment of Parliament Order of 1992, together with its ancillary legislation.

When dealing with a petition concerning the validity of a Parliamentary election, the court needs to be mindful of the common law of Parliament, and its own ability to determine its own membership and election procedures and disputes, and the extent to which it has delegated (or abrogated) the latter to the

courts. The High Court, despite its own inherent original jurisdiction, unlimited in civil and criminal matters, shall remain to approach election disputes conscious of parliamentary regulation of how and by who it may be taken to the Courts.

In the original 1968 constitution of Swaziland, section 56(l)(c)confened jurisdiction of the High Court to hear and determine ay question whether any person has been validly elected as an elected member of the House (Parliament). It went on (in section 56(2)(c)) to hold that an application to the High Court may be made for the determination of any question under subsection (1)(c) by any person who was a candidate, at or entitled to vote in the election to which the application relates, or by the Attorney General.

The whole of this chapter V, including Section 56 of the initial 1968 Independence Constitution was repealed in 1973 by the late King Sobhuza II in the King's Proclamation of the 12th April 1973 and not reinstated like various other chapters. Thus, the chapter which regulated Parliamentary elections, the petition procedure and locus standi of petitioners, as well as the High Court's jurisdiction to hear matters incidental thereto, was abolished.

This led to the conclusion that the Parliament Petitions Act of 1968 was also repealed, by implication. In February 1994, Hull CJ held, albeit arguably obiter, in Civil case No. 1580/1993, an unreported judgment in the matter between the Attorney General v

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Dlamini and Others at page 2 (after referring to the petition vis-a-vis application procedure to bring election matters to court):-

"There are sound reasons why that should be so and it is desirable, in my view, to reinstate the provisions formerly contained in the Parliament (Petitions) Act 1968 (No. 16 of 1968) and the rules that were made under it, if my conclusion that that Act was impliedly repealed is correct. In the meantime, as a matter of practice, or if that conclusion was wrong, proceedings of this kind should in future be commenced by way of petition. "

For present purposes, it is not necessary to determine if the above conclusion of law by the learned former Chief Justice has to be applied in casu or not, for the reasons given below. Suffice to say, chapter V of the Independence Constitution of 1968 was repealed, not thereafter reinstated, leaving a lacuna that was later addressed by the 1992 Establishment of Parliament Order, which reintroduced the substance of section 56 of the repealed Constitution, in amended form, by way of section 28 of King's Order - in-Council, No. 1 of 1992 (the establishment of Parliament of Swaziland Order) referred to above.

Section 28 of this King's Order - in - Council, which aim is "to provide for the Establishment of the Parliament of Swaziland and other matters relating thereto", provides for the decision of questions as to membership of Parliament. One has to be mindful of what I mentioned above of the manner in which the courts became enjoined to decide on disputes arising from Parliamentary elections. A strict interpretation of the enabling legislation, especially so when the locus standi of petitioners is to be considered, needs to be followed. Section 28(1)(b) reads that:

"The High Court shall have jurisdiction to hear and determine any question whether any person has been validly elected as a member of the House, " and section 28(2)(b) reads:

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"An application to the High Court may be made for the determination f any question under subsection (l)(b) by any Senator or elected or nominated member of the House, as the case may be, or by the Attorney General. "

That is what the 1992 Establishment of Parliament Order legislated. No more and no less.
Circumvention of this conferment of the standing to seek the court's intervention in the outcome of

elections was pronounced upon by Hull CJ in the Attorney General v Dlamini and others, supra. Again on page 2 of the unreported judgment he said:-

"A fundamental issue of locus standi in judicio arose ... The effect of this (corrigendum to Order No. 1 of 1992, section 8) shortly put, is thai whereas it had appeared up to that point in the proceedings that Mr. Mncina, as a candidate, had the standing to bring them personally ...(referring to petitions), (as is the case in South Africa and England), the true intent of subsection (2) of sectin 28 of the Order is that an application to the High Court for the determination of any question whether any person has been validly elected as an elected member of the House may only (my emphasis) be made by the Attorney General" (that is, over and above an elected or nominated member of the House, in the present circumstances.)

