IN THE HIGH COURT OF SWAZILAND

Civil Case No. 2792/2006

JAN SITHOLE N.O.	**1st Applicant**
MARIO MASUKU	**2nd Applicant**
PEOPLES' UNITED DEMOCRATIC MOVEMENT	**3rd Applicant**
DOMINIC TEMBE	**4th Applicant**
NGWANE NATIONALLIBERATORY CONGRESS	**5th Applicant**
SWAZILAND FEDERATION OF TRADE UNIONS	**6th Applicant**
SWAZILAND FEDERATION OF LABOUR	**7th Applicant**
SWAZILAND NATIONAL ASSOCIATION OF TEACHERS	8**th Applicant**

And

THE PRIME MINISTER	**1st Respondent**
SWAZILAND GOVERNMENT	**2nd Respondent**
MINISTER OF JUSTICE & CONSTITUTIONAL AFFIARS	**3rd Respondent**
THE ATTORNEY GENERAL	**4th Respondent**
CHAIRMAN CONSTITUTIONAL DRAFTING COMMITTEE	**5th Respondent**
SPEAKER OF THE HOUSE OF ASSEMBLY	**6th Respondent**
PRESIDENT OF SENATE	**7th Respondent**
MINISTER OF HOUSING & URBAN GOVERNMENT	**8th Respondent**

Coram: S.B. MAPHALALA – J

For the Applicants: MR. T. MASEKO

For the Respondents: MR. M. VILAKATI

JUDGMENT

21st August 2007

Introduction

[1] Before addressing the substantive questions in this application I think it is important to first explain the reason for the present composition of this court. It has been a custom of this court to hear matters similar to the one before court by a Full Bench of the High Court of Swaziland. This is a rule of practice that I favour in that each and every dispute brought before court is given the due weight and prestige it deserves in the context of the development of our jurisprudence in matters with a constitutional flavour. However, in the present case in view of the exigencies of the matter this application has been brought under a Certificate of Urgency and the logistics of constituting a Full Bench mentioned above became cumbersome and impossible. It is in view of this fact therefore that I agreed to hear the matter as a single Judge as I am in fact entitled to sit by the laws of this country. I say so because constitutionally a single Judge of the High Court is empowered and has the necessary jurisdiction in terms of the Constitution to adjudicate and determine and actually enforce the provisions of the Constitution and the Bill of Rights. In this regard I refer to Section 15 (5) of the Constitution which must be read with Section 150 (2) (a) thereof.

The application.

[2] The application before court was brought under a Certificate of Urgency in a Notice of the 13 August 2007 for the following relief:

1. Waiving the normal time limits and forms of service stipulated by the Rules of this Honourable Court and hearing this matter as one of urgency;

2. Calling upon the 8th Respondent to show cause, if any, on a date and time to be determined by this Honourable Court, why:

2.1. He should not allow the 3rd and 5th Applicants and all such political organizations, political associations and political parties as juristic persons to contest the elections, campaign, hold meetings and rallies in terms of Section 3 of the Urban Government Act No. 8 of 1969 as read with section 25, 84, 85 and section 1 of the Constitution of Swaziland Act 001 of 2005.

3. Regulation 14 of the Urban Government (Elections) Regulations should not be declared null and void on the ground that it is inconsistent with the provisions of the Constitution;

4. That the local government elections be stopped and held in abeyance until such time and main application on the meaning and extent of Section 25 of the Constitution as read with ancillary sections is heard and finally determined by the Honourable Court;

5. That paragraphs 2 and 4 above operate as an interim order with immediate effect pending the final determination of this matter;

6. Further and/or alternative relief as this Honourable Court may deem just;

7. Costs of the application against the Respondents jointly and severally the one paying the other to be absolved.

[3] The application is founded on the affidavit of one Mr Jan Sithole in his capacity as a Trustee of the National Assembly Trust. In the said affidavit he attaches various pertinent annexures including sections of the relevant legislation and various sections in the Universal Declaration of Human Rights. Mr. Mario Masuku who is the President of the People's United Democratic Movement (PUDEMO) has filed a supporting affidavit to the founding affidavit. One Mr. Thami Hlatshwayo and one Mr. Clement Dlamini have also filed supporting affidavits. The former is a member of the National Executive Committee of the NNLC and the latter is a member of the General Council of the Swaziland Federation of Trade Unions (commonly known as "SFTU"). The last supporting affidavit is that of the Secretary General of Swaziland National Association of Teachers (commonly known as "SNAT") Mr Dominic Nxumalo. Also the supporting affidavit of one Mr. Musa Reuben Ndlangamandla who is the Second Assistant Secretary General of the Swaziland Federation of Labour (SFL) is filed.

