

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 3741/08

In the matter between:

MLAMULI DLAMINI

1ST RESPONDENT

TEDDY MAVUSO

2ND APPLICANT

and

BHEKI MKHONTA

1ST RESPONDENT

EBC

2ND RESPONDENT

ATTORNEY GENERAL

3RD RESPONDENT

CORAM: Q.M. MABUZA -J

FOR THE RESPONDENTS: MR. S.V. MDLADLA

FOR THE RESPONDENTS: MR. T. MLANGENI

MR. T. DLAMINI

RULING 24/10/08

[1] This application was brought by way of urgency for an order to disqualify the 1st Respondent (Bheki Mkhonta) as a candidate in the secondary elections for member of

Parliament which were held at Mtsambama Inkhundla on the 19/9/08 and to declare the 1st Applicant (Mlamuli Dlamini) the winner. Alternatively for this court to declare the results of the said elections set aside or nullified and to direct a re-election; costs against whoever opposes the application and further and or alternative relief.

[2] The 1st Respondent won the secondary elections. He had 1,246 votes. The 1st Applicant lost. He had 1,237 votes. He was runner up to the 1st Respondent. Should the court disqualify the 1st Respondent, the law provides that the 1st Applicant automatically becomes the winner.

[3] The complaint by the 1st Applicant is that the 1st Respondent perpetrated acts which are in violation of the concept of free and fair elections and which are in direct breach of Part II of the Elections Order 1992. He did this by giving out bread, money footballs and T-shirts to would be voters in breach of section 63 (1) of the order. Hereunder are the incidents complained of:

[4] a) Allegation

On the 8th September 2008 at Bhangonoma during a campaign he is alleged to have come with a van full of bread which he distributed to would be voters who were around 50.

b) Response

To this allegation the 1st Respondent has responded that as marketing manager for Swaziland United Bakeries he always carries bread for promotion purposes. On that day he had 24 loaves which were less usual. This information is common knowledge in his community. (paragraph 9 of his further affidavit). At paragraph 8 of the opposing affidavit he states that the campaign started late and lasted for a long time and the people got hungry. One of the candidates asked him for bread for the people. He gave it. He denies that this was treating or that it was offered to buy votes.

[5] a) Allegation

The campaign thereafter and on the same date proceeded to Ka Zenzile Community. It is alleged that before the 1st Applicant addressed the electorate, one Bholojane Simelane who is a traditional leader said that before addressing them the 1st Applicant should commit to giving them money as the 1st Respondent had done earlier. After his address, there was a debate among the people as to how much they would each receive from the money that the 1st Respondent had given

them. The 1st Applicant further states that it was rumoured that the 1st Respondent had given the community a cheque towards the purchase of a farm for the community. There were 50 would be voters.

b) Response

The 1st Respondent denies the allegations herein (see paragraph 11 of opposing affidavit).

[7] a) Allegation

On the 10th September 2008 the campaign went to Ebenezer where the 1st Respondent is alleged to have distributed loaves of bread. He was confronted by the 1st Applicant but responded that he was entitled to do that since the place was his home area and he would not be told what to do or what not to do.

The would be voters were in excess of 100.

b) Response

The 1st Respondent denies these allegations. His response was that some people went to his car where his children were and asked for bread. They were given by the children without his knowledge

and consent.

[8] The story of the 1st Respondents alleged malpractice is taken up and narrated by Khayeni Khumalo, Philile Mamba, Thulisile Kunene and Thembi Dlamini.

[9] a) Allegation

Khayeni Khumalo has stated that on the 17th September 2008 she was at e Kwendzeni Royal Kraal where there was a meeting of the community. The 1st Respondent donated E500.00 in cash and three soccer balls. These were given to Sam Dlamini an Indvuna of the area.

b) Response

The 1st Respondent denies that he donated E500.00 and soccer balls to obtain any favours from the voters. His response is:

"I was invited by the Council as I was told that there was a Sibhimbi, when I arrived, I was told that they were requesting for contributions. There was never any mention of any votes. To this I responded by pledging an amount of E550.00. The 1st Applicant on the other hand, donated 4 bags of cement. He as well, was giving in response to the request for contributions. He never mentioned any votes nor did the inner Council mention votes. I am surprised therefore by the 1st Applicant who

now seeks to use this as a way of tarnishing my image and bringing this spurious application against me.

With regards to the soccer balls, this has also been placed totally out of context. For the record, I have been sponsoring the league for the past 4 years. These balls were due to the league. I have been giving kits and balls since 2003".

