IN THE HIGH

COURT OF ESWATINI

Case No. 1448/2018

In the matter between:

JAN SITHOLE	**Applicant**
And	
CHAIRMAN OF THE ELECTIONS AND	
BOUNDARIES COMMISSION	**1st Respondent**
STEVE HORTON	**2nd Respondent**
DOCTOR SIMELANE	**3rd Respondent**
DUMSANI DLAMINI	**4th Respondent**
SIZWE SIHLONGONYANE	**5th Respondent**
MACFORD SIBANDZE	**6th Respondent**
ATTORNEY GENERAL	**7th Respondent**

Neutral citation: *Jan Sithole v Chairman of the Elections and Boundaries Commission & 6 Others (1448/2018) [2018] SZHC 259 (16 November 2018)*

Coram : **T.L. Dlamini J**

For Applicant : **Mr T.R. Maseko**

For 1st and 7th Respondents : **Mr K. Nxumalo**

For 2nd to 6th Respondents : **No appearance**

Heard : **17th September 2018**

Delivered : **16th November 2018**

Civil procedure – Interim interdict – Requirements thereof considered.

Summary

Applicant is a candidate for election to be a Member of Parliament representing the Manzini North Inkhundla (Constituency) – He is one of those candidates who won the primary elections in their respective chiefdoms under Manzini North Inkhundla – He seeks before this court an interim order staying the secondary elections for Manzini North Inkhundla pending the determination and finalization of an application that was filed against the 6th respondent. The 6th respondent is also a candidate for election from Makholweni chiefdom which is under Manzini North Inkhundla. It is alleged in the pending application that the 6th respondent was registered as a voter under the Manzini North Inkhundla unlawfully and contrary to the provisions of the Voters Registration Act of 2013.

Held: *That the application fails to meet other requisites for an interim interdict and therefore warrants a dismissal.*

Held further: *That an order staying the election will bring about a state of affairs in which the election will be held outside the period prescribed by the Constitution, 2005. The application is accordingly dismissed with costs.*

***EX TEMPORE* JUDGMENT**

The parties

[1] The applicant is a candidate for election to be a Member of Parliament representing the Manzini North *Inkhundla* (Constituency). The Manzini North *Inkhundla* is made up of, amongst others, the Manzini Central Chiefdom and the Makholweni Chiefdom.

[2] The applicant won the primary elections at Manzini Central Chiefdom and is now a candidate for election in the secondary elections after which he would become, if successful, the Member of Parliament representing Manzini North *Inkhundla*.

[3] The 6th respondent, Macford Sibandze (Mr Sibandze), is also a candidate for election to become a Member of Parliament representing the Manzini North *Inkhundla*. Mr Sibandze was successful in the primary elections under Makholweni Chiefdom and his candidacy continues to the secondary election stage.

Background

[4] On the 30th August 2018 two candidates who lost the primary election held at Makholweni Chiefdom filed an application under High Court Case No.1387/18. They seek an order setting aside the nomination and subsequent

election of the 6th respondent. They allege that his registration as a voter under Manzini North *Inkhundla* is irregular, unlawful and contrary to the Voters Registration Act of 2013. This matter (Case No.1387/18) has not yet been determined and is still pending before the High Court. From the papers filed before this court and the submissions made, an application for recusal of the Judge presiding over the matter was made and scheduled to be heard on the 18 August 2018.

The application

[5] The state of affairs set out in the above paragraph then prompted the applicant to file under a certificate of urgency this application. He seeks an order staying the special voting and secondary election scheduled for 18 and 21 September 2018 respectively in respect of Manzini North *Inkhundla* pending determination and finalization of Case No.1387/18

[6] The applicant asserts that whilst the eligibility of the 6th respondent as a candidate is challenged, the election under Manzini North *Inkhundla* cannot be free, fair and democratic because there is uncertainty about the 6th respondent's candidacy. For this reason, he filed this application and seeks an interim order interdicting the special voting and the secondary election in respect of Manzini North *Inkhundla* pending the determination of Case No. 1387/18.

