

THE HIGH COURT OF SWAZILAND

ENOCK JAMES DLAMINI

Applicant

And

THE CHIEF ELECTORAL OFFICER

1st Respondent

THE RETURNING OFFICER

2nd Respondent

Civil Case No. 2481/2003

Coram

S.B. MAPHALALA - J

For the Applicant

MR. SIMELANE

For the Respondent

MISS MKHWANAZI

(Attached to the Attorney General's Chambers)

JUDGEMENT

(17/10/2003)

Serving before court is an application brought under a certificate of urgency for an order inter alia that the primary elections held on 20th September 2003, at Ekuvinjelweni Umphakatsi should be declared null and void for want of compliance with certain provisions of the Elections Order No. 2 of 1992. That any steps or all

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steps taken pursuant to the elections outcome be suspended. Further, that the primary elections be commenced de novo to enable all voters to exercise their right to vote.

According to the Applicant in his founding affidavit on or about 20th September 2003, and at Ekuvinjelweni where he was contesting elections under that Umphakatsi for the position of Member of Parliament.

The voters are required to make a cross on the photograph of the person they want to vote for and thereafter to fold and drop the ballot paper into the ballot boxes provided at the polling station. He annexes "EJ1" being Form No. 14 indicating the list of candidates that have been nominated to contest in the election.

As could be expected, not all voters were fully aware of what was expected of them. Some did not indicate the choice of their candidate by making the cross on the photograph, but the cross was made below the photograph of the candidate, as appears on annexure "EJ1". As such those ballots were then to be dealt with in terms of Section 46 of the Election Order of 1992.

The said Section provides as follows:

Section 46: The counting officers shall put aside for the decision of the returning officer all ballot papers.

- a) which apparently do not bear the officer mark, or
- b)
- c)

In paragraph 8, 9 and 10 of his founding affidavit the Applicant avers that with the doubtful ballot papers, the Returning Officer is required by Section 47 to scrutinize such ballot papers with the candidates, or their agents and to consider any objection or arguments put forward in connection with the doubtful ballot papers then the Returning Officer is to decide whether he rejects the ballot papers or having accepted it for which candidate or candidates the vote is given. In casu, it is the Applicant contention that the doubtful ballot papers were not dealt with in terms of Section 48 (1) in that doubtful ballot papers were not crossed on the photograph of one of the contestants, namely Mr. Benjamin Mhlanga were accepted. However ballot papers

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for him and other contestants which were crossed below the photograph were rejected.

The Applicant's main contention therefore 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 the same.

Section 48 (1) states as follows:

The Returning Officer shall reject and not count a ballot paper. a) which is marked that he cannot determine for which candidate a vote was intended to be given.

At paragraph 11 and 12 of his founding affidavit the Applicant further avers that 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, he including the other contestants were informed that such ballot papers will be rejected. Ballot papers in his 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.

Surely, he continues in argument, 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 the Applicant. The rule should have been the same to apply to all the candidates.

The second ground in which the Applicant challenges the outcome of the primary elections conducted on the 20th September 2003, is found at paragraph 13, 14 and 15 of his founding affidavit.

Essentially the challenge is that potential voters were also excluded on the basis of an error on the certificate of registration of voter. There were discrepancies between the voter's chief code. For a number of voters their registration certificate indicated that

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the code for the chief is 001 yet the correct code is 111. Based on this discrepancy, they were turned away. Some left without voting. They were denied the right to vote through no fault of theirs. The Applicant annexes "EJ2" and "EJ3" being copies showing the discrepancies on the voter registration certificates.

However, not all the voters left, those who insisted upon voting were eventually allowed to do so. They were told not to deposit their ballot papers into the ballot boxes, but these were put into two envelopes. According to the Applicant this was a violation of Section 19 of the Election Order, in that an envelope cannot serve the same purpose as that of a ballot box.

The Applicant avers that the ballot papers which were placed in envelopes should have been counted. The Returning Officer told them that they will not consider them. This was unfair or even amounted to fraud on the voters who were made to believe that they have voted when in fact their votes will not be considered. In this regard the Applicant filed confirmatory affidavit of those voters whose ballot papers were placed in an envelope (see "EJ4" and "EJ5").

At paragraph 18, 19 and 20 the Applicant alleges urgency and that he cannot be afforded substantial redress at a hearing in due course.

For ease of reference annexures "EJ1", "EJ2" and "EJ3" (being the ballot paper with the pictures of the candidates; certificate of registration of voter 386489/2003 and certificate of registration of voter no. 386414/2003, respectively), will form part of this judgement.

In opposition the answering affidavit of the Chief Electoral Officer Mr. Robert Thwala is filed of record.

Essentially the defence put forth when dealing with doubtful ballot papers, is that the Returning Officer acted in accordance with the relevant provisions of the Elections Order No. 2 of 1992.

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According to Section 46 of the Election Order No. 2 of 1992 the doubtful ballot papers were put aside by the counting officer for the decision of the Returning Officer.

On the second challenge it is the Respondent's answer that voters were never at any stage turned away. The Respondents' version of events is that voters were never at any stage turned away. Certain voters came with tendered ballot papers, and in terms of Section 34 (3) of the Election Order No. 2 of 1992, these are not kept in a separate envelope. There was therefore compliance with the law in putting the tendered ballot papers in envelopes. These ballot papers are not to be put into ballot boxes. Section 45 of the Election Order No. 2 of 1992 which provides for the counting of votes, only makes provision for the counting of ordinary ballot papers. There is no mention of the counting of tendered ballot papers which are kept in a separate envelope. This according to the Respondent presupposes that they are not to be mixed with the ordinary ballot papers, hence should not be counted.

When the matter came for arguments counsel filed very useful Heads of Argument for which I am grateful.

There are two issues for determination in this case viz i) whether there was violation of Section 47 and 48 of Act No. 2 of 1992 (the manner doubtful ballot papers were treated by Returning Officer); and ii) whether there was violation of Section 32 of Act No. 2 of 1992 (tendered ballot papers were incorrectly issued to voters).

I shall proceed ad seriatum.

i) Whether there was violation of Section 47 and 48 of Act No. 2 of 1992 (the manner in which doubtful ballot papers were handed by the Returning Officer).

Section 47 of Act No. 2 of 1992 reads as follows:

"Returning officer's decision on doubtful ballot papers.

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Subject to Section 48, the Returning Officer shall, with such candidates or their agents as may desire to do so, scrutinize a ballot paper put aside for his decision, and shall, after considering any objections or arguments put forward in connection there with by any candidate or his agent, decide:

- a) Whether he will reject it, or
- b) Having accepted it, for which candidate the vote is given" (my emphasis).

According to the Respondent what happened in casu is that in terms of Section 47 of the Act the Returning Officer together with the candidates or their agents scrutinized the doubtful ballot papers, which were put aside for his decision and he considered the views and objections of the candidates or their agents. However, contends the Respondents, the Returning Officer in terms of Section 47 of the Act, is vested with the discretion to decide whether or not to accept the doubtful ballot papers. It is in the exercise of this discretion that the Returning Officer rejected certain ballot papers. In this regard though I tend to agree with Mr. Simelane 's interpretation of the Section that the Returning Officer in dealing with doubtful papers has no sole discretion as he has to do so with the candidates or their agents, and he must consider any objections or arguments and it would appear in casu the candidates were informed that certain ballot papers will be accepted and other are to be rejected. The doubtful ballot papers which were in favour of Benjamin Mhlanga were considered notwithstanding that similar doubtful papers for other candidates the Applicant included which were marked below were rejected. The doubtful ballot papers in favour of Benjamin Mhlanga were considered when the general rule as agreed by the candidates and their agents was that such ballot papers will be rejected.

According to Baxter, Administrative Law at 408:

"Discretion involves a degree of judgment and choice and the extent to which discretionary power is conferred on a public authority the authority is free to decide how it should act. This does not mean that a public authority possessing discretionary power is free to act as it pleases. Even though discretion entails a choice, the choice is always a limited one". (my emphasis).

In Banetoo Bros vs National Transport Commission, 1973 (4) S.A. 667 (N) at 685 A - D the court said:

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"I am for the moment concerned with what is meant by the expression "apply its mind to the matter", certain aspects of which have already been covered by this judgment. It seems to me essential that the tribunal is essentially obliged to consider all relevant and material information placed before it. To pay mere lip service to this obligation is not sufficient, just as it would be a dereliction of duty to hear representations which are pertinent, and then to ignore them. The problem arises whether the court is concerned with the degree of importance which the tribunal attaches, in the exercise of an honest judgment, to the relevant considerations. Take a case for example, where a factor which is obviously of paramount importance is relegated to one of insignificance, and another factor, though relevant, is given weight far in excess of its true value. Accepting that the tribunal is the sole judge of the facts, can it be said that it has in the circumstances postulated properly applied its mind to the matter in the sense required by law? After much anxious considerations I have come to the conclusion that the answer must be in the negative" (my emphasis).

Similar observations were made in North West Townships (Pty) Ltd vs The Administrator, Transvaal 1975 (4) S.A. 1 (T) at 86 where the court said:

"The last-mentioned possibility has been held, in other English and South African cases, to include capriciousness, a failure, on the part of the person enjoined to make the decision, to appreciate the nature and limits of the discretion to be exercised; a failure to direct his thoughts to the relevant data or the relevant principles, reliance on irrelevant considerations, an arbitrary approach, and an application of wrong principles" (my emphasis).

In casu 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 the Applicant. The rule should have been the same to apply to all the candidates.

For the above reasons therefore I would rule that Section 48 has not been complied with and thus vitiating the primary elections conducted on the 20th September 2003, at Ekuvinjelweni.

ii) Whether there was violation of Section 32 of the 1992 Act (whether tendered ballot papers were incorrectly issued to voters).

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In my view the first point addressed above (i) disposes of the matter, but for the sake of completeness I shall proceed to determine the second question I have mentioned earlier on in this judgment.

Having considered the facts presented in the affidavits of the parties and the submissions by counsel, I am inclined to agree with the Respondents in this regard. Certain voters came with tendered ballot papers; and in terms of Section 34 (5) of the Election Order of 1992, these are to be kept in a separate envelope. There was therefore compliance with the law in putting the tendered ballot papers in envelopes. These ballot papers are to be put into the ballot papers.

Section 45 of the 1992 Act which provides for the counting of votes, only makes provision for the counting of ordinary ballot papers. There is no mention of the counting of tendered ballot papers.

I agree with Miss Mkhwanazi's submission that the fact that tendered ballot papers are to be kept in a separate envelope presupposes that they are not to be mixed with the ordinary ballot papers hence should not be counted.

On the other aspect of the matter that voters were denied to vote I am unable to hold on the evidence before me that this actually happened.

Therefore, on this ground the Applicant would not succeed.

iii) Court order. In the result, an order is granted in terms of 2.1 and 4 of the notice of application.

S.B. MAPHALALA

JUDGE