

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CIVIL CASE NO. 2788/03

In the matter between

NORMAN MUSA NGCOBO

APPLICANT

VERSUS

PETROS DZEMU NGWENYA

1st RESPONDENT

ROBERT THWALA

2nd RESPONDENT

CORAM SHABANGU AJ

FOR THE APPLICANT

MR. C.S. NTIWANE

FOR THE RESPONDENT

MR. B. DLAMINI

JUDGEMENT 10th February, 2004

The applicant one Norman Musa Ngcobo initiated the present proceedings by way of a Notice of application accompanied by a founding affidavit before this court seeking an order as follows:

- (a) "That the rules of the above Honourable Court in respect of form, manner of service and time limits be dispensed with and the matter be heard as one of urgency.
- (b) Declaring the Secondary Elections at Mahlangatsha Inkhundla void,
- (c) Declaring the election of 1st Respondent at such secondary election void.
- (d) Costs.
- (e) Further and or alternative relief. "

Cited as respondents' in the application are one Petros Dzemu Ngwenya who is stated to be the winner of the secondary elections under the Mahlangatsha Inkhundla. The second respondent is the Chief Electoral Officer one Robert Thwala. The secondary elections, as it appears on the papers were held on 18th October, 2003 and the first respondent who won the elections obtained eight hundred and twenty four (824 votes) followed by the applicant who obtained seven hundred and twenty two (722 votes). This is common cause on the papers. In paragraph six of the founding affidavit the applicant states;

"I submit that there were a number of anomalies and irregularities in the conduct of the elections which render the secondary elections void in that they affected the whole electoral process as is more fully set out below. These irregularities and anomalies can be imputed to the 1st Respondent."

What follows after the abovequoted paragraph of the applicants' founding affidavit is a description of the alleged anomalies or irregularities. What is described as irregularities by the applicant are instances of perceived violations or non-compliance with certain provisions of the various legislation applicable to elections in this country.

The alleged irregularities are as follows . The applicant states that there is some anomaly in relation to the people residing under the area of Mgomfelweni. The anomaly as alleged by the applicant is to the effect that the people of the Mgomfelweni area can and did vote in two different Inkhundla namely Gege and Mahlangatsha. The applicant then argues in paragraph 6.1.2 of its founding affidavit "that people who registered in one Inkhundla were not supposed to vote in a different Inkhundla. In the paragraphs which follow this, the applicant by way of example mentions the name of Tholakele Vilakati (born Lukhele) whom the applicant claims was initially nominated for a position to the Bucopho of Mgomfelweni area under the Mahlangatsha Inkhundla, but eventually won the primary elections as a candidate For Indvuna Yenkhundla of Gege Inkhundla, after she had lost at Mahlangatsha. A second illustration mentioned by the applicant is that one Jobha Vilakati who had

registered under the Gege Inkhundla eventually voted at Mahlangatsha. Similarly one Demu Dladla of Mgomfelweni under the Gege Inkhundla is

2

alleged to have voted at the Mahlangatsha Inkhundla. Then the applicant concludes on the basis of the allegations referred to above that;

It is submitted that in the premises many people did not vote under the Inkhundla they had been registered under and this had a direct bearing on the outcome of the elections. "

Even though earlier on, the applicant states all the alleged irregularities can be imputed to the respondent, the applicant offers no evidence why this is so in respect of the alleged irregularities I have just mentioned. Secondly other than its conclusion that many people did not vote under the Inkhundla they had registered under and that this had a direct bearing on the outcome of the elections, there is no evidence of names of the many people who did not vote under the Inkhundla on which they were registered. There is not even an attempt to furnish evidence of the number of people who allegedly voted under the Mahlangatsha Inkhundla whereas they were registered under the Gege Inkhundla. The lack of evidential support for the allegations made by the applicant is one reason it cannot be a basis for the granting of the relief claimed in the Notice of Motion, which relief is that the Secondary elections at Mahlangatsha Inkhundla and the election of the first respondent be declared void.

The other alleged irregularity upon which the applicant founds his claim for the relief sought is summed up in paragraph 6.2.1 and 6.2.3 of the founding affidavit.

"6.2.1. On the 23rd September, 2003 when the candidates were campaigning at the Mpolonjeni Umphakatsi, 1st Respondent in our presence advised the electorate to vote for him as, according to him, they were now going to be in a position to plough their fields because he would provide them with fertilizer. I beg leave to refer to Jimmy Hlophe's affidavit in support hereof. 6.2.3 A week before the secondary elections indeed 1st Respondent caused 155 bags of fertilizer and five (5) bags of maize seed to be delivered at Mpolonjeni where they were kept at the home of Make Dlamini (laVilakati). I beg leave to refer to the supporting affidavit of Constance Dlamini in this regard. "

Then in the next paragraph which is paragraph 6.2.4 the applicant concludes;

"It is my humble submission that this is a crime in terms of section 63 of the Elections Order of 1992 and directly affected the electorate of the Mpolonjeni area and ultimately the outcome of the results,"

