IN THE HIGH COURT OF SWAZILAND

Held at Mbabane	CivilCaseNo.2481/2003
In the matter	
BENJAMIN MHLANGA	Applicant
And	
ENOCK JAMES DLAMINI THE CHIEF ELECTRORAL OFFICER THE RETURNING OFFICER	1st Respondent (Applicant) 2nd Respondent (1st Respondent) 3rd Respondent (2nd
In re:	
ENOCK JAMES DLAMINI And THE CHIEF ELECTRORAL OFFICER THE RETURNING OFFICER	Applicant 1st Respondent 2nd
Coram	Annandale, ACJ
For Applicant For 1st Respondent 2nd and 3rd Respondent	Mr. C. Ntiwane Mr. M. Simelane No appearance

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JUDGMENT 26th
January, 2004

On an urgent basis, applicant seeks an order *"That the judgment and order of the above Honourable Court of the 17th October, 2003 under Case No. 2481/03 in terms*

of which the Primary Elections held on the 20th September, 2003 were declared null and void for want of compliance with certain provisions of the Elections Order No. 2 of1992 be rescinded and/or set aside. "

Should this be done, he also wants leave to file an answering affidavit in the main application. He further seeks costs, in the event that his application is opposed, as is the case.

What he does not pray for is an order for him to be co-joined as an interested party in the main application.

The main application referred to concerned a matter wherein the present 1st respondent sought and obtained an order wherein the primary elections held on the 20th September 2003 at the Ekuvinjelweni Umphakatsi were declared null and void for want of compliance with certain provisions of the Elections Order No. 2 of 1992, that steps taken pursuant to the elections outcome be suspended and that the primary elections be commenced *de novo.* It was in that election that the then applicant "lost" and the present applicant "won". The matter centred on certain irregularities, wherein ballot papers in favour of Benjamin Mhlanga, the present applicant, were said to have been incorrectly accepted in his favour while similar doubtful ballot papers were excluded to the detriment of Enock James Dlamini, the present 1st respondent. Issue was also taken with the counting or not of tendered votes and whether some voters were denied the right to vote.

The basis of the present application is the fact that Benjamin Mhlanga, who was declared the "winner" of the primary elections, was not made aware of the proceedings in which his victory was taken away from him, and thus denying him the right to participate in the matter and contest the application. In the initial application, only the Chief Electoral Officer and the Returning Officer were cited as respondents.

The present applicant contested and won the elections at Ekuvinjelweni

announcement over the radio on the 17* October 2003 that the primary election had been declared null and void. He *states that* he has a substantial interest in the matter as he had won the election which was set aside, without being afforded a hearing.

He continues to aver good prospects of having the main application dismissed, if he were to be afforded a hearing. This he bases on a contention by 1st respondent that doubtful ballot papers were rejected save for those in his favour, which he contests, saying that all candidates were treated similarly, that all doubtful ballot papers were considered in the presence of all candidates, without favouritism. This, he says, will be confirmed by confirmatory affidavits by the other candidates, if he is given the opportunity to obtain it.

This is contrary to the allegations placed before the court in the application brought by the present 1st respondent. In the judgment now sought to be rescinded, the learned Mr. Justice Maphalala said (at pages 2 and 3, *Civil* Case No. *2481/2003):-*

> "In casu, *it is the applicant's contention that 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 him and other contestants which were crossed below the photograph were rejected.*
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> *The applicant's main contention is that the Returning Officer did not proceed in terms of Section 42, in that the accepted ballot papers for Benjamin Mhlanga when he should have rejected the same...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 were 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*

From this, there is a clear and strongly held factual dispute between the versions of the two applicants. The learned Judge held (at page 7) that :-

> "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 candidates. "*

This finding was made by the court on strength of the papers filed of record. The onesided version given of unfair treatment came from the then applicant, without the contrasting version of equal treatment to all candidates, as per the basis of the present applicant's version, which he further says will be bome out by other candidates.