[4] The Respondents have filed a Notice of intention to oppose and thereafter filed a Notice to raise points of law. The respondents have not filed any affidavit on the merits of the case. The determination of these points of law is the subject-matter of this judgment. These points reads

ipssima verba as follows:

1. **Locus standi.**

1.1. A full bench of this Honourable Court has previously held that the 3 rd and 5th Applicants are illegal organizations and hence lack capacity to sue. In terms of the common doctrine of *stare decisis* it is incompetent for a single judge of the same court to overrule a decision of a full court;

1.2. The standing of all the Applicants to seek the relief that they seek in the main application is disputed in that application. Consequently, they cannot be granted any relief in an ancillary application until their standing has been definitively adjudicated.

2. **Urgency.**

2.1 The Applicants have failed to make out a case for the relief sought in prayer 1 of the Notice of Motion.

3. **No *prima facie* case for the relief sought in prayers 2.1 and 3.**

3.1. In terms of Section 3 of the Urban Government Act, 1969 a juristic person can only contest local government elections if it, inter alia, is registered as a voter and owns or occupies immovable property within any municipal ward;

3.2. The Applicants have failed to allege that the 3rd and 5th Respondents satisfy the above-mentioned conditions;

3.3. The Applicants have failed to allege how Regulation 14 of the Urban Government (Elections) Regulations is inconsistent with the Constitution of Swaziland Act 001/2005

4. **Non-joinder.**

4.1. Regulation 14 confers power on town clerks to be running officers for local government elections. The town clerks have a direct and substantial interest in the constitutionality of the Regulation 14 and yet the Applicants have failed to cite and join them;

4.2. The town board, town councils and city councils have a direct and substantial interest in the conduct of local government elections; the Applicants ought to have joined them.

[5] In this judgment I shall address the above-cited points of law *ad seriatim*, thusly:

Locus standi

[6] The argument for the Respondents in this regard is that this court has previously held that the 3rd and 5th Applicants are illegal organizations and hence lack capacity to sue. *(per* the full court judgment in the *Swaziland Federation of Trade Unions and 3 others vs Chairman of the Constitutional Review Commission and 7 others - Civil Case No. 3367/2004).* In this regard the court was referred to the common law doctrine of *stare decisis* that it is incompetent for a single Judge of the same court to overrule a decision of a full court. It is further argued by the Respondents in this regard that the standing of all the Applicants to seek the relief that they seek in the main application is disputed in that application. Consequently, they cannot be granted any relief in an ancillary application until their standing has been definitively adjudicated.

[7] The Applicants have advanced *au contraire* arguments to the effect that the Respondents' reliance on the judgment of the Full Bench Case No. 3367 of 2004 is unfortunately misguided and misplaced for the following reasons:

(a) The way in which that application was made is totally different from the present application. The main application is predominantly based on the interpretation of paragraph 2 (e) of the King's Proclamation of 12 April 1973. In Case No. 3367/2004 no arguments were made on the interpretation, import and extent of paragraph 2 (e) as read with Section 80 (2) of the establishment of Parliamentary of Swaziland.

(b) It will also be submitted that Case No. 3367/2004 is distinguishable on the ground that no argument was advanced to contend that the spirit and purport of paragraph 2 (e) of the Proclamation as read with Section 80 (2) of the Order when referring to the "people of Swaziland" does not only include individuals but groups as well. It is important to state that no comprehensive averments were made under Case No. 3367/2004 on why the Applicants averred that they had the necessary *locus standi*, which they have ably done in their main application.