The opposition

[7] The application is vigorously opposed by the 1st respondent, *viz.*, the Elections and Boundaries Commission (the Commission). The 2nd to 6th respondents did not file any papers in opposition notwithstanding that the application was served upon them as required in terms of the Rules of this Court. Returns of service were attached to the application.

[8] Points *in limine* were raised by the 1st respondent and some are entwined with the merits of the application. The 1st respondent contends that the application does not meet the threshold of urgency as prescribed by the Rules of this Court. It also contends that the application is defective in that it seeks a prayer, *viz.*; prayer 2.1, which was dismissed by this court, per **Fakudze J**, on 10th September 2018 under Case No.1387/18. The 1st respondent further contended that the interim order being sought is meant to evade compliance with the provisions of Rule 6 because the application is premised on Case No.1387/18 in which the applicant is not a party and it does not involve him. For this reason, the 1st respondent submitted that the applicant is not entitled to the relief he seeks because there is no status *quo* to be preserved with regard to him as Case No. 1387/18 does not involve him.

[9] It was a further contention of the 1st respondent that the issues in Case No.1387/18 arose because the applicants in that case failed to make an

objection against the inclusion of the 6th respondent's name in the register of voters for Manzini North *Inkhundla* as required in terms of **section 18 of the Voters Registration Act of 2013**, read with General Notice No.26 of 2018 which prescribed the period for inspection of the voters register for purposes of filing objections and making corrections where necessary. Section 18 of the Voters Registration Act provides, *inter alia*, as quoted below:

> **"Objections**
>
> **18. (1) A registered voter may at any time object to-**
>
> **(a) the inclusion or retention of any person's name in the register of voters;**
>
> **(b) the restoration or addition of any person's name to the register of voters;**
>
> **(c) the removal of a person's name from the register of voters; or**
>
> **(d) the correctness of any person's registration details in the voters' register.**
>
> **(2) The objection in subsection (1) shall be lodged with the Commission in the approved Form No.6."**

[10] It was further contended that by granting the application, this court would be allowing a state of affairs that would result in the violation of section 136(1) of the Constitution of the Kingdom of Eswatini, 2005 (the Constitution) and section 27(1) of the Elections Act No.6 of 2013 (the Elections Act). Section 136(1) of the Constitution provides as quoted below:

> "**General Elections**
>
> **136 (1) A general election of elected members of the House shall be held at such time within sixty days after every dissolution of Parliament, as the King shall appoint by proclamation published in the Gazette."**

Section 27(1) of the Elections Act re-states the provision of section 136(1) of the Constitution.

[11] The 1st respondent further contended that the application does not meet the requirements for an interim interdict and therefore ought to be dismissed.

[12] I now proceed to deal with the contested issues.

POINTS OF LAW

Urgency

[13] The 1st respondent submitted that the application fails to meet the peremptory requirements of Rule 6(25) regarding urgent matters. Its attorney correctly pointed out that it was held in the cases of **Humphrey H. Henwood v Maloma Colliery and Another (1623/94) SZHC 68 (30 September 1994)** and **Megalith Holdings v R.M.S. Tibiyo (Pty) Ltd and Another, High Court Case No.199/2000 (unreported)**, firstly, that an applicant is required to set forth the circumstances which he avers render the matter urgent. Secondly, he must also set forth the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course.

[14] In paragraphs 10.1 and 11.2 of the founding affidavit the applicant deposed as quoted below:

10.1

"**Urgency**

I humbly state that the matter is urgent for the reason that the special voting is scheduled to take place on Tuesday September 18, 2018.

10.2, 11, 11.1 …

11.2

Quite plainly, the harm that I seek to avert shall have taken place if the matter is heard under the normal course."

