



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1929/2012

In the matter between:

MANDLA MDLULI	1st	Applicant
MANQOBA NGWENYA	2nd	Applicant

And

SAMKELISO NDLANGAMANDLA	1st	Respondent
MXOLISI GAMEDZE N. O.	2nd	Respondent
THE PRINCIPAL SECRETARY, MINISTRY OF HOUSING & URBAN DEVELOPMENT	3rd	Respondent
THE TOWN CLERK, NHLANGANO COUNCIL	4th	Respondent
THE ATTORNEY GENERAL	5th	Respondent

Neutral citation: *Mandla Mdluli & Another v Samkeliso Ndlangamandla & 4 others*
(1929/2012) [2013] SZHC 117 (11th June 2013)

Coram: M. Dlamini J.

Heard: 27th November 2012

Delivered: 11th June 2013

–urgent application – duty of court to eschew applications of this nature to ascertain whether urgency is not self-created or that the averments in support of urgency are not mere lip service.

Summary: The applicant under a certificate of urgency moved for orders disqualifying 1st respondent as a winner of Ward 3; interdicting 1st respondent from being sworn in as Councilor and directing 4th respondent to hold re-election of Ward 3 Councilor. The reason advanced is that 1st respondent did not qualify to stand for the said elections.

[1] When the matter was argued on the 27th November 2012, I dismissed the application and stated that reasons shall follow in a written judgment.

[2] It is apposite to refer to applicants' grounds for the orders prayed for *ipsissima verba* which are as follows:

“10. *On the 4th November 2012, elections were conducted under the auspices of the 3rd respondent at Nhlanguano where the 1st respondent was the eventual winner.*

11. *My co-applicant and I were also contestants in the elections under Ward 3 of the 4th respondent where the 2nd respondent was the presiding officer.*

12. *Prior to the elections, during the nominations, a complaint was raised to the effect that the 1st respondent was neither residing nor carrying on business within the boundaries of Nhlanguano town and as such he did not qualify to vote or be voted for.*

13. *The 1st respondent is alleged to have taken the 2nd respondent or some other official of the 4th respondent to a Simelane residence*

within the boundaries of the town allegedly to show them his flat when in fact he was no longer staying there at the time he registered for the elections.

14. *My co-applicant, apart from residing in town, also carries on business at the Nhlangano bus rank where he rents a stall and I have a home within the boundaries of the town.*
15. *After the visit to the Simelene residence, nothing was communicated to us and the 1st respondent was allowed to stand for the elections and won.*
16. *Residents and business people under Ward 3 then protested alleging that they could not be represented by a person who was not residing nor carrying on business within town as their interests would not be adequately attended to.*
17. *The owner of the residence where 1st respondent alleged he was residing disowned him and stated that he left her residence sometime in December 2011 to reside at his homestead situated at Maseyisini area.*
18. *I am reliably informed that after the owner of the residence disowned him, the 1st respondent has been trying other means to justify his standing for the elections like being co-opted as a director of Calvary Victory Ministries which operates within the boundaries of the town.*
19. *It is my humbly submission that the 1st respondent does not qualify to stand for elections within the town as he ceased to reside within its boundaries and he does not have any business in it.”*

[3] *Au contraire*, the respondents state:

“5.1 *The contents herein are vehemently denied. The Applicants are put to strict proof thereof. I submit that in terms of the Act and Regulations, a voter’s roll was published in newspapers circulating within Swaziland and it was posted outside the offices of the elective authority calling upon any person, including the Applicants who had an objection to lodge same in writing with the Town Clerk within 14 days after the date of publication of the notice in the newspaper.*

5.2 *The Applicants have failed to lodge a written claim or objection in accordance with the prescribed form and have failed to annex a copy of the written objection if any in accordance with the rules.*

5.3 *I further submit that in terms of the Regulations I was nominated by 10 voters of Ward 3 and such nomination was published after the returning officer and proven to his satisfaction that I am eligible to stand for elections.*

[4] From the above contention by the parties before court, the first question that comes to mind as also canvassed by respondents is whether the matter is urgent.

[5] The applicants brought the present application in terms of Rule 6 (25) (a)

“6. (25) (a) *In urgent applications, the court or judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to the court or judge, as the case may be, seems fit.*”

[6] Rule 25 (b) set out the prerequisites necessary for an application of the nature *in casu* and it is as follows:

“(b) In every affidavit or petition filed in support of an application under paragraph (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.”

[7] **Coetzee J. in Western Bank Limited v Packery 1977 (3) S.A. 137** was faced with a similar application under Rule 6 revealed at page 141:

“The Rules of Court are delegated legislation, have statutory force and are binding on the Court.”

[8] Clearly once the applicant has “*set forth explicitly the circumstances which he avers render the matter urgent*” the court is duty bound to examine those circumstances with a view to ascertain their urgency.

[9] In discharge of the duty to “*set forth explicitly the circumstances*” which “*renders the matter urgent*” **Coetzee J.** wisely admonishes in **Luna Meubel Bervaardigers v Makin and Another 1977 (4) S.A. 135** at 137.

“Practitioners should carefully analyse the facts of each case to determine, for purposes of setting the case down for hearing, whether a greater or less degree of relaxation of the Rules and of the ordinary practice of the court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirement ...will not do and an applicant must make out a case from the founding affidavit to justify the particular extent to the departure from the norm.”

