

IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO. 3389/08

In the matter between:

PHUMLANI DLAMINI	1st APPLICANT
PHINEAS SHONGWE	2nd APPLICANT
JABULANI DLAMINI	3RD APPLICANT
VIVIAN DLAMINI	4th APPLICANT
SIFISO KUNENE	5th APPLICANT
NYOSANA DLAMINI	6th APPLICANT

**AND
THE ELECTIONS & BOUNDARIES
COMMISSION**

PERCY MAZIBUKO	1st RESPONDENT
ELIAS SHABANGU	2nd RESPONDENT
WANDILE MNISI	3rd RESPONDENT
JABULANI DVUBA	4th RESPONDENT
	5th RESPONDENT

CORAM: MAMBA J

FOR APPLICANTS: MR TR MASEKO

FOR 1st RESPONDENT: MRS DLAMINI

FOR 2nd RESPONDENT: MR N. MABUZA

JUDGEMENT

30/9/08

[1] The first three Applicants and the 2 Respondent stood as candidates in the Parliamentary elections at the Ezulwini Inkhundla held on the 23rd and 24th August this year. At the end of the polls, the 2nd Respondent was declared the eventual winner.

[2] The third Respondent, fourth and fifth Applicants contested the election for Indvuna Yenkhundla at the same centre. The 3rd Respondent won the contest.

[3] On the 2nd September 2008, the Applicants filed this application, accompanied by a certificate of urgency and they sought an order calling upon the Elections and Boundaries Commission, the first Respondent to show cause, if any, why:

"2.1 It must not be ordered to extend the election period for the Ezulwini Chiefdom conducted at the Roman Catholic School on 23 & 24 August 2008 on the ground that eligible voters and the Applicants were unlawfully denied their fundamental right to vote and to be voted for in terms of section 84(1) and 85(1) [of] the Constitution of Swaziland Act 001 of 2005;

2.2 Declaring the election of the 2nd Respondent as a member of parliament under the Ezulwini Chiefdom to be null and void and of no force or effect in law on the ground that he unlawfully canvassed for votes contrary to the provisions of section 87(5) of the Constitution."

[4] I note from the outset that despite the wording of prayer 2.1 quoted above, the Applicants do not contend that they were not allowed to vote. They did vote but contend that many potential voters, were turned away by the first Respondent and were denied their rights to vote. The Applicants argue that, by extension, this denial of the right denied them the applicants, the right to be voted for (as candidates). I shall examine this contention presently.

[5] The allegations in support of prayer 2.2 is to be found in the first Applicant's founding affidavit where he makes the point that:

"12.2 The second Respondent did [unlawfully canvass for votes] by employing a certain Jabulani Dvuba who is an Indvuna of the area. As such the said Jabulani Dvuba unlawfully used his powers as a traditional authority to influence the voters.

- a) The said Jabulani Dvuba was using the pictures of the second Respondent in buses used to transport members of the community to the polling station.
- b) In the buses he was holding up pictures of the second Respondent instructing voters that this was the person who they were for.
- c) We verily believe that it was due to this unlawful influence in the voters that the second Respondent subsequently won the elections."

[6] The first Applicant has attached a list of 61 names of people whom he refers to as "witnesses who were turned back." I understand this to be a list of the registered voters who were allegedly denied the right to vote on the 24th August, 2008. The other Applicants, in a joint affidavit, all "confirm that eligible voters were turned away by the first Respondent, consequent to which we have been prejudiced. [AND] not only have we been prejudiced, the voters have been unlawfully and unjustly deprived of their fundamental right to vote for representatives of their free choice."

[7] The 2nd Respondent denies that Jabulani Dvuba was hired by him as his polling agent. He is supported by the said Dvuba in this regard. Dvuba takes the issue further by denying that he ever campaigned for and or on behalf of the 2nd Respondent. He denies further that he is an Indvuna of the area in question or any other area for that matter.

[8] The first respondent admits that when polling was stopped at 5 p.m. on

the 23rd August, 2008 there were registered voters waiting to cast their votes and these were told to return the following day. Of those who came to vote the next day, there were no people who arrived at the polling station after 11.30 a.m. and when it was clear that no other voters were coming to the polling station to vote, the presiding officer, with the concurrence of all the stakeholders there present decided to declare the voting closed and the counting of the votes began.

[9] The above then is the summary of the case before me.

[10] There are at least two contentious points in this application and these are

(a) whether or not Jabulani Dvuba campaigned for or acted as the election agent for the 2nd Respondent and

(b) whether or not there were voters waiting to cast their votes when the polling process was declared closed on the 24th August 2008.

These two issues may appear to be disputes of fact but I think, in the circumstances of this case, they are not. And if they are disputes of fact, they have to be decided in favour of the respondents for the following reasons:

(i) it is only the 1st Applicant who says Jabulani Dvuba did what I have set out above. The 1st Applicant has provided no evidence whatsoever in support of his allegations against Dvuba. His co-applicants have not supported him in this regard either. Dvuba has denied the allegations and has even stated who the Indvuna of the area is. In his replying affidavit, the 1st Applicant has blandly or glibly conceded that Dvuba is not an Indvuna, but argues that he is a person in authority in the area and "he used his influence to obtain votes for the [2nd] respondent as alleged." One would have expected that if Dvuba had openly done what he is alleged to have done, people in the area, e.g. some bus commuters would have supported the first Applicant on this. This allegation by the first Applicant is without foundation at all. It is therefore not a genuine, real or substantive dispute of fact. It is

a bare allegation only.

The same is true of the alleged many voters who were turned away and denied the right to vote. Not a single voter has come forward to confirm this. Further, it is inexplicable and therefore highly improbable that the presiding officer would have closed the elections around midday on the 24th August, whilst there were voters still waiting to cast their votes.

[11] If, however, I am wrong in my analysis or assessment of the above two issues, and that these are genuine disputes of fact, I would still dismiss the application on that ground that these are disputes of fact that are incapable of resolution on the papers. I return to the alleged denial of the right to vote.

[12] The right to vote is the right of the voter. It is not transferable. It is not a right of the candidate standing to be voted for. The candidate or person standing for election has no right to demand that a voter must cast his vote for him; or vote at all. The registered (potential) voter has an absolute right to cast his vote for a candidate of his choice or to abstain from voting. The candidate is, in a way at the mercy of the voter from whose generosity or benevolence he benefits if voted for. Whilst the candidate may understandably feel aggrieved by some voters not being allowed to vote, his legal interest in their situation is such that it is secondary, remote and not strong enough so as to cloth him with the locus standi to vindicate and or enforce it before a court. It is the right-holders, in my judgement, that have this requisite standing to vindicate or enforce this right. The benefit that a candidate receives from the voter's right is only contingent; contingent on the voter voting for that candidate. It is more of a hope than a right. It is an expectation that is uncertain. That is how remote the Applicants' interests are in these alleged uncast votes. In casu, none of the voters who were allegedly turned away from the polling station have moved or supported this application. The Applicants have no locus standi to move

this application to assert this right.

[13] The application was accordingly dismissed with costs.

MAMBA J