Thus the real bone of contention by the applicant is that his election in the primary election was ordered to be set aside without natural justice being applied - he was not afforded a hearing at all, negating *audi alteram partem.* He says that he did have a direct and substantial interest in the matter as being the one who was elected in the primary elections and whose election was set aside without him even being aware of the application to do so, let alone being given a chance to contest it by placing his contrasting version of events before court, for consideration. He therefore now seeks the initial judgment to be rescinded or set aside and to file his answering affidavit, although for some reason he does not specifically apply for joinder or leave to intervene to be ordered as well.

First Respondent's attorney, Mr. Simelane, argued *in limine* that the new application is not urgent at all, essentially that the matter has been overtaken by events, and lost its urgency, as at the time the matter was heard, members of the newly elected Parliament had already been sworn in. He argues that substantial redress may be obtained in the normal course of events and as the only chamber of Parliament still to be announced at the time of the hearing was the Senate, and with the applicant not having averred any prospect of so being appointed, the

To this, Mr. Ntiwane made the court aware of firstly, the manner in which the I[s] respondent delayed in its reaction to the application, by filing its opposing affidavit after expiry of the *dies* indicated in the Notice. The opposing affidavit was filed a week later than required. He secondly concedes that the matter had since been overtaken by events, but not at so at the material time when it was instituted. As set out in the founding papers, when the application was launched, the elected members of Parliament still had to be sworn in, after which a Cabinet was to be chosen, closing the door to such a potential position if elections had to be conducted afresh. Further, the costs of campaigning all over for purpose of new elections are said to be "unnecessary expenses" If there is a need to do so.

I cannot agree with respondent's contention that there is no urgency in the matter. The present application follows on the heels of 1st Respondent's initial application to declare the elections in his Inkhundla invalid, which was brought to court and dealt with on an urgent basis. It is precisely the outcome of that matter which is now sought to be rescinded and to have it dealt with once the applicant is enabled to challenge the setting aside of the elections, already ordered to be conducted *de novo.* It requires to be done before the new election process has been done. It is untenable to hold that there is no urgency as elected candidates had already been sworn in at the time the matter was argued in court, especially so when it is the 1[st] respondent who delayed the hearing of the application.

Mr. Simelane raised a second point *in limine, that* Rule 31 (3) (b) does not apply, as the applicant was not a defendant (respondent) in the proceedings now sought to be set aside. This is raised due to the paying in of E200 as security, by the applicant. The deposit is said to be made "in respect of costs as envisaged by the Rules of Court", without any reference to a particular rule.

The Rule referred to by Mr. Simelane relates to applications by defendants to set aside judgments obtained by default, and he further argues that instead of wanting to have the complained of judgment to be set aside, the applicant should have applied to intervene, as regulated under Rule 12. No reason has been advanced as to how the present respondents could be jeopardised or prejudiced by the payment of security for

costs, under whichever Rule it was done. There can be no prejudice to any party in this matter by furnishing of security for costs either, and I fail to see the purpose of this point raised *in limine*. As mentioned above, the present applicant has omitted to specifically *apply* to intervene as an interested party under Rule 12, which makes provision for both plaintiffs and defendants to intervene as such. It does not now require to be decided whether it also applies to a respondent or not, as *this* point relates to the furnishing of *E200* security for costs, which has already been paid by the applicant, which the 1st Respondent objected to. As is the position with the first mentioned point, this also holds no merit.

The further basis on which the application is averred to be fatally defective is that it does not meet with the requirements of Rule 6(2), in that it was not initially necessary to notify the present applicant of the proceedings. The argument is that he was not required to report or to take any appropriate action in the exercise of statutory duties.