[10] As correctly observed by the learned judge **Coetzee J. supra** at 136:

“urgency involves mainly the abridgment of times prescribed by the rules and secondary, the departure from established filing and sitting times of the court.”

[11] The basis for practitioners to examine and set out the circumstances of a case said to be urgent by weighing *“the relaxation against the exigency of the case demands”* as pointed out by **Coetzee J. supra** emanates from the nature of motion proceeding as highlighted by **Murray A. J. P. in Room Hire Co. (Pty) Ltd Jeep Street Mansions (Pty) Ltd 1949 (3) S. A. 1155 T.** that motion proceedings and this applies with greater force to urgent applications:

“...deprive his opponent of a number of procedural advantages instanced in the judgment referred to viz. prematurely the right to plead without disclosing his evidence, the right to make tactical denials in order to force his opponent into the witness box, the right to raise alternative defences of possible inconsistency.”

[12] I now embark on enquiring whether from the founding affidavit of applicants the requisites of urgency as propounded by **Coetzee J. in Luna’s** case *supra* have been satisfied.

[13] From paragraph 10 of applicants’ founding affidavit reflects that elections where 1st respondent was declared a winner were held on the 4th November 2012. The applicants lodged their applications on the 20th November 2012 as borne by the Registrar of this Court’s stamp. This delay on its own vitiates the urgency.

[14] However, what adds weight on the scales herein is as reflected under paragraphs 12 and for purposes of clarity I will cite it again:

“12. *Prior to the elections, during the nominations, a complaint was raised to the effect that the 1st respondent was neither residing nor carrying on business within the boundaries of Nhlanguano town and as such he did not qualify to vote or be voted for.*”(my emphasis)

[15] From their own showing, the applicants were aware of the character of the 1st respondent which was the subject of complaint on 20th November 2012 before court well before election period and that is during nomination stage. They allowed for the nomination process to complete without any challenge. For a second, even if one were to accept that they lodged a complaint, they inform the court in paragraph 15 that “*after the visit to the Simelane residence, nothing was communicated to us and the 1st respondent was allowed to stand for the elections....*” One wonders why then did applicants stand by, allowed the 4th respondent to include the 1st respondent on the list of candidates when they believed he did not qualify. In other words, what prevented them at that stage to come to court? This is more so because the dates for nomination and registering to be voted is not a matter of a day or two. They are quite far apart.

[16] Applicant s’ application is further confounded by their admitted averments as shown in the replying affidavit that 4th respondent published names of candidates for election after the nominations and invited anyone with an objection to file the same in a prescribed form. Applicants admit that they did not heed to the invitation extended to them by 4th respondent. They now demand that 4th respondent re-conducts the election for their *ex post facto* of standing by and allowing 1st respondent to contest the elections.

The court cannot, with due respect, come to their rescue for their own irresponsible actions.

[17] **Melamet J. in De Wet and Others v Western Bank Ltd 1977 (4) S. A. 770** adjudicating upon a default judgment taken as a result of appellants' failure to communicate with their attorney had this to say:

“Their default to appear is due to a failure on their part. The court should not come to the assistance of the appellants. They are the authors of their own problems and it would be inequitable to visit the other party to the action with the prejudice and inconvenience flowing from such conduct.”
(my emphasis)

[18] The above *dictum* should apply with equal force *in casu*.

[19] The applicants in support of urgency state:

“20. The matter is urgent by virtue of the fact that the people that were elected are to be taken for and induction seminar and then be sworn in as councilor any time now as the elections process has been finalized.

21. Consequently if the matter were to take the normal course, my co-applicant, the interested people and I stand to suffer irreparable harm as the 1st respondent would have been sworn in as a councilor and he would be carrying on his duties which would render the application academic. It is in this regard that I humbly submit that I cannot be afforded redress at a hearing in due course.”

[20] For the reasons stated above, the applicants' averments *supra* on urgency are with due respect to applicants in the wise words of **Coetzee J.** in **Luna op. cit.** "*mere lip service*" or as respondents' counsel eloquently put it "*self created*" urgency. The application stands to fall.

[21] Before I enter the necessary orders, this court notes and must comment *en passant* that although applicants in their founding affidavit depose that they lodged a complaint with 4th respondent although *pro non scripto* in their reply, they state that they did not file the complaint but other people did. This throws their application in disarray as it becomes difficult to understand how they have now come to court to demand that 4th respondent conducts elections afresh when they totally folded their arms up until the 1st respondent was declared an overall winner. In other words no complaint was ever lodged with 4th respondent who is now compelled to expend rate payers' money to conduct elections. Surely, if the complaint were genuine, applicants who were contenders would have taken up the matter themselves or ensure that it is prosecuted accordingly before 4th respondent. The court is informed on reply that other people reported the complaint. This cannot be accepted especially in the face of a denial by respondent of this fact. Applicants' papers are shaky and therefore unreliable. A litigant must stand or fall by his papers as was propounded in **Short v Naisty 1955 (3) S.A. 572** at 574.

[22] In the totality of the above I enter the following orders:

1. Applicants' application is dismissed;

2. Applicants are ordered to pay 1st and 4th respondents costs of suit.

M. DLAMINI

JUDGE

For Applicants : Mr. N. Manana
For 1st Respondent : Mr. N. T. Dlamini
For 4th Respondent : Mr. B. Ngcamphalala