

IN THE HIGH COURT OF SWAZILAND

HELD IN MBABANE In the
matter between:

CIVIL CASE NO. 2401/03

ENOCK JAMES DLAMINI VERSUS
THE CHIEF ELECTORAL OFFICER THE
RETURNING OFFICER BENJAMIN
MHLANGA

APPLICANT

1ST RESPONDENT 2nd

RESPONDENT 3rd

RESPONDENT

CORAM
FOR APPLICANT
FOR 1st AND 2nd RESPONDENT
FOR 3rd RESPONDENT

SHABANGU AJ MR. C.
NTIWANE MS. Z.
MKHWANAZI MR. M.
SIMELANE

JUDGEMENT 7th

October, 2004

The applicant one Enock James Dlamini of Ekuvinjelweni Umphakatsi has commenced

proceedings by way of application before this court seeking an order in the following terms:

"2.1 That the primary elections held on 20th September, 2003 are to be declared null and void for want of compliance with certain provisions of the elections order No. 2 of 1992/

COURT REPORTER: HON. JUDGE J. M. D. MHLANGA

2.3 That the primary elections be commenced denovo to enable all voters to exercise their right to vote."

The matter commenced as an urgent application on 30th September, 2003 and enrolled for hearing on 3rd October, 2003. When the matter commenced on 30th September, 2003 the only respondents' cited were the Chief Electoral Officer as first respondent and "the Returning Officer" as the second respondent. The present third respondent, one Benjamin Mhlanga was not cited or joined in the proceedings. The said Benjamin Mhlanga has now been joined as third respondent in these proceedings.

The application is brought as arising from two grounds. The first basis is that the returning officer did not deal with doubtful ballot papers as required of him in section 47 and 48 of the Elections Order 1997. The applicant makes reference to the provisions of the abovementioned sections. In so far as relevant, provision is made in section 46 of the Elections Order that the counting officer shall put aside for the decision of the returning officer all ballot papers which are either unmarked or appear to be void for uncertainty. The returning officer is then obliged by section 48 to scrutinise the ballot papers which would have been set aside by the counting officer in accordance with section 46 of the Elections Order, 1992. Ballot papers which have been set aside for the decision of the returning officer by the counting officer have to be scrutinised by the returning officer who is required to consider any objections or arguments put forward by any candidate or his agent, and then decide whether to reject or accept the said ballot paper. If the returning officer accepts the ballot paper he is also required at the same time to decide for which candidate the vote is given. Section 48 (1) requires and obliges the returning officer to reject and not count a ballot paper because of a number of reasons including *inter alia* that the ballot paper is so marked that he cannot determine for which candidate a vote was intended to be given. The alleged irregularity complained of is that the returning officer accepted ballot papers which were not crossed on the photograph of the third respondent and further that he counted such ballot papers as votes in third respondent's favour. In addition to this the returning officer is said to have rejected ballot papers which were crossed below the photographs. It is contended that the returning officer ought to have rejected the ballot

papers which he accepted as being votes cast in favour of the third respondent. In paragraphs nine to twelve the applicant's complaint is formulated as follows;

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"9. In casu, the doubtful ballot papers were not dealt with in terms of section 48 (1) in that doubtful ballot papers which were not crossed on the photograph of one of the contestants, namely Mr. Benjamin Mhlanga were accepted. However ballot papers for myself and other contestants which were crossed below the photographs were rejected.

10. My main contention is that the returning officer did not proceed in terms of section 48, in that he accepted ballot papers for Benjamin Mhlanga when he should have rejected them...

11. As per the returning officer's decision on doubtful ballot papers not crossed on the photograph, having proceeded with the matter in terms of section 47, myself including the other contestants were informed that such ballot papers will be rejected. Ballot papers in my favour were similarly rejected. However as aforesaid those in favour of Benjamin Mhlanga were considered much against the decision of the returning officer in dealing with ballot papers of this nature.

12. Surely if the ballot papers are marked below the photograph and the returning officer's decision being that he will reject such, then that decision should apply to all candidates without exception. The defect is the same, to then consider those ballot papers in favour of other candidates, clearly prejudices the other candidates including myself. The rule should have been the same to apply to all the candidates. "

There is no rule in the provisions of section 46, 47 and 48 of the Elections Order, 1992, relied upon by the applicant that doubtful ballot papers which have been set aside by the counting officer for a decision of the returning officer in connection there with, should all be treated in a similar manner by the returning officer. In other words the returning officer is not required to make a general or blanket rejection or acceptance of all the ballot papers which the counting officer has set aside for his decision. It does not follow that if the returning officer rejects one of the ballot papers he must then reject all the other ballot papers as well. Similarly, it does not follow that if the returning officer accepts one of the ballot papers he must then accept all the other doubtful ballot papers, regardless of whether he is able to determine on the face of the individual ballot papers for which candidate a vote was intended to be given. The returning officer is required and obliged by section 48 (1) to "reject and not count a ballot paper" for any of the reasons listed in paragraphs (a) to (e) of the subsection. The complaint or alleged irregularity raised by the applicant is not that the ballot papers which were rejected were not rejected because of a reason mentioned in section 48 (1) (a) - (e) of the Elections Order, 1992. Furthermore, it is not being contended that it was possible for the returning officer to determine that the ballot papers in question

were in favour of the applicant or the other contestants. There would be non-compliance with sections 47 and 48 of the Elections Order, 1992 if the returning officer rejected the ballot papers in question without applying his mind to the question whether he could determine for which a candidate a vote was intended to be given or if there is any reason amongst those listed in section 48 (1) (a) - (e) for the rejection of the ballot papers. The applicant expresses a conclusion that the ballot papers which were rejected were in his favour and the other contestants. There is no evidence at all tendered as to how the applicant came to this conclusion particularly if regard is had to the fact that the returning officer rejected them because he could not determine in whose favour the votes were given. That is one difficulty the way of the present application.

The second alleged irregularity complained of is that some potential voters were denied the right to vote when they were turned away because their voter registration certificate erroneously reflected a wrong Chiefs code. The complaint reveals that the voters who were turned away had Voter Registration Certificates which reflected their Chiefs Code as 001 instead of 111 which is the correct Chief's Code. Some of the potential voters insisted on being allowed to vote. This latter group were given ballot papers which they were not allowed to deposit in the ballot box, but were placed in a separate envelope. It is contended that it was a violation of Section 19 of the Elections Order to place the ballot papers in question in an envelope instead of a ballot box. The applicant then summarises his view of the procedure adopted regarding the aforesaid ballot papers in paragraph fifteen of his founding affidavit with these words;

"During the counting session, I together with the rest of the candidates demanded to have the ballot papers which were placed in envelopes also counted. The returning officer told us that they will not consider those. This is unfair or even amount to fraud on the Voters who were made to believe that they have voted when in fact their votes will not be considered. To be precise, the returning officer informed us that they just wanted to get rid of those voters. This election could not be declared as free and fair, when qualifying voters are simply denied the right to vote. It is indeed a separate enquiry whether or not they would have voted for me or not. Those voters have no idea that their votes have been discarded, and it is incumbent upon me as a candidate to highlight this anomaly. "

The applicants' second alleged irregularity does not state the number and the names of the voters who were allegedly turned away or even of those whose ballot papers were not put in the ballot box but were placed instead in an envelope. This being application proceedings

the applicant was required to give the evidence of the allegations he is making. (See HART V. PLNETOWN DRTVE-INN CJJSTEMA (PTY) LTD 1972 (1) SA 464 (D) @ 469C-E. (See also HERBSTEIN AND VAN WINSEN THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA 4th edition by MERVYN DENDY @ 364-65). Adl that the applicant has made are very bare and unsupported allegations that some voters were turned away and that the ballot papers placed in envelopes were not counted. This is not sufficient and it is one reason the application cannot succeed. Similarly the applicant does not say if the voters turned away and those whose ballot papers were not counted would have affected the result in his favour. As it will be observed below the applicant must show more than that there were irregularities in the conduct of the elections. He must show in addition that the elections were not conducted in accordance with the principles governing elections and that the mistake or irregularity complaint affected the **result** of the election in the sense that a different candidate would have won the election had there been proper compliance with the provisions of the relevant election law. In civil case number 1588/93 unreported involving the Attorney-General Vs. Dlamini & Others, in a judgement delivered on 17th February, 1994 FIULL C.J. stated the principle as follows;

"The thrust of his [counsel's] submission was that irregularities should not disenfranchise voters if their intention is clear and those irregularities do not affect the result. The governing principle, which is referred to in his written submissions is that the court will not set aside an election because of mistakes or non compliance with the provisions concerning the conduct of an election or the exercise of the right to vote, if it appears to the court that the election was conducted in accordance with the principles governing elections and that the mistake or non-compliance does not affect the result. See JOUBERT THE LA W OF SOUTH AFRICA volume S, page 374 at paragraph 455. The first of these two considerations can be put another way perhaps a little more pointedly, i.e whether or not an election has really been conducted at all under the existing election laws. (See in this respect WOODWARD V. SARSONS L.R. 10 CP. at pages 743 - 45.)

Then later at page five of his judgement the learned Chief Justice concluded in reference to the matters mentioned in the abovequoted passage of his judgement, as follows

"In my judgement, the proper course is to act on the Attorney-Generals' submission and to refuse to grant the orders sought in the application. It has been said that to upset an election, a judge ought to be satisfied beyond all doubt that it was void and, in any event, that the return of a member is a serious matter that is not lightly to be set aside. "

The abovementioned principle referred to by HULL C.J. in his judgement in ATTORNEY GENERAL V. DLAMINI supra presents a difficulty in the way of the applicants' success in these proceedings. However the principle is also applicable in the

first objection raised by the applicant in saying that the elections should be set aside because of an alleged non-compliance with the sections 47 ad 48 of the Elections Order 1992

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In the circumstances the application is dismissed with costs.

TALEX S. SHABftCNram
ACTING JUDGE