[15] It is important to note that Case No.1387/18 on which this application is premised was filed in court on 30 August 2018. This application was filed on 13 September 2018. In my opinion, the applicant has not delayed launching the present application. He believed, according to the depositions that he made and submissions made on his behalf, that Case No.1387/18 would be finalized before the commencement of secondary elections. That belief was not unreasonable in my opinion.

[16] The depositions of the applicant as quoted in paragraph [14] above satisfy the requirements of Rule 6(25) in my view and the point of law on urgency is accordingly dismissed.

Defective application

[17] The 1st respondent also submitted that Prayer 2.1 of the application was dismissed by this court in Case No.1387/18 and for that reason it was argued that this application is defective. Prayer 2.1 seeks an order interdicting the 1st respondent from conducting the special voting scheduled for 18 September

2018 and the secondary elections scheduled for 21 September 2018 in respect of the Manzini North *Inkhundla* pending the final determination of Case No.1387/18.

[18] With due respect to the 1st respondent and its attorney, this submission is incorrect. On the date when this matter was argued, Case No.1387/18 was still pending before **Fakudze J** and no order had been issued on any of the orders that are being sought. An interlocutory application was filed wherein a recusal of **Fakudze J** was sought. The application for recusal was due to be heard on the day following the date of arguments in *casu.* In other words, the recusal application was to be heard on Tuesday 18 September 2018. In my finding, the 1st respondent's submission that Prayer 2.1 under Case No.1387/18 was dismissed has no merit. It is accordingly rejected and dismissed.

[19] I am alive to the finding and guidance of the Supreme Court per its judgment in the case of **Shell Oil Swaziland (Pty) Ltd v Motor World t/a Sir Motors (23/2006) [2006] SZSC 11 (21 June 2006)**. The Supreme Court stated that the courts should be loath to dispose of matters on technicalities but should do so based on the real merits of the case. I am also alive to the fact that electoral disputes are of fundamental importance due to their constitutionally guaranteed right and liberty for citizens to participate in and elect a government of their own choice. On account of this importance, electoral disputes ought to be properly resolved on their real merits than on technical objections. The applicant's attorney implored this court to take

guidance from the judgment of the **Shell Oil Swaziland (Pty) Ltd (supra)** case.

[20] In opposition, amongst the points of law raised, the 1st respondent submitted that the applicant is not a party to Case No.1387/18 and therefore is not a proper person to seek an interim interdict for preservation of the status *quo* pending determination of that case. It was also submitted that if the applicant has an interest in the outcome of Case No.1387/18, he ought to have applied to be joined as a party in terms of Rule 12 of the Rules of this Court.

[21] It was further submitted by the 1st Respondent that the interim interdict sought affects not only the candidates for election to be Members of Parliament but even those to be elected as *Tindvuna teTinkhundla*. For this reason, the 1st respondent submitted that the application should be dismissed for non-joinder of these interested parties.

[22] These points of law do not address the merits of this case. They are merely technical objections. As I have pointed out, the importance placed on the proper resolution of electoral disputes need not be over emphasized. I therefore will proceed to determine the merits than the points of law.

THE MERITS

[23] The applicant seeks an interim relief (interdict) pending the determination and outcome of Case No.1387/18. According to **Iain Currie and John De Waal, "The Bill of Rights Handbook, 6th edition at p.198**, the "*purpose of an interim relief is to preserve the status quo pending the final adjudication of a dispute.*"

[24] This being an application for an interim interdict, it is important that the requisites for the relief be satisfied. An applicant for an interim interdict will succeed if able to satisfy the following requisites:

(i) a prima facie right;

(ii) well-grounded apprehension of irreparable harm;

(iii) balance of convenience that favours granting of the interim relief; and

(iv) lack of other satisfactory remedy. **See: Herbstein and Van Winsen, "The Civil Practice of the High Courts of South Africa", 5th edition, Vol. 2 at p.1456-1457**