The bottom line, so to speak, is that the empowering legislation which confers jurisdiction on the High Court to hear election disputes of the election of members of the House, bestowed on the courts by the legislative arm of Government, which otherwise would have determined the issue itself in parliament, limits locus standi as determined in the Order, to the Attorney General or and elected/nominated member of the House. This is in contrast to the 1968 Act, which also included a further class of petitioner, namely "...a person entitled to vote in the election to which (he petition relates ".

In its wisdom, the legislature, whether it be Parliament or the King - in - Council, whose ability to legislate as he did does not come up for consideration at present, decided to place a limitation on the standing of petitioners to seek the intervention of the courts

in election matter. The legislature is presumed to be fully cognisant of existing and non-existing legislation when it passes new enactments. Whether it works in favour or against the interests of losing candidates is not the question now to be pronounced upon. The court is enjoined to apply the law as it finds it, not to amend the law to give effect to potential petitioners who were excluded from bringing such matters to court to be decided upon.

Losing candidates and voters in their election districts or Tinkhundla were excluded from bringing their matters to court. That is the clear and unambiguous stated position in section 28 of the King's Order - in - Council, No. 1 of 1992, in stark contrast to the Parliament Petitions Act of 1968, also contrary to the provisions under the repealed chapter V of the Independence Constitution.

Apart from the (arguably obiter) pronouncement on the present validity of the 1968 Parliament Petitions Act, by Hull CJ in A.G. v Dlamini and others (supra), or its implied repeal, it has very recently (last month) been held by Maphalala J in an unrepoited Civil Case No. 2498/2003 in the matter between Rogers Matsebula and 9 others v Magwagwa Mdluli and another, at page 9 thereof, that:-

"...is further correct that the Parliament (Petition) Act was promulgated in relation to the Electoral act No. 4 of 1971. Although the latter Act has not been expressly repealed, it appears to have been impliedly repealed by the 1973 Proclamation and the promulgation of the Election Order 1992, and the Voter Registration Order 1992. The election which is the subject of the present application was held under the Election Order, 1992."

It is the results of the same election which is challenged in the petition currently under consideration, with the petitioner seeking locus standi under the provisions of the 1968 Parliament Petitions Act, which as already mentioned, had the standing removed from voters (and losing candidates) in the 1992 Order.

In the event that I may be wrong to conclude, as I do, that the 1992 legislation does not confer standing in law to bring the petition on the petitioner, whether he be a registered voter in the Motshane Inkhundla (which he does not aver in his petition or

verifying affidavit but which may perhaps be inferred by implication) or in his capacity of a losing candidate, there is a further aspect to consider.

The petitioner's attorney, Mr. Simelane, strenuously argues that the 1968 Act has not been repealed, either expressly, or by implication. He thus wants it to be found that if the 1992 Order is the applicable legislation (which he does not concede to be the case) the 1968 Parliament Petitions Act still has an important function to fulfil. This is to hold that the standing to bring a petition, conferred on "a person entitled to vote in the election to which the petition relates", gives standing to the petitioner, in that it serves to amplify the 1992 Order which omits that category of petitioner.

For this contention, Mr. Simelane relies on, amongst others, the South African Interpretation Act 1957, which in principle determines that any regulation or by-law made under an enactment which is repealed, is also repealed, unless the repealing statute states otherwise. Generally the old provisions remain in force until the new one comes into operation. The argument goes on to say that the general principle is that if an Act is repealed, then any proclamation on regulation made in terms of the Act which has been repealed is also repealed by virtue of the fact that the enabling statute has been repealed, and such proclamation or regulation would then cease to have any validity. However, he goes on, where a repealed statute is immediately substituted with a corresponding Act, the position is different. Should the terms of the corresponding act or section differ to a certain extent from the original provisions which have been repealed, then the old section will merely be regarded as amended and any proclamation or regulation issued under the original section stands unrepealed, as was held in Oraranjeville Dorpsbestuur v Gulliver 1970(1) SA 554(0).

This principle may arguably be true but it does not find application in the present matter. The 1968 Parliamentary Petitions Act was not a proclamation or regulation under the 1968 Constitution but substantive legislation which was impliedly repealed. When the 1992 Election Order was enacted, the legislature being presumed to be cognisant of existing and non-existent legislation, determined in section 59(2) of the King's Order - in - Council that:-

"All existing laws shall continue to operate with full force and effect but shall be construed, with such modifications, qualifications and exceptions as may be necessary to bring them into conformity with this Order (as may be amended)".

