

IN THE HIGH COURT OF SWAZILAND

CIVIL TRIAL No. 3223/08

In the matter between

Dumsani Christopher
Ndlangamandla

Applicant

vs

The Elections and Boundaries
Commission

1st Respondent

The Attorney General

2nd Respondent

Coram: S.M. Monageng J

Q. Mabuza J

M. Mamba J

For Plaintiff: Mr. N.V. Mabuza

For Defendant: Mr. T. Dlamini

**JUDGMENT
22 AUGUST 2008**

Monageng]

[1] This application is brought on urgency and the applicant one Dumsani C. Ndlangamandla seeks the following relief:

(1) An order directing the 1st Respondent, the Chairman of Elections and Boundaries Commission (EBC) to endorse the nomination of the applicant for the position of Member of Parliament during the elections held at Engudzeni Inkhundla, Endushulweni uMphakatsi on 2nd August 2008.

(2) In the alternative, the applicant seeks an order directing that the nomination process of Endushulweni polling station under the Engudzeni Inkhundla be reconstituted and started **de novo**.

[2] The applicant sites Section 97 (1) (c) of the Constitution of the Kingdom of Swaziland as entitling him to the reliefs he seeks. The Section provides that:

"97. (1) Notwithstanding the provisions of section 96, a person does not qualify to be appointed, elected or nominated as the case may be, a Senator or member of the House if that person-

(a)....

(b)....

(c) is a member of the armed forces of Swaziland or is holding or acting in any public office and has not been granted leave of absence for the duration of Parliament";

[3] The applicant is a public servant, specifically a teacher at the Ngwane Teacher's College. He is a registered

voter for the Engudzeni Inkhundla having registered in the Ndushulweni polling centre. On the 2nd of August 2008, he proceeded to the voting centre in Ndushulweni to participate in the elections and was duly nominated by one Duduza Beatrice Nkambule for the position of Member of Parliament.

[4] An officer of the Elections and Boundaries Commission one Mr. Shongwe, asked him if he was a public servant, to which he responded in the affirmative. Mr. Shongwe then asked him for a document showing that he had been granted leave of absence by his employer. Applicant told Shongwe that he had a letter from his employer, who was still processing his leave of absence. This is annexure "DN2". At that juncture, the applicant did not have DN2 with him and says that he had forgotten it at home, in his haste to attend the elections. Shongwe's senior then informed the applicant that his name would be removed from the list of names of nominees, since he had failed to exhibit DN2, and he was promptly removed, despite applicant's protestations, and despite him saying that he would produce DN2.

[5] In his papers before the Court is attached confirmatory affidavits from 12 registered voters, who state that they had attended the election solely to nominate and vote for him, as a Member of Parliament. The applicant further avows that, some nominees who had forgotten their letters of leave of absence were assisted with transport by officers of the Elections and Boundaries Commission to fetch their letters, but the officers refused to assist him, and that as a result he was denied his constitutional right to participate and contest the elections.

[6] He further says that the Elections and Boundaries

Commission's officers' conduct is unlawful and arbitrary for the reasons that:

- (1) He did have the letter that they demanded.
- (2) Other people who were in a similar situation were assisted in obtaining documents facilitating nomination, and he therefore had a reasonable and legitimate expectation that similar consideration would apply to him.
- (3) The said Elections and Boundaries Commission officers' conduct is unfair and unreasonable and impeached his right to stand for election.

[7] It is important for the contents of "DN2" to be reproduced and it reads as follows:

"2nd August 2008

*The Officer In-charge
National Elections Office*

Re: Recommendation for Mr. Dumsani Christopher Ndlangamandla to run for the National Parliamentary Elections.

The above mentioned candidate has informed me that he intends running for the National Parliamentary elections. Kindly allow him to stand while his final leave of absence is being processed.

Thank you Yours
faithfully
Dr. A.M. Mahlalela
Principal

[8] After the applicant's name was removed from the register, he says that on numerous occasions he approached the 1st respondent and the entire Commission with a view to having the matter resolved, and that on the 15th August 2008, the 1st respondent (Elections and Boundaries Commission) informed him of its decision not to accept his nomination and candidacy, hence this application.

[9] The applicant says that he has no other remedy, save to have his nomination approved and endorsed by the Court, or alternatively for the nomination process to be reconvened since after the 23rd August 2008, the date on which the election takes place, there will be no remedy available to him.

[10] He further says that, the balance of convenience favours the grant of the order sought, especially that, in his view, the 1st respondent will lose nothing by his inclusion on the nominee roll.

[11] The respondent argues that it is the 1st respondent's responsibility to ensure that the candidates who participate in the elections qualify to do so in terms of the relevant election

laws, and to oversee and supervise the registration of voters per Section 90 (7) (a) and (d) of the Constitution which provides

that:

"90 (7) The Junction of the Commission shall be to:

(a) oversee and supervise the registration of voters and ensure fair and free elections at primary, secondary or other level;

90 (7) (d) perform such other Junctions in connection with elections or boundaries as may be prescribed".

[12] The respondents also argue that Section 97 (1) (c) of the Constitution requires public servants to be granted leave of absence for the duration of Parliament, that is five years, if they wish to be nominated, elected and appointed as members of the House of Parliament. Consequently, they argue that, contrary to what the applicant says, DN2 is not and cannot be said to be leave of absence. The respondents argue that leave of absence, in terms of the Teaching Service Regulations of 1983 is granted by the Teaching Service Commission and that it is only the Commission that has authority to approve leave.

[13] Accordingly, they argue that any authorisation granted by the Principal, to the applicant, is ineffective, unlawful and unenforceable, because the Principal has no such powers. The respondents site Regulation 9 of the Teaching Service Regulations of 1983 which provides:

"9 (1) an application for leave shall be made by a teacher to a manager in such manner as the commission may prescribe from time to time.

(2) a manager may grant leave to a teacher during a school term if such leave is required for -

(a) attending a church conference;

- (b) *writing an examination recognized by the Commission;*
- (c) *compassionate reasons;*

Provided that such leave shall not be granted without the approval of the Commission if it will exceed seven days in one calendar year".

In terms of Regulation 2, a 'manager' is defined as-"any person or body responsible for the management of a school and includes the National Education Board established under the Education Act".

[14] This position was also confirmed by Mr. Moses Zungu, the Executive Secretary of the Teaching Service Commission. Zungu further said that to date the Commission has not received any application for leave of absence from the applicant and is as such not processing any application for

him. It appears that the applicant believes that DN2 gives him authority to go ahead and participate in the process of elections. The question is whether DN2 is such authority for leave of absence. The applicant argues that it is, and that if it is not, then the leave of absence proper was being processed, so that on the basis of that information, contained in DN2, he is as good as having been given such authority. This, with respect cannot be, in view of Zungu's affidavit which indicates that the Teaching Service Commission has not received a request from the applicant. It is also clear from the Teaching Service Commission regulations that the Principal is not authorised to grant such leave.

[15] The applicant has not denied this, but seems to suggest that it was not up to him to make a follow up of his request for leave of absence, since it is the Principal who wrote the letter to the Teaching Service Commission. This argument is odd to say the least. It gives the impression that the applicant was not serious about being granted leave of absence. He knew the requirements of the law, hence he caused the Principal to write DN2 to the Elections and Boundaries Commission.

[16] He knew that he did not have the authority from the Teaching Service Commission and one can conclude that this is why he did not take DN2 with him to the polling station. To the extent that, despite the fact that he knew that he would need the letter of authority, but neglected making any follow up, on his request, he is the architect of his own misfortune and he cannot turn around and put the blame on everybody else except himself.

[17] The Court cannot assume the role of the Teaching Service Commission because this will be unlawful. The Court can similarly not reconvene the elections because this would invalidate a process that was carried out according to the law. The applicant was quite obviously negligent in the handling of this application for leave of absence and the Court cannot condone this and undo the nomination process.

[18] It is not necessary for an analysis of the many accusations and counter accusations that were made in Court, because they do not alter the fact that the applicant had not been granted leave of absence by the Teaching Service Commission. It is clear that the Principal could not have given such leave of absence. Even in the event that the Elections and Boundaries Commission had transported him to his home, this

would have led to nought, since DN2 is not leave of absence.

[19] In the result, the Court finds that Mr. Ndlangamandla's application should fail. The reliefs he seeks cannot and should not be granted. There will be no order for costs since this is a constitutional matter, but the Court expresses the view that this is a clearly vexatious application that should ideally attract punitive costs.

S.M. Monageng

JUDGE

I agree

Q. Mabuza

JUDGE

I agree

M. Mamba

JUDGE