



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE No. 1844/2023

In Matter between:

MKHULULI DLAMINI

APPELLANT

And

THE ELECTIONS AND BOUNDARIES COMMISSION

1ST RESPONDENT

THE ATTORNEY GENERAL

2ND RESPONDENT

CORUM: Magagula Z

Date heard: 18.08.23

Date delivered: 22.08.23

REASONS FOR JUDGMENT

[1] This matter was called before me on Friday 18th August 2023. After hearing arguments from the parties, I granted the following orders.

- " 1. The decision of the Election and Boundaries Commission dated 22nd July 2023 is hereby set aside and the Applicant's name re-instated on the Voters Roll of Maphilingo uMphakatsi.
2. The Elections and Boundaries Commission is hereby ordered to either;
 - (a) Hold a special nomination process at the Maphilingo uMphakatsi to determine the nomination of the Appellant; or,
 - (b) Include the Appellants name in the list of nominees for member of Parliament [MP] for the Maphilingo umphakatsi.
3. Costs to follