

HIGH COURT OF SWAZILAND

Held at Mbabane

**Mpumelelo Andrew Ngwenya And
five others**
Applicants

vs

Henry Dlamini and 2 Others
Respondents

Civil Case No.376j/200|^

Coram
For the Applicants
For the 1st Respondent
For 2nd and 3rd Respondents

MAPHALALA PJ
MR. M. MAGAGULA
MR. MABUZA
MR. DLAMINI

JUDGMENT

10th July 2009

[1] October 2008 this court issued a ruling dismissing the application on points of law. I stated therein that a reasoned judgment will be issued in due course. Following is the said judgement.

[2] The six applicants had filed an urgent application before this court for the following relief:

"1. Declaring that the elections held on the 19th of September 2008, for the Ntfontjeni Inkhundla be declared null and void.

2. That the Second Respondent be ordered to recount the ballot papers".

[3] The first Respondent one Mphumelelo Andrew Ngwenya has filed a Founding Affidavit outlining the sequence of events in this matter. The other Applicants filed confirmatory affidavits to the Founding Affidavit of Mr. Ngwenya.

[4] The first Respondent has filed a notice to raise points *in limine* as follows:

"NON-JOINDER

1.1 The Applicants have failed to cite Bheki Mkhonta, who was declared the winner in the Indvuna Yenkhundla category yet he has a vested substantial interest since if the election is nullified, he also will be affected.

1.2 Applicants have failed to cite the Attorney General yet he is an interested party as representative of government and its departments and bodies under governmental supervision.

Application is not urgent. If it is said to be urgent, the urgency has been created by the Applicants themselves. The election complained of was undertaken on the 19th day of September, 2008 and the Applicants have waited for weeks before coming to court.

2.1 The Applicants have failed to meet the requirements of Rule 6 (25) (b) of the above Honourable Court Rules.

JURISDICTION

No allegation of jurisdiction has been made by the Applicant which would show that the Court has jurisdiction in the matter.

LOCUS STANDI IN JUDICIO

The Applicants have failed to prove they have the requisite *locus standi*.

4.1 The Applicants have not proven that they are eligible voters. They have failed to annex copies of their voter registration cards. Proof that they are registered voters, hence eligible candidates would have founded their *locus standi*.

4.1.1 It is trite that to procure relief in the Courts, an Applicant must show he has *locus standi*. This is exacerbated by the fact that the relief sought is a declaratory order and the Applicants have failed to prove their interest in the order sought.

4.2 The Applicants call themselves candidates yet section 49 of the Elections Order states that after counting the votes the returning officer declares the candidate, who in this case is the 1st Respondent. The Applicants cannot be candidates.

HEARSAY EVIDENCE

The Applicant in the founding affidavit at paragraph 16 informs the Court that "they" were informed that there was an envelope containing soldiers' votes. The Court is not informed who said this, nor do we have their confirmatory affidavits.

5.1.1 Further at paragraph 22 of the founding affidavit there is a serious but unsubstantiated allegation of bribery levelled against 1st Respondent.

OBJECTIONABLE MATTER

The founding affidavit contains objectionable matter which is argumentative and irrelevant. The first Applicant at paragraphs 14 to and including 20 draws inferences and alleges his own opinion and conjecture.

The Applicants have failed to pray to the Court for abridgement of the Rules of Court in relation to time limits, service and institution of proceedings before the court".

[5] In arguments, before Counsel for the 1st Respondent could finish his arguments in support of the above points *in limine* the matter was postponed to another date for continuation of arguments. On the return date Counsel for the Applicant before commencing his arguments applied to amend the prayers in the Notice of Motion to the effect that "*only the election of the member of Parliament be declared null and void*" to the entire Entjonjeni Inkhundla.

[6] I pointed out to Counsel for the Applicant that this was a highly unorthodox approach in view of the fact that Counsel for the 1st Respondent had finished his arguments earlier on. However, Counsel for the Applicant cited a South African case of *Ne Jayiya vs Member of the Executive Council for Welfare, Eastern Cape et al Case No. 264/2002* in support of this approach.

[7] I must further put it on record that Counsel for the Swaziland Government also advanced very interesting arguments supporting what has been said by Mr. Mabuza for the 1st Respondent. I shall revert back to some of his arguments later on as I address the issues raised in the Notice to Raise Points *in limine* if I find that Applicant is correct in his application for amendment.

[8] I must also put it on record that Counsel for the Applicant conceded that the points *in limine* are unassailable but argued that for the interest of justice the court ought to address the issues on the merits and disregard the weaknesses of the Applicant's case shown by the preliminary objections. In my respectful view it would be pointless for any party to raise preliminary objections if their objections would be dismissed on these grounds.

[9] The only point for decision by this court for whatever it is worth in view of the Applicant's concession is whether the amendment to the notice of motion should be granted. Even if this amendment is granted in view of the concession made by the Applicant the application ought to be dismissed forthwith on these grounds; The amendment does not change anything it is merely an intellectual exercise at this stage of the proceedings.

[10] I find that the legal authority in *Ne Jayiya (supra)* does not apply in the present case. The Respondents have argued their points *in limine* to the end and then the Applicant replied to these arguments. The

The granting of such an amendment at this stage will prejudice the Respondents.

In the result, the points *in limine* by the Respondents are upheld with costs.

S.B MAPHALALA

PRINCIPAL JUDGE