[10] In his reply Khayeni Khumalo in responding to the 1st Respondent sets out a long story that in itself is a package full of disputes. There is no need for me to set out its contents.

[11] a) Allegation

Philile Mamba has stated that on the 15th September 2008 she was given E500.00 cash and 19 T/shirts by the 1st Respondent for a support group known as Siyayikhatsalela Imphilo Yetfu which is based in the area. She is its secretary. These gifts were for votes.

b) Response

The 1st Respondent denies these allegations. This is his response:

"I deny that the contents herein are both true and correct. I further wish to indicate to the above Honourable Court that the said Philile Mamba does not have any idea as to what transpired herein. This is

obvious from the contents of her affidavit. For the record. I never gave money to the said group, I was requested to purchase roof tiles by them long before the elections and I gave them money to do so. The facts in the affidavit are a distortion of the true facts. Same are denied and the deponent is put to strict proof therein".

[12] a) Allegation

Thembi Dlamini has stated that on the 17th September 2008 she attended a campaign meeting at 'e Dladleni' for orphaned children. At this meeting the 1st Respondent donated E500.00 in cash in return for votes.

b) Response

The 1st Respondent denies these allegations. His response is:

"Contents herein are denied. I never paid any money for votes. I was invited to this orphaned children's kitchen, this is one of the numerous projects I am involved in, in the area. To even suggest that this was to buy any votes would be an insult to these orphaned children, and the people assisting them".

[13] a) Allegation

Thulisile Kunene states that on the 20/8/08 the 1st Respondent arrived at their support group at Emweni to campaign. He gave them E500.00 and asked for

support in the elections. The money was distributed between themselves and she received E30.00.

b) Response

"I deny that I paid for any support in the elections. What I know is that in this area there is another kitchen for orphaned children which I support on a frequent basis. I have no recollection of ever giving money, however, if I did, it was not for any votes. What is common though is that the 1st Applicant seems to have cited all the places I have connections with and which I have been supporting for a while".

[14] a) Allegation

Enock Simelane states that on the 8th September he attended a meeting for the campaigners at ka Zenzele community. The 1st Respondent produced E500.00 cash and gave it to him. He later returned this money to the 1st Respondent.

He further states that on the 18th September the 1st Respondent returned and bought traditional brew for

E70.00 for the people. Those who did not drink were given bread. The 1st Respondent later produced E200.00 and it was shared among the people.

b) Response

The 1st Respondent denies these allegations.

"The contents therein are denied. I never gave Enock Simelane money, however, of note is the fact that Enock Simelane makes no mention of me asking for any votes from anyone. These contents assuming they were correct, do not even suggest any impropriety on my part. I need mention though that when we arrived in this area to campaign, the people demanded that they be bought food as they had been waiting. I genuinely thought that their complaint was genuine. I considered buying them something to eat and when I realised that there were differences concerning what they were to eat, I retracted and turned down their request."

[15] I have set out the above in order to highlight the litany of disputes of fact. Throughout his replying affidavit the 1st Applicant re-inforces the disputes of fact instead of trying to cure this defect. The confirmatory affidavits do nothing in my view to control the damage either. The defection of Philile Mamba from the 1st Applicant's camp to the 1st Respondent's camp in itself raises more questions than answers.

[16] I agree with Mr. Mdladla that there are too many disputes of fact which ought to have been foreseen. Mr. Mlangeni suggests that these were not foreseen as they were a ***fait accompli***. I do not for a moment seriously believe that he expected the 1st Respondent to admit any

wrong doing.

[17] On the question of law, the Elections Order 1992 spells out clearly the offences and their penalties. I agree with Masuku J that a criminal conviction is a sine qua non for an application to setting aside an election, (see Jabulani Khumalo v Titus Thwala and two others case 2865/2003). In fact I align myself to the whole judgement and I believe that this case is on all fours with the said judgment. In which case I shall not go over the same ground. This court is not a criminal court and is therefore not competent to try the infractions complained of by the 1st Applicant.

[18] Council for the 1st Applicant was heard to lament that the police would not investigate nor would a prosecution be held but there was no proof brought to this court by the Applicant that he has even laid criminal charges. Perhaps it is because he realises that the required standard of proof beyond a reasonable doubt in a criminal court would be too high a hurdle to overcome. Unfortunately that is the law and this court cannot ignore it.

[19] In the circumstances the application is dismissed with costs.

Q.M. MABUZA-J