When regard is had to the wording of Rule 6(2), *which* reads that:-

> *"When relief is claimed against any person, or where it is necessary or proper to give any person notice of such application, the notice of motion shall be addressed to both the Registrar and such person, otherwise it shall be addressed to the Registrar only ",*

the first respondent misses the boat entirely. Initially, the Chief Electoral Officer and the Returning *Officer* fell to be appraised of the matter and they did comply by filing their affidavits. It is now the complaint of the present applicant that he was not even made aware of proceedings in which his election as parliamentary elected candidate in the primary elections were sought to be nullified, not that he was *expected* to report or to take appropriate action in the exercise of any statutory duty. He says that the "carpet was pulled out from underneath him," so to speak. He was unaware of the proceedings to set aside his election until he heard an announcement over the radio that the secondary elections would not be proceeded with. He was not able to contest the application brought by the present first respondent as he was not aware of it - he was not cited as an interested party, a third respondent.

Although no relief was claimed against Mr. Benjamin Mhlanga, and he was not required by any statutory duty to do anything about the matter, it seems to me that he certainly was a party in respect of whom it was proper to give notice of the proceedings. It was his election as winner of the primary elections which was sought to be set aside. To argue tat he had no interest in the matter is to negate the importance attached to parliamentary elections. Mr. Enock James Dlamini, who wanted the results to be nullified, himself regarded the elections as important. In my view, it stands to reason that if the second placed candidate wants the first placed to be removed from the winners' rostrum, he has to tell him so, without sneaking behind his back. This resulted in the court deciding the matter on a one-sided version, without the opportunity to hear the story of the winner.

A further point raised *in limine* is that the applicant in these proceedings was not accused of any wrongdoing, but that all blame was placed at the feet of the Returning Officer. It is said that by mentioning him as the person who was preferred above all others, it did not imply that he had a direct and substantial interest in the outcome of the matter. Again, it negates the fact that it was the election of the present applicant that was sought to be set aside as an inextricable result of the alleged misdirection by the Returning Officer. It was initially averred that the votes improperly cast in favour of Dlamini "and all other candidates" were rejected, while those of equal doubtfulness but in favour of Mhlanga were blithely counted in his favour, resulting in him being elected.

It is ill conceived to argue that Mhlanga had no interest in the matter brought by Dlamini, to have the election of the former set aside, on the basis that Mhlanga was not accused of any wrongdoing, interference or improper influence over the Returning Officer. Yet again, the point is not whether Mhlanga did any wrong or not , but whether he had any direct and substantial interest in the outcome of the matter, wherein his election was sought to be set aside.

Reliance was placed on Amalgamated Engineering Union v Minister of

> *"The fact, however, that, when there are two parties before the Court, both of them desire it to deal with an application asking it to make a certain order, cannot relieve the court from inquiring into the question whether the order it is asked to make may affect a third party not before the court, and, if so, whether the Court should make the order without having that third party before it. Indeed, I cannot see that in this respect the position of the two litigants would be any better than that of a single petitioner who applies* ex parte *for an order which may affect another party not before the Court. The third party's position cannot be prejudiced by the consensus of the two litigants that they do not wish that party to be joined. "*

To argue that the present applicant would not have had *locus standi* to claim relief in the same matter, if the roles were to have been reversed, cannot hold water. Equally so to argue that as a result of non-joinder, the then non-joined party could obtain an order on the same facts which would be irreconcilable with the order already obtained. Of course it would have been possible for the non-joined present applicant to have sought a declaratory order that he was properly elected. If he did seek such an order, he would by necessity have had to cite the non-winning candidates as respondents, for they would have had to be given the opportunity to contest the order he may have sought. Such are the rules of natural justice. It is the inverse of this what the initial applicant sought to be done, and which he now insists should be deprived of the present applicant. Amalgamated Engineering *(supra)* and its formulation of the tests for a direct and substantial interest and joinder is no authority to hold that joinder of the present applicant would only have been for the sake of convenience. Quite the contrary, as set out above, I do not agree with Mr. Simelane that the winner of the primary elections, whose election was sought to be set aside, can be said to have had no direct or substantial interest in the matter. He was in fact affected by it, negatively so, through his election being set aside. It further cannot be said that this should be deduced on the basis that Mhlanga was not involved in the process of deciding which of the doubtful votes were to be accepted and allowed in favour of a particular candidate and which not. This argument misses the point completely. Mhlanga should have been joined as an interested party from the onset as he very much had a direct and substantial interest in the

all, it is his election that was sought to be set aside and which was done, without him even being aware of the process until he heard of the outcome when announced over the radio.