[25] In the heads of argument, the applicant begins by quoting **Iain Currie and John De Waal, "The Bill of Rights Handbook" (supra) at page 198**. The text which he quoted is reproduced below:

> **"The purpose of interim relief is to preserve the status quo pending the final adjudication of a dispute. In general, in constitutional litigation, the High Courts apply the common-law criteria pertaining to the granting of interim interdicts (a prima facie right, well-grounded apprehension of irreparable harm, no other satisfactory remedy and that the balance of convenience favours the granting of the interim relief)."**

[26] I must mention that the above quoted text was partially quoted by the applicant and is incomplete. The text sets out a legal position whose qualification was, in my opinion, conveniently left out by the applicant. Below is a full quotation of the text. The part that has been left out is in bold text:

> "The purpose of interim relief is to preserve the status quo pending the final adjudication of a dispute. In general, in constitutional litigation, the High Courts apply the common-law criteria pertaining to the granting of interim interdicts (a prima facie right, well-grounded apprehension of irreparable harm, no other satisfactory remedy and that the balance of convenience favours the granting of the interim relief)**, but they grant temporary restraining orders <u>against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out</u>. Also, in constitutional matters <u>the courts must factor in under the balance of convenience</u>, so called 'separation of powers harm', i.e., the extent to which the restraining order intrudes into the exclusive terrain of another branch of government."** (own emphasis)

[27] The first part of the text which the applicant excluded speaks to the granting of an interim interdict against the exercise of statutory powers. The second part speaks to granting an interim interdict in a constitutional matter.

[28] The 1st respondent is a constitutionally established institution that is independent. It has the exclusive function to manage, conduct and supervise elections in the Kingdom. **See: section 90(1) read with subsection (7) of the Constitution.** In so doing, it exercises a constitutionally derived power. This power is also vested on the 1st respondent in terms of the **Elections and Boundaries Commission Act 3/2013 [section 7(1)] and the Elections Act 6/2013**. The 1st respondent therefore exercises statutory powers. In cases where an interim interdict is sought against the exercise of such power, the

court ought to grant it in exceptional cases and where a strong case has been made, according to the authority cited in paragraph [26] above.

[29] In my view, a strong case has not been made for the interim interdict. The setting aside of an election and conducting a re-election, which is what the applicant asserts to be the harm that is to be avoided, is generally inherent in all elections. The reasons for setting aside an election vary with each case, hence unavoidable in my opinion.

[30] In *casu*, the interim interdict sought will intrude into the 1st respondent's ability to conduct the election within the 60 days period that is stipulated by **section 136(1) of the Constitution**. The section is quoted in paragraph [10] above. In order to avoid cross-referencing, the section is again reproduced below:

> "**General Elections**
>
> **136 (1) A general election of elected members of the House shall be held at such time within sixty days after every dissolution of Parliament, as the King shall appoint by proclamation published in the Gazette."**

[31] Parliament was dissolved with effect from 30 June 2018. **See: Government Gazette Extraordinary, Legal Notice No.120 of 2018**. A proclamation was duly made by the King and was published in the Gazette under **Legal Notice No.93 of 2018**.

[32] Holding general elections is a constitutional requirement. In terms of **section 134(2) of the Constitution**, Parliament stands dissolved five years less two months from the date of the first meeting of the House of Assembly following a general election. In terms of **section 136(1) of the Constitution**, a general election is to be held within 60 days after dissolution of Parliament. There is therefore no hesitation that a general election is a constitutional issue. I accordingly find no justifiable reason why this court should issue the interim interdict as it will intrude into the 1st respondent's exclusive power and constitutional duty to deliver an election within the period stipulated in the Constitution.

[33] The applicant asserted that the election in respect of Manzini North *Inkhundla* cannot be considered as free, fair and democratic if held whilst Case No.1387/18 is still pending in court. The requirement that an election is to be free, fair and democratic is provided for in the Constitution. **See: section 79 read with section 90(7)(a) of the Constitution**. This is the requirement which the applicant asserts to be enforcing by launching these proceedings. There is again no hesitation in my mind that this is a constitutional issue.