3

The other alleged irregularity is that on 30th September, 2003 at Mlindzini Primary School whilst the candidates were again campaigning the first Respondent provided food and beverages for the electorate to the prejudice of the applicant and the other candidates. It is further alleged that on the date of the secondary elections the First Respondent's brother in law provided a truck with which to ferry and transport first Respondents' supporters to the polling stations. The applicant then says "This again was irregular according to the relevant election law." It is further alleged that "the First Respondents' relative was appointed a registration officer and was the person that issued the voter's registration certificates at Mgomfelweni." The applicant then proceeds to state that this also "affected the election process in that she did not only register persons from Mgomfelweni area but other people from other Umphakatsi To illustrate this fact I make reference to Mbekeni Nkosingiphile Dlamini of Mambatfweni who was furnished with certificate number 25782 at Mambatfweni and later with certificate number 335214 at Mgomfelweni."

Finally, a further irregularity is alleged in paragraph six of the founding affidavit as follows;

"6.5. A further irregularity is the case of Comfort Tsela. 6.6.1 Initially Comfort Tsela was a registration officer of KaZulu Umphakatsi and actively issued certificates to the people of that Umphakatsi and actively issued certificates to the people of that Umphakatsi. 6.6.2. Mr Tsela subsequently was nominated as a candidate of the KaZulu Umphakatsi and was a candidate at the Secondary elections at Mahlangatsha Inkhundla. I am advised that this was bad at law and should not have been allowed. 6.6.3 What compounds the anomaly is the fact that when we were campaigning the said Tsela

advised the electorate to vote for 1" Respondent. "

Then at paragraph seven of the founding affidavit the applicant concludes;

"it is my respectful submission that the irregularities aforementioned affected the whole electoral process and the subsequent results of the election. In the premises it cannot be said that the electorate exercised its rights to vote freely and fairly according to law. "

4

The first respondent denies most of the allegations made by the applicant. In so far as the allegations relating to the promise and delivery of one hundred and fifty five bags of fertilizer the first Respondent says;

"13. I specifically deny that I caused 155 bags of fertilizer to be delivered at Mpolonjeni. What happened is that as a former member of parliament, an application was made in July, 2002 by UMZAMO WESAFELOKATI ASSOCIATION to the E40M Development Fund managed and Administered by the Enterprise Trust Fund. The application for the loan by the said Association was processed whilst I was still a member of the previous Parliament and I did this in conjunction with the Bucopho of that area. It was only around September that the loan was approved and according the requested items were made available to the Association. I enclose hereto a copy of the Swaziland Government order form authorising the supply of the items complained of by the applicant which is marked "DN1". The said goods were never financed from my personal pocket but I was merely called to assist as a person who was at the forefront when the application for the grant was made."

The first Respondent then goes on to deny that he provided food and beverages for the electorate and further states that he puts the applicant to the proof thereof. In so far as the allegation that his brother in law provided transport to the polling stations, for his supporters, he responds as follows;

"I deny the contents of this paragraph, I wish to point out that on the date in question there were many trucks and motor vehicles and not at once did I ask any of the vehicles to ferry my supporters to the polling station. What I can further add is that one government truck came at 2,30 p.m. and was assisting all the people who had come to vote. "

Then at paragraph seventeen the First Respondent responds to the allegation that his relative was appointed Registration officer as follows;

"17. I admit that a distant relative of mine was appointed as Registration Officer. However I was not even aware that she had applied for the position and I do not know the criteria used to employ her. I however deny that people from other chiefdoms were registered by her and I put Applicant to the proof thereof. I once again reiterate that I do not understand why I should be involved on this issue even if there were such irregularities. In short I deny that I perpetrated, motivated or instigated any of the alleged irregularities, if there were any."

5

At paragraph nineteen of his opposing affidavit the applicant states that he is not aware that the said Comfort Tsela was urging the people to vote for him and that he never informed the said Tsela to do so.

The first respondent also raised certain points of law in limine in its answering affidavit. At the hearing of the matter it was agreed by both counsel that it would be convenient to argue the points of law raised in limine during the course of the hearing of the main argument on the merits.

The preliminary points taken in limine by the first respondent are formulated as follows in paragraph four of the respondents' opposing affidavit;

"4.1. The applicant has failed to explicitly set out the grounds upon which the above court has jurisdiction to hear and dispose of this matter.

4.2. The applicant has not fully disclosed his locus standi which entitles him to bring before court the present application.

4.3. Applicants' application is fatally defective in that there has been a non joinder of the Attorney-General who is a material party to the proceedings before court.

4.4. The matter is fraught with a serious dispute of facts (sic) which cannot in any way be resolved on the papers. ..."

These are the four main points taken in limine by the respondent on the application. In paragraph 4,5 the first respondent takes a point relating to the urgency of the application and states that the "the applicant has virtually failed to set out the grounds which he avers render the matter urgent" The point about urgency is expanded upon in two subparagraphs of paragraph 4.5 wherein the objection is that "The applicant has not set out in the application why he failed to bring the application at an earlier date given the fact that the primary elections were conducted on the 18th October, 2003" and further that "there is no averment in applicants' affidavit in which it is explained why applicant cannot be afforded redress at a hearing in due course. " Then in paragraphs 4.6 and 4.7 the following further points are taken, that;

6

"4.6 The time given to applicant to file his notice to oppose and thereafter his opposing Affidavit is grossly unreasonable and there is just no way that 1<sup>st</sup>.

Respondent could sufficiently prepare his case on the time given to him by Applicant."

4,7 Applicants' application is fatally defective in that the orders sought will only serve to leave the matter hanging and as such it is not possible to grant Applicant relief on the prayers therein set out"

The first point on jurisdiction was not vigilantly pursued by Mr Dlamini for the applicant during the hearing. In any event this point can be disposed of by a reference to the provisions of section 28(1) of the Establishment of the Parliament of Swaziland Order No :1 of 1992 which provides that "the High Court shall have jurisdiction to hear and determine any question whether - (b) any person has been validly elected as an elected member of the House." In the present application the applicant seeks, inter alia, an order declaring the election of first respondent at the secondary elections at the Mahlangatsha Inkhundla void. The Applicant relies for the relief he claims on a number of alleged irregularities in the conduct of the election process which according to him render invalid the election of the first respondent. So the application raises questions on whether the first respondent has been validly elected as an elected member of the House of Assembly having regard to the alleged irregularities described by the applicant in his founding affidavit. If therefore the matter involves the determination of questions on whether the first respondent has been validly elected as a member of the House of Assembly then the High Court has jurisdiction in terms of section 28 (1) of the Establishment of the Parliament of Swaziland Order 1992, to hear and determine such question. On this basis this point cannot succeed. It was as already stated in any event not seriously pursued by Mr. Dlamini during arguments.

The second point raised in paragraph 4.2 of the first respondents' opposing affidavit is that the applicant has not fully disclosed his locus standi. Subsection two of section 28 of the Establishment of the Parliament of Swaziland Order 1992 may have an application to the present question relating to locus standi providing as it does as follows;

7

"2. An application to the High Court may be made for the determination of any question - (b) under subsection (1) (b) and (c), by any Senator or elected or nominated member of the House, as the case may be, or by the Attorney General."

It would seem to follow that since the applicant is not any of the persons named in the abovequoted subsection, which persons are conferred with the right to approach the High Court by way of an application for the determination of any question whether any person, has been validly elected as an

elected member of the House, that this point has some substance. The applicant is clearly not a Senator, nor is he an elected member of the House. During argument of the application the applicant did not attempt to show despite invitation by the court that he would qualify to bring these proceedings on the basis that he is a nominated member of the House. A nominated member is the member of Parliament who is appointed to Parliament by the King in accordance with section 18 of the Establishment of the Parliament of Swaziland Order 1 of 1992. The applicant is not such a person.. Were it not for the existence of the Parliament (Petitions) Act, 1968 there would be no further question whether the first respondents point should be upheld and therefore whether it should dispose of, this application. The question is whether the Parliament (Petitions) Act 1968 has any application in relation to the point raised by the first respondent and assuming it has some application the next question is how does it affect the matter of the applicants' locus standi. The Parliament (Petitions) Act, 1968 which appears to me to be the main statutory enactment providing for the supervision of elections by the court confers upon "a person entitled to vote in the election to which the petition relates" the locus standi to approach this court by way of petition proceedings and there raise the question whether an elected member of the house has been validly elected or not. Whatever the present status of the Parliament (Petitions) Act, 1968 and the Electoral act 4/1971 these acts do not have application on the present proceedings which being application proceedings could only have been brought on the basis of section 28 of the Establishment of the Parliament of Swaziland Order, No. 1 of 1992. Subsection 2 of section 28 of the Establishment of the Parliament of Swaziland Order No: 1 of 1992 not only allows application proceedings in respect of matters with which this court is conferred with jurisdiction by the same section, but it also identifies the persons who have locus standi to approach the court to question whether any member of the House has

8

been, validly elected. The applicant is not one of those persons who may bring an application before this court and question whether a member of the House of Assembly has been validly elected or not. (see also DE VILLIERS V. LOUW 1930 AD 426 AT 431 AND OLUFSEN V. KLINER 1959 (3) SA 351 (N) AT 354 H. quoted with approval by HULL C.J. in the unreported decision of this court in JAMESON MNCINA V. JAMES MAJAHENKHABA DLAMINI AND OTHERS CASE NO. 1588/93. I must point out that it is unnecessary for me to consider whether the Parliament Petitions Act 1968 and the Electoral Act 4/1971 were repealed or not. Suffice it to say that I incline to the view subject to persuasion that it was not repealed. In the circumstances the first respondents' second point in limine is upheld and the application is dismissed with costs. ALEX S. SHABANGU

ACTING JUDGE

9