The last ground on which the application is challenged *in limine* is that there is no cause of action. Due to the furnishing of security for costs, Mr. Simelane argues that the application is brought in terms of Rule 31(3)(b), by necessary inference. This Rule, referred to above, provides for a judgment obtained by default of notice of intention to defend or failure of filing of a plea, to be set aside on the showing of good cause. It also requires security or payment of costs of the default judgment and of the application itself. The present matter does not fall within this category. The applicant was not a defendant against whom a judgment was obtained by default.

The argument continues on the basis that Rule 42(1)(a) cannot find application since it does not require security to be furnished, as applicant has done, thereby excluding rescission under Rule 42, leaving it within the ambit of Rule 31(3)(b). Rule 42(l)(a) reads that:-

> *"42(1) The court may, in addition to any other power it may have,* mero mom *or upon the application of any party affected, rescind or vary:*
>
> *(a) an order or judgment erroneously granted in the absence of any party affected thereby."*

First respondent's attorney says that it does not appear anywhere in applicant's affidavit that words to the above effect are used, thus no cause of action is established, and apart from furnishing of security for costs, which causes it to fall under Rule 31(3)(b), Rule 42 has no application.

Is this so? I think not. When regard is had to applicant's affidavit, he states that he was a candidate who contested the primary Parliamentary elections in his constituency and won it by a fair margin. He was about to contest the secondary elections. First respondent, who amassed 226 votes

"notwithstanding my interest as aforesaid." He states his belief that his "interest in the matter is substantial as I won the elections." He continues to say that "I verily believe 1st Respondent ought to have given me notice of the proceedings and his failure to do so meant that I was not afforded a hearing according to law." He then sets out his prospects on the merits.

Mr. Simelane goes on to argue that the common law equally cannot apply as the applicant has to show that his default to oppose was not wilful and that he has a defence on the merits, neither being established. This loses sight of the very reason the present applicant now comes to court. His default to defend or oppose was clearly due to an absence of knowledge of the proceedings wherein his election was sought to be set aside. His defence is that he was not favoured in the decision as to which doubtful votes were allowed and which not, as all candidates were treated alike by the Returning Officer.

In Polo Dlamini v Martha Siphiwe Nsibande, an unreported judgment by Masuku J under case number 1581/00 dated the 21st March 2001, the learned Judge considered whether an application for rescission of a judgment which does not fall to be decided under the Rules concludes the matter. He referred, with approval, to comments by White J in Nyingwa v Moolman N.O. 1993(2) SA 508 (TK G.D) at 510 - C:-

> *"Although I agree with Mr. Locker's submission that the application cannot be brought under Rule 31(2)(b), I do not believe that this is the end of the matter. That would be too formalistic an approach. This court must also decide whether the application can succeed under provisions of either Rule 42(l)(a) or the Common Law."*

The present applicant has shown, as said above, that he has a reasonable and acceptable explanation for the default in not opposing or challenging the relief obtained. The remaining question to decide, if he is to succeed under common law, is whether he has also shown, on the merits, a *bona fide* defence which *prima facie* carries some prospect of success. Is his defence, as he set it out, only a terse statement of a defence, or is there some

The allegation was that doubtful ballot papers were not equally considered in that Benjamin Mhlanga was unduly favoured by having doubtful ballots counted in his favour while those in favour of Enock James Dlamini and other candidates were rejected "much against the decision of the Returning Officer."

