

IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO. 3355/06

In the matter between:

SAZI NGCAMPHALALA

1st APPLICANT

BHEKUYISE SHONGWE

2nd APPLICANT

LOUIGE DLAMINI

3rd APPLICANT

MATHOKOZA GAMEDZE

4th APPLICANT

AND

**CHAIRMAN ELECTIONS &
BOUNDARIES COMMISSION**

1st RESPONDENT

TRUSTY GINA

2nd RESPONDENT

TENSON MAGAGULA

3rd RESPONDENT

ESTER MBAMALI

4th RESPONDENT

CORAM: MAMBA J

FOR APPLICANT: MR P.K. MSIBI

FOR 2ND RESPONDENT: MRT.M. MLANGENI

JUDGEMENT

23RD SEPTEMBER, 2008

[1] The Applicants together with the 2 Respondent were all candidates in the Primary National Parliamentary elections at the Mndobandoba Inkhundla where the 4th Respondent emerged as the eventual winner.

[2] The Applicants have filed this application on a certificate of urgency and they want the court to nullify the elections that took place at the said Inkhundla on the 23rd and 24th August 2008. They want the elections to start afresh and have raised two issues which they contend warrant a re-run of the elections. These are the issues:

- (a) An unregistered voter one Hans Steffen junior was allowed to cast his disabled father's vote, contrary to the electoral law and
- (b) The election officers caused each voter's number to be written on the face of his ballot paper and thus compromised the secrecy of the voting process inasmuch as anyone seeing the voter's number on the ballot paper would be able to tell who the voter is and which candidate he voted for.

[3] The Respondents deny the allegations stated in (b) above but admit the first allegation above. I shall consider the second one as it seems, if true, would indicate a serious non observance of the election process. Seeing that this was a question of fact whether or not the voters numbers were written on the ballot papers, I ordered, with the concurrence of Counsel herein, that the relevant ballot boxes be made available to the Registrar of this court for inspection of the ballot papers in the presence of Counsel. This was done on the 10th

September, 2008 and Counsel on both sides together with the Registrar reported in open court that the irregularity or irregularities complained of were not true. In effect it was reported that the voter's numbers did not appear on the ballot papers. That fact disposed of that issue.

[4] It is common cause that Mr Hans Steffen junior was not a registered voter but he came to the polling station to cast his father's vote. He used

his father's voter's card. He was allowed to do so by the Presiding officer after a request had been made to him by the voter, who because of his disability - he is wheelchair bound, an invalid - could not go to the polling station to cast his vote. The Presiding officer permitted him to mandate his son to cast his vote for him. However, the law provides that in such a situation the vote should be cast by the Presiding officer on behalf of and on the instruction of the voter. Section 35 of the Elections Order 2 of 1992 provides that

"(1) An application by a voter who, owing to inability to read or on account of blindness or other physical infirmity, is unable to vote in the manner provided by section 33, the presiding officer shall take the voter aside and shall ascertain from him, no other person being present or within hearing the name of the candidate or candidates for whom he wishes to vote.

(2) The presiding officer shall then immediately go into the polling booth with the voter and mark the ballot paper of the voter in the manner directed by the voter, and the presiding officer shall thereupon fold the ballot paper as required by this order and, in the case of an ordinary ballot paper put it in the ballot box, in the case of a tendered ballot paper, retain it to be dealt with as provided by section 34 (4) and 34 (5)."

[5] The issue that has to be decided in this case is whether or not the failure by the Presiding officer to cast the vote on behalf of the voter and allowing the voter's son to do so renders the whole electoral process a nullity and that a re-run should be ordered.

[6] In casu the voter was not at the polling station and therefore did not go into the polling booth with the presiding officer. The arrangement between the voter and presiding officer were apparently made away from the polling station.

[7] The case law is unanimous that an electoral process is a very important and serious national exercise and may only be set aside on grounds of gross irregularity. In this case, the presiding officer clearly did not follow the letter of the law in dealing with the contentious vote herein. He may have followed the spirit of the law by allowing the registered voter to vote through his son. In this case the voter was not denied the right to vote just because of his infirmities or inability. The voter entrusted his vote to his confidant - his trusted son - with the consent of the presiding officer. It may not be argued in my view that by allowing the son to cast his father's vote, the presiding officer was delegating his delegated powers under section 35 (1) and (2) to the son. The general rule is that a delegate may not, in the absence of clear authority, delegate those delegated powers, (*Delegatus non potest delegare*”).

[8] What is of paramount importance in this application is that we are dealing with a single contentious vote. This vote can not in my opinion render the whole exercise a nullity. Admittedly, what the presiding officer did in allowing the son to cast his father's vote was not in accordance with the provisions of section 35. This infraction does not amount to such a gross irregularity as to render the exercise a non act.

[9] Taking into account the number of voters received by each candidate, which I set out hereunder, even if the vote cast by Mr Steffen's son is declared spoilt and deducted from or not credited to any of the candidates, the results of the poll would remain unchanged. In the circumstances I declare the vote by Mr Hans Steffen senior cast on his behalf by his son spoiled.

[10] The court declines to declare the primary elections held under the Mndobandoba Umphakatsi under Nkilonko Inkhundla irregular or illegal.

[11] The first respondent , being the Chairman of the Elections and Boundaries Commission is not without blame in this matter, especially in

the manner his presiding officer dealt with Mr Hans Steffen's vote. For this reason I do not think the first Respondent is entitled to the costs of this application. Save for the second Respondent, the rest of the respondents did not oppose this application and that being the case they have incurred no costs and no order for costs is awarded in their favour. The second Respondent has successfully opposed this application and her costs are to be borne by the Applicants jointly and severally each paying, the other to be absolved.

MAMBA J