(c) It is also significant to mention that under Case No. 3367/2004 no reliance was made on the submission that in constitutional matters the court is enjoyed to adopt a liberal, broad and generous approach in dealing with constitutional issues. It will be contended that this Honourable Court when faced with constitutional questions, has to adopt such liberal and generous approach

to protect and promote the rights of the citizens. This approach has been adopted by many countries across the Commonwealth. IN Tanzania, this is what the court has stated the law:

But before even the enactment of the Supreme Court Act, a liberal view of standing was already taking shape and a generous approach to the issue was already considered desirable. This is illustrated by these words of Lord Diplock in *Inland Revenue Commissioner* v *National Federation of Self-Employed and Small Business Ltd (supra):* It would, in my view, be a *lacuna* in out system of public law if a pressure group, like the federation or even a single spirited tax-payer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.
(d) This is an absolutely accurate pronunciation of the law which cannot be faulted, and there is no reason why this court should not adopt a similar approach;
(e) It will be submitted that the judgment under Case No. 3367/2004 is distinguishable from the present in that no reliance was placed on the country's obligation under international law, which the application has a lot of reference to.
(f) Above all, Case No. 3367/2004 was argued before the Constitution was adopted, Section 35 of which expands *locus standi.* The following submissions are apposite to this argument.

[8] In my assessment of the arguments by the parties in this regard I have come to the considered view that the *dictum* in the Full Bench judgment cited above that the 3rd and 5th Applicants are illegal organizations and hence lack capacity to sue. I agree with the contention by the Respondents that in terms of the common law doctrine of *stare decisis* it is incompetent for a single Judge of the same court to overrule a decision of a Full Bench. I also find that no new facts have arisen in the status of the 3rd and 5th Applicants to upset the position of the court in the Full Bench decision. Furthermore, it was pointed out to this court when the matter came for arguments on Friday that the standing of all the Applicants to seek the relief that they seek in the main application is disputed in that application. Consequently, they cannot be granted any relief in an ancillary application until their standing has been definitely adjudicated.

[9] In the circumstances the point of law of *locus standi* succeeds on the above reasons cited in paragraph [8] *supra.*

Urgency.

[10] In this regard it is contended for the Respondents that the Applicants have failed to make out a case for the relief sought in prayer 1 of the Notice of Motion. In this regard the court was directed again to the *dictum* in the Full Bench case of *Swaziland Federation of Trade Unions and 3 others vs Chairman of the Constitutional Review Commission and seven others (supra)* where that court cited the trilogy of cases that of *Humphrey H. Henwood vs Maloma Colliery and another- Civil case No. 1623/93 (per* Dunn *J), the case of H.P. Enterprises (Pty) Ltd vs Nedbank (Swaziland) Limited- Civil Case No. 788/1999 (per* Sapire CJ as he then was,) and that of *Megalith Holdings vs RMS Tibiyo (Pty) Limited and another — Civil Case No. 199/2000 (unreported) (per* Masuku J). In those decisions the requirements of Rule 6 (25) (a) and (b) were discussed. The principle which governs the above-cited Rule was stated with absolute clarity in the judgment of Chief Justice Sapire in *H.P. Enterprises (supra)* at page *2 - 3* as follows:

"A litigant seeking to invoke the urgency procedures must make specific allegations of fact which demonstrate that the observance of the normal procedures and time limits prescribed by the rules will result in irreparable loss or irreversible deteriotion to his prejudice in the situation giving rise to the litigation. The fact alleged must not be **contrived of fanciful but must give rise to a reasonable fear that if immediate relief is not afforded, irreparable harm will follow"** (my emphasis).

[11] Rule 6 (25) (a) and (b) which govern urgent applications provides as follows:

"(a) In urgent applications, the Court of Judge may dispense with the forms and service provided for in these rules and may dispose of such matter as such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to the Court or Judge, as the case may be, seems fit.

(b) In every affidavit or petition filed in support of an application under paragraph (a) of this sub rule, the Applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course".

[12] The Applicants in the Founding affidavit of Mr. Jan Sithole has submitted that the matter is critically urgent for the following reasons:

Urgency

12.1. It is the Applicants' respectful submission that the matter is critically urgent for the following reasons:

12.2. If the local government elections are allowed to proceed, this would have the effect of rendering the Applicants' challenge in terms of Section 25 merely academic, as they may be wrongly interpreted as having acquiesced to the holding of elections under the current undemocratic and unconstitutional order;

12.3. The existing political organizations and association will be unlawfully deprived of the opportunity and right of contesting the elections, yet Section 25 of the Constitution allows them to exit, campaign and participate in the governance of the country, presuming that the days of the 1973 Proclamation are gone and are no more;

12.4. Indeed, there can be no doubt that, it the Applicants' contention is correct on Section 25, then the local government elections are unlawfully, hence it will be necessary that a re-election be conducted in future, at the expense of the taxpayer and yet the economy is already ailing;

12.5. It will be contended that, it goes without saying that if these elections are allowed to proceed, many citizens who are otherwise entitled to vote will unlawful and unconstitutionally be disenfranchised, thus deprived of their fundamental and democratic right to vote and participate in the governance of the municipalities, where they reside and pay rates and taxes. The question of elections, be they local is a matter of national concern.

12.5. The 8th Respondent will soon announce the date of the elections and conduct the elections, unless by lawful court order, he is stopped from doing so;

Substantial redress at a hearing in due course

13.1 The Applicants respectful submit that they will certainly not be afforded substantial redress at a hearing in due course, because once the elections are held their members will have to wait another five years to exercise their right to vote;

13.2 Moreover, because the disenfranchisement of their members will mean that they and their

affairs are being managed and executed by individuals who do not have the popular mandate and popular support of the electorate;

13.3 Further and quite simple, the Applicants may have difficult in having the elections declared null and void on the basis of illegality when they will have allowed the process to proceed until completion, yet they could have done so earlier, as they do now.

matter came for arguments on Friday is that the perceived danger is imminent. It can happen during the 7 o'clock news bulletin or it might happen tomorrow or the day after and so forth. In my view it appears to me that the Applicants' sat on their laurels as they knew the scheme of things a year or so ago that local government elections will be held being followed by General Elections thereafter. It appears to me that the Applicants have reacted to a knee jerk reaction and they have realized at the eleventh hour that the Minister is about to announce the elections for Local Governments and hence this extremely urgent application. The question then which arises can they invoke the peremptory requirements of Rule 6 (25) (a) and (b) in these circumstances.

[15] It is my considered view on the basis of the above-cited reasons above in paragraph [14] *supra* that the peremptory requirements of Rule which governs urgent applications before the court have not been followed. I must mention that when the matter came for arguments and Counsel for the Applicants was quizzed on this anomaly the court was invited to make assumptions and suppositions on the papers to establish whether urgency has been established. I must say that this is not the way urgency is established in such applications in that the Rules of the High Court are clear in this respect and the legal authorities in the trilogy puts the question beyond doubt what is to be done in such applications.

[16] In the circumstances I have come to the considered view that on the legal authority of the trilogy of cases cited above the Applicants has dismally failed to establish urgency as provided for by Rule 6 (25) (a) and

[13] In arguments before me Counsel for the Applicants addressed the issue of urgency that the trilogy of cases relied upon by the Respondent does not really apply to cases like the present case with a tint of constitutionalism and he cited a number of foreign cases in the international arena that Swaziland should not stick out like a sore thump in this respect. In this respect I agree with

Counsel but the courts in Swaziland ought to follow precedents in cases in their country and not to follow wily nilly the prescribes of decisions in other countries. Further Counsel for the Applicants contended that indeed there are no hard and fast rules to determine urgency, each matter must be judged according to its merits. All the Applicants are to show is that there is a degree of urgency attached to the matter. In this regard the court was referred to what is stated by the learned author *Harms L.T.C. (1990) Civil Procedure in the Supreme Court* at page *8* where the following was stated:

"The object of the rules is to secure inexpensive and impetuous completion of litigation before the courts; they are not an end in themselves. Consequently the rules should be interpreted and applied in a spirit which will facilitate the work of the courts and enable litigants to resolve their disputes in as speedy and inexpensive manner as possible. This it has been held that rules exist for the court, not the court for the rules. Formalism is the application of the rules is not encouraged by the court".

[14] In my assessment of the papers before me and the arguments two important issues arise in the present case concerning the issue of urgency. Firstly, it is not canvassed in the Founding affidavits of the Applicants on urgency when the Applicants got to know of the impending danger to seek the protection of the courts. Secondly, it is not stated when the danger is to be activated by the Respondents. The only thing I could gather when the

(b) of the Rules of the High Court and therefore the application ought to be dismissed on this point alone.

The issues of no *prima facie* case in prayer 2.1 and 3 and non joinder.

[17] In view of my findings on the question of urgency mentioned above, it would be an academic exercise to traverse these other two grounds *in limine* as in view of what I have said above on urgency the application has not been enrolled.

[18] In the result, for the afore-going reasons the application is dismissed and costs to follow the event.

S.B. MAPHALALA

JUDGE