

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE In the matter

CIVIL CASE NO. 2661/03

between: JOCONIA MALLNDA MAMBA

VERSUS

DOREEN SIPHUMELELE HLATSHWAYO THE

APPLICANT

CHIEF ELECTORAL OFFICER THE ATTORNEY

GENERAL

Ist RESPONDENT 2nd

RESPONDENT 3rd

CORAM

RESPONDENT

FOR APPLICANT FOR Ist

RESPONDENT FOR 2nd

SHABANGU AJ MR.

RESPONDENT

MAMBA

**JUDGEMENT 17th
February, 2004**

In this matter the Applicant commenced the proceedings by way of an application, by notice of motion claiming an order in the following terms;

1. An order dispensing the provision relating to forms of service and time limits and hearing this case as an urgent application.
2. Ordering the second respondent to suspend or stay the Parliamentary secondary elections for the Gege Inkhundla scheduled for the 18th day of October, 2003 pending finalisation of this application.
3. Ordering that the sealed bag or box or packet containing the votes for the Gege Inkhundla parliamentary elections held on the 20th day of September, 2003 be opened and the votes and or ballot papers be recounted and verified under the supervision of the Registrar of this Honourable Court, or
 - 3.1 Ordering that the parliamentary elections held Gege Inkhundla on the 20th day of September, 2003 be declared null and void and the declaration by 2nd respondent that 1st respondent is the winner thereof, void and ordering that such elections be conducted anew.
4. Ordering the respondents jointly and severally, each paying the other to be absolved, to pay the costs of this application (only in the event that this
 - application is opposed.)
5. Granting the applicant such further and or alternative relief as this court deems just.

When the application came before me on the 17th October, 2003 Mr Mamba for the Applicant indicated that he will be seeking an order in terms of prayer three (3) which in effect was for scrutinizing the ballot papers upon an order of this court. So at the time of the hearing I gave Miss Maseko who appeared for the respondents an opportunity to consult with the Chief Electoral Officer as to whether such an order would be opposed. After such consultation Miss Maseko came back and indicated that such an order was not opposed and so the order was granted. I further granted an order staying the secondary elections under Gege Inkhundla pending the compliance with prayer three (3) of the

Notice of Motion. A report has now been filed by the Registrar relating to the primary elections that were held at Gege Inkhundla on the 18th September, 2003 and in the Registrar's report they indicated that the result remains the same in that a number of additional votes were added to each of the parties, the applicant and the first respondent. In effect the applicant got some three additional votes to the 136 that he had previously obtained and the first Respondent got 2 additional votes. The result is that the total votes for the Applicant amounted to 139 and the total votes for the first Respondent amounted to 140. However Mr Mamba for the Applicant states "that there should have been an additional vote which should have been awarded to the Applicant, a vote which was on ballot paper No. 0357. Regarding this ballot paper, the Registrar's report is that there was no mark on the face of the ballot paper but there was a mark at the back in the form of a cross. The cross is on a square holding Applicant's picture, that seems to be what is intended to be said by the Registrar. Mr Mamba submits that a mark at the back of the Applicant's photo is a mark which is on a square directly opposite the name and representative or candidates or photograph" as envisaged in section 33 subsection 1(a) of the Elections Order of 1992. On the other hand Ms Maseko's submission is that, the mark on the back of the ballot paper is not a mark or a vote that should be taken into account because in terms of section 45 subsection 5 of the same Order, no person should be permitted to look at the back of the ballot paper. Therefore by implication it is argued that a vote at the back of the ballot paper should not be taken into account. It has also been said by Mr Mamba that such a vote indicated at the back of the ballot paper is also on a square. The drawing of the square is at the front of the ballot paper but because one can see the lines from the back, then that mark is on the square directly opposite the name so the argument goes. I am unable to agree with Mr Mamba so far as this submission is concerned. It is my view that the mark on ballot paper no. 0357 was not on a square

directly opposite the name of the candidate. So in the circumstances it was properly disregarded during the counting. The result is that the results of the primary elections at Gege Inkhundla are not disturbed and the first Respondent remains the winner. So the applicants' application would have to be dismissed as a final outcome of this matter. The applicant will have to pay the costs of the Application.

ALEX S. SHABANGU

ACTING JUDGE