[34] In considering the balance of convenience requirement, the court must factor in the separation of powers harm. In other words, the court must consider the extent to which the interim interdict will intrude into the exclusive terrain of the 1st respondent, according to the authority cited in paragraph [26] above.

[35] In *casu*, the interim interdict sought will, without a doubt, intrude into the 1st respondent's exclusive function and ability to conduct the election within the 60 days period that is stipulated by **section 136(1) of the Constitution**. It is accordingly my finding that the balance of convenience is not in favour of the applicant but favours the 1st respondent.

[36] In my view, the application ought to fail.

Uncertainty about 6th respondent's candidacy

[37] The applicant contends that the uncertain status concerning the 6th respondent's candidacy makes the electoral process not to be one that is **free**, **fair** and **democratic**. For definition purposes of the terms "free", "fair" and "democratic election", the applicant used the **SADC Principles and Guidelines Governing Democratic Elections, 2015.** He states in paragraph 5.2.4 of his heads of argument that the Kingdom's Constitution and electoral laws do not define these terms. He accordingly submitted that recourse must be made to other human rights sources, in particular those that the Kingdom of Eswatini is a party to.

[38] I entirely agree with the applicant regarding the use of the SADC Principles and Guidelines Governing Democratic Elections, 2015 (SADC Principles and Guidelines) as a benchmark. The SADC Principles and Guidelines is our best source of the human rights sources because of the country's membership to SADC, and also because the SADC Principles and

Guidelines are informed by and premised on international standards and principles for elections.

[39] The term **"free (elections)"** is defined in the SADC Principles and Guidelines as follows:

> **"means** ***'Fundamental human rights and freedoms are adhered to during electoral processes, including freedom of speech and expression of the electoral stakeholders; and freedom of assembly and association; and that freedom of access to information and right to transmit and receive political messages by citizens is upheld; that the principle of equal and universal adult suffrage are observed, in addition to the voter's right to exercise their franchise in secret and register their complaints without undue restrictions and repercussions'."***

[40] The question to be asked and answered is how the uncertainty concerning the 6th respondent's candidacy undermines the concept of a free election as defined above. I am not able to understand and appreciate how the pending matter against the 6th respondent offends the free election concept. The applicant's attorney did not demonstrate, to my satisfaction, how the concept of free election is undermined by the pending Case No.1387/18

[41] In my view, the rights and freedoms of the electorate are not interfered with but are respected and adhered to. I am also of the opinion that the issues in Case No.1387/18 do not undermine the freedom of speech and expression, the freedom of assembly and association, the freedom to access information and the right to transmit and receive political messages.

[42] I also fail to see how the 6th respondent's candidacy undermines the concept of equal and universal adult suffrage. The voters' right to exercise their vote in secret and register their complaints without undue restrictions is also not undermined by the pending Case No.1387/18. It is accordingly my view that the concept of "free election" is not undermined by the participation of the 6th respondent in the election race whilst Case No.1387/18 is still pending.

[43] The term **"fair (elections)"** is defined in the SADC Principles and Guidelines as follows:

> **"means '*electoral processes that are conducted in conformity with established rules and regulations, managed by an impartial, non-partisan professional and competent Electoral Management Body (EMB); in an atmosphere charecterised by respect for the rule of law; guaranteed rights of protection for citizens through the electoral law and the constitution and reasonable opportunities for voters to transmit and receive voter information; defined by equitable access to financial and material resources for all political parties and independent candidates in accordance with national laws; and where there is no violence, intimidation or discrimination based on race, gender, ethnicity, religious or other considerations specified in these SADC Principles and Guidelines Governing Democratic Elections.'"***

[44] From the above definition, the applicant's attorney placed emphasis on the words ***"electoral processes that are conducted in conformity with established rules and regulations … in an atmosphere charecterised by respect for the rule of law".*** Great emphasis was placed on the words ***"in an atmosphere charecterised by respect for the rule of law".***

[45] The applicant's attorney submitted that an election that is being challenged in court should be held in abeyance until the matter has been finally determined. He appears to have, in my view, paid little attention to the fact that it is not the election that is being challenged under Case No.1387/18 but the candidacy of the 6th respondent. I do not think that justice would be done to the electoral process if it would be stopped because one candidate is allegedly not qualified to contest the election. This is particularly true because a timeline for the general election is stipulated by the Supreme Law of the Kingdom. **See section 136(1) of Constitution.**

[46] The election of a non-qualifying candidate can always be set aside by the court and a by-election be held thereafter. By-elections are not uncommon in elections as they happen time and again. I accordingly find no compelling reason why the secondary election in respect of Manzini North *Inkhundla* should be held in abeyance and made to be held outside the period stipulated by the Constitution simply because one candidate is alleged to be non-qualifying.

[47] The applicant's attorney further submitted that the rule of law is the founding value of how things should be done, including the conduct of general elections. In general terms, rule of law refers to the supremacy of the law and respect for decisions of the courts. It also refers to the absence of any arbitrary power on the part of the government. **See "Black's Law Dictionary", 10th edition, 2014**.

[48] In the Kingdom's Constitution and electoral laws there is no legal provision that requires an election to be held in abeyance where one of the candidate's eligibility is challenged.

[49] The applicant's attorney made reference to two Presidential election results that were challenged in court in Zimbabwe and Kenya in the cases of **Chamisa v Mnangagwa & Others, CCZ 42/18** and **H.E. Raila Amolo Odinga & Another v Independent Electoral Commission & Others, Presidential Petition No.1 of 2017 respectively.** He submitted that the electoral processes were stayed in these two countries pending the decision of their respective courts.

[50] I wish to state however, that in both matters referred to in the above paragraph, it is not the election that was held in abeyance but the inauguration of the candidates who were declared to have been elected by the respective electoral commissions.

[51] In Zimbabwe, **section 94(1)(c) of the Zimbabwe Constitution** stipulates that persons elected as President and Vice President assume office, in the event of a challenge to the validity of their election, within 48 hours ***"after the Constitutional Court has declared them to be the winners"***.

[52] A proper understanding of section 94(1)(c) of the Zimbabwe Constitution requires that the inauguration of the President elect or Vice President elect

must be held in abeyance pending a determination by the Constitutional Court in the event there is a challenge to the validity of their election. These are therefore distinguishable cases. Firstly, it is not the election that was held in abeyance but the inauguration of the elected President. Secondly, the Constitution puts it in clear terms, in the case of Zimbabwe, that once the validity of the election of the President or Vice President is challenged in court, the challenged President or Vice President will only assume office ***within 48 hours after the Constitutional Court has declared them to be winners.*** The Kingdom of Eswatini does not have a similar provision in the Constitution or the electoral laws.

[53] The judgment of the matter of **H.E. Raila Amolo Odinga & Another (supra)** is too bulky, with 178 pages which contain 405 paragraphs. I was, due to time constraint, unable to read it. I am therefore not in a position to comment on the issues therein and on the findings of the court.

[54] On the basis of what I have stated in paragraphs [51] and [52] above, I accordingly find no violation of the rule of law by not ordering a stay of the Manzini North *Inkhundla* elections pending the determination of Case No.1387/18. I further do not see how the concept of fair election as defined in the SADC Principles and Guidelines is undermined.

[55] The term **"democratic elections"** is defined in the SADC Principles and Guidelines as follows:

> **"means, '*competitive, periodic, inclusive, regular elections in which persons to hold office at all levels of government are elected, through the secret ballot, by citizens who broadly enjoy fundamental human rights and freedoms.*'"**

[56] The principles of a democratic election as defined above are not, in my view, undermined by the issues to be determined in Case No.1387/18. To the contrary, the 6th respondent received a massive support of the electorate. He was elected by secret ballot by an electorate that enjoyed the right and freedom to elect a candidate of their own choice.