From this subsection, it is abundantly clear that whether the legislature regarded the 1968 Act intact or not, it wanted to ensure that it is the new provisions, Of 1992, that are in full force and effect, and that it must not be construed to bring the latter legislation in conformity with the previous legislation. It is the other way around. Old and existing legislation is expressly stated to be brought in conformity with the 1992 Order in so far as it is not inconsistent. When applied in the present situation of locus standi, the 1992 Order determines who may bring a petition. It is not to be construed so as to also include the omitted category of voters, as was the position in the 1968 Act.

Mr. Simelane further contends that where two apparently contradictory statutory provisions are capable of a sensible interpretation which would reconcile the apparent contradiction, that interpretation should be preferred, as was held in Shop v Minister of Justice, KwaZulu 1992(2) SA 338(N) at 342 by Magid J.

This also does not hold water. There can be no room for "sensible interpretation" in the present situation where the latter enactment expressly states that all existing laws (if the 1968 Act was still existent at all) "... shall be construed with such modifications, qualifications and exceptions as may be necessary to bring them into conformity with this Order". To now hold that a voter as mentioned in the 1968 Act but not mentioned in the later 1992 Order is reconcilable with an implied inclusion in the latter Order, will be tantamount to flaunting express legislation and forcing an irreconcilable interpretation onto it. That is not the function of the court. If Parliament wishes to include further classes of petitioners, it is free to do so. It was chosen not to do it in the 1992 Order.

Due to the conclusions I have come to, as enumerated above, I shall only briefly and superficially deal with the objections in law which were raised by Mr. Vilakazi for the second and third respondents, and not deal at all with the two applications for striking

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out of (parts of and a full) affidavits brought by both the 2nd respondent as well as the applicant/petitioner.

The thrust of the argument by Mr. Vilakazi is that the applicant/petitioner should not have approached the High Court as first part of call. The Voters Registration Order of 1992 (King's Order - in - Council No. 3 of 1992) details the procedure to be followed when the compilation of a voters list is objected to, in Section 13 of the Order. The inclusion or retention of any name in, or the restoration or addition of any name to a voters list, and the removal of any name from it, may be objected to by any voter at any time by lodging with the electoral officer of the Inkhundla concerned an objection in the approved form No. 7 with a fifty cents revenue stamp affixed thereto. Provision is further made for the manner in which the objection is to be dealt with and eventually determined by the electoral officer. Section 14 goes on to determine how appeals arising from such a determination is to be dealt with, by a magistrate. Thereafter, outcome of the appeal may be caused to be brought before a Judge of the High Court in chambers by a dissatisfied appellant, ultimately to the Court of Appeal, all steps and procedures again explicitly set out in sections 14 and 15 of the Order.

It is common cause that these procedures have not been followed audi exhausted. Equally, there is no explanation in the petition as to why this was not done, nor an application to condone the by-passing of the statutory procedures.

The point is thus that prior to the application/petitioner approaching the! High Court on petition, the above remedies have to first be exhausted.

The difficulty with this argument is that it refers to the voters list, i.e. the individuals that are entitled to vote. Strictly taken, in favour of the petitioner, this aspect has only a bearing on one facet of his petition, which relates to his concerns of who the voters were, and his prayers that the voters list or roll for the Motshane Inkhundla be scrutinized and amended, further that the elections be commenced de novo to ensure that only validly registered voters are allowed to vote.

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As said, it is not necessary to determine these aspects, valid as the point taken by the second and third respondents may be, as this would hinge on the applicant's ability to bring the petition in the first place.

Having heard full and comprehensive argument and consideration of the law, having read the papers filed, it is the inevitable conclusion of this court that the applicant / petitioner does not have locus stand to bring the matter to court in eo nomine. It follows that the ancillary objections and questions of striking out of affidavits or parts of affidavits does not require to be determined as well.

In the event, the petition (or application as it is also termed by the applicant/petitioner) stands to be dismissed in limine, and it is so ordered. Costs are ordered to follow the event.

ANNANDALE, A C J