In his answering affidavit in the initial application, the Chief Electoral Officer explained that *"the Returning Officer is to decide whether to reject a doubtful ballot paper or accept it, after considering any objections or arguments put forward in connection therewith by any candidate or his agent. "* He continues to state that *"the doubtful ballot papers were put aside by the counting officer for the decision of the Returning Officer"*, who then did as aforesaid. *"The Returning and Presiding Officers would lift the doubtful ballot papers in full view of the candidates and their agents and ask for their views. There was unanimous agreement between the candidates and their agents that all the papers that were eventually rejected by the Returning Officer indeed had to be rejected. However the decision as to whether to reject the ballot papers or not ultimately rested with the Returning Officer. "*

The Chief Electoral Officer then said:-

> *"The doubtful ballot papers which were accepted in favour of the said Mr. Benjamin Mhlanga were similarly dealt with in accordance with the relevant provisions of the Elections Order No. 2 of 1992. These were lifted in full view of the other candidates and their agents and there was an agreement that it was clear that the crosses were intended for him. It was clear in that below his picture on the ballot paper there was no other picture which meant that if the cross was below his picture, an inference could be drawn that it was meant for him. In exercise of his discretion, the Returning Officer accepted such ballot papers."*

Both the Returning and Presiding Officers confirmed this scenario on affidavit.

Accordingly, the averment by the present applicant, that all candidates were treated equally in regard with doubtful ballot papers, is distinctly supported with the corroborative versions of the Chief Electoral Officer, Returning Officer and Presiding

Officer, starkly in contrast with the allegation by the initial applicant that Mhlanga was unfairly favoured.

In his judgment on the initial application, the learned judge found that:

> *"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."*

This factual finding forms the *radio decidendi* for vitiating the primary elections and granting the initial application. The learned judge had come to his decision on the available evidence, particularly the allegations by Dlamini. Mhlanga, the man accused of being unfairly favoured and whose election was set aside, was not a party to the proceedings and had no way of presenting his version of equal treatment to all candidates. If his version were to be correct, it would have altered the outcome of the matter, but the court was not aware of his version, which is supported by the other respondents. I must emphasise that the judgment of the learned Judge is neither considered as an appeal against it, nor is it under review. Most certainly, the learned Judge is not criticised either. The decision that was made was done on the basis of the facts presented to the court, but with the exclusion of the present applicant as a party thereto.

Whether it be under Rule 42 or the Common Law, I hold the clear view that the present applicant has established good cause for the original judgment to be rescinded and to place his full answering affidavit before Court for consideration. It is not found that the learned Judge incorrectly decided the matter, nor that the proposition of Mhlanga is correct. It has not come up for consideration as yet, but if eventually found to be meritorious and accepted above the version of Dlamini, it may well alter

For the above reasons, the legal points raised against the application are dismissed and the applicant succeeds on the merits.

Regarding he question of costs, Mr. Ntiwane has argued that it be granted on the punitive scale of attorney and client. Reason for this, he holds out, is that before coming to court, the issue was canvassed with 1st Respondent's attorneys who adamantly refused to acknowledge applicant's interest in the matter, causing him to seek relief in court. Yet, in writing, the first respondent's attorneys agree that applicant was an interested party. Notwithstanding this, his application was vigorously opposed.

Apart from this, immediately after hearing the matter, I spoke with both attorneys in chambers and indicated the outcome of the matter to them. A draft order was then written out *inter alia* in terms of which the Registrar of the High Court would have been ordered to scrutinise the contested ballot papers in the presence of all interested parties and report to court. This would have obviated the need to conduct the elections afresh, as initially sought by then applicant, also the litigation now to be had as result of this matter.

Despite numerous reminders, 1st respondent's attorney who wanted to take instructions from his client never reverted back to me. It resulted in the long delay of this judgment and places a question mark behind the *bona fides* of the 1st Respondent, whether he does not actually want "a second bite of the cherry", so to speak.

In all, under the prevailing circumstances, it is ordered that costs of the present application be against the first respondent, on the attorney-client

In the event, it is ordered that the judgment of the 17th October 2003 in Civil case number 2421/2003 be rescinded; that applicant be granted leave to intervene and to file his answering affidavit in the main application within 10 days of this order, with costs against the 1st