[57] On the totality of the aforegoing considerations, it is my finding that the issue for determination in Case No.1387/18 does not undermine the principles of a free, fair and democratic election as defined in the SADC Principles and Guidelines for Democratic Elections. These Principles and Guidelines are informed by international standards for democratic elections.

[58] I have already stated in paragraph [35] above, that the balance of convenience does not favour the applicant's case but that of the 1st respondent. I however have no hesitation that as a registered voter, the applicant has established a *prima facie* right.

[59] In establishing that he will suffer irreparable harm should the interim interdict not be granted, the applicant asserted that in the event the court finds against the 6th respondent in Case No.1387/18, he will suffer both financial and emotional harm. This will happen because the election will

have to be started afresh. According to the applicant, this will come at a further cost to him and the tax-payer as well.

[60] With due respect, I do not find this kind of harm to be one that justifies an order for a stay of an election. To be a candidate for election is voluntary. It follows, in my view, that the harm which is asserted by the applicant is voluntarily assumed by each candidate and therefore cannot supersede the constitutional requirement of holding a general election within 60 days after the dissolution of Parliament. Emotional harm cannot be separated from election results, particularly for all the election loosers. This cannot, in my view, be a good reason to order a stay of the election and allow a state of affairs in which the election will be held outside the constitutionally stipulated time period.

[61] **Herbstein and Van Winsen, 5th ed., (supra) at p.1468**, cites with approval the case of **Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd 1992 (2) SA 459 at 464** where **Cooper J** states as quoted below:

> **"the grant or refusal of an interdict is a matter within the discretion of the Court hearing the application and depends on the facts peculiar to each individual case and the right the applicant is seeking to enforce or protect"**

[62] The authors **Steven Pete et al, "Civil Procedure: A Practical Guide", 3rd ed., at p.458,** state as quoted below:

> **"Note that in the case of an application for a final interdict, a court is obliged to grant the interdict once the applicant has proved all the requisites. In the case of an application for an interim interdict, however, the court has a discretion, and is not abliged to grant such an interdict, even if all the requisites are shown. The court must exercise the discretion judicially and will grant or refuse the interdict depending on a consideration of all pertinent issues, including the prospects of success, the potential injury, the balance of convenience and the availability of alternative remedies."** (own emphasis)

[63] On the strength of the above authorities, the grant of an interdict is in the discretion of the court guided by the facts of each particular case. On the totality of the aforegoing considerations, the application fails. It does not meet other requisites for an interim interdict.

[64] On the issue of costs, Mr Maseko submitted in closing that on such matters there is no need to insist on costs particularly because this is a matter where the applicant was against a giant, *viz*., the state, represented by the Attorney General. In the heads of argument, he however seeks an order as per the notice of motion in terms of which he also seeks an order for costs.

[65] Mr Nxumalo for the 1st respondent submitted that he seeks an order for costs. In my view, both attorneys prayed for an order for costs although Mr Maseko later decided to stand in the middle on this issue when making his closing submissions.

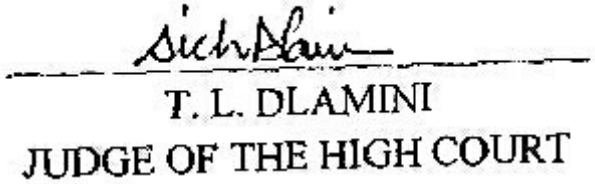
[66] In exercise of the discretionary power with which this court is vested, costs are to follow the event.

[67] I accordingly issued an *ex tempore* order in the following terms:

1. The application is dismissed.

2. Costs to follow the event.

[68] These are my reasons for the *ex tempore* order of 17 September 2018.



T. L. DLAMINI
JUDGE OF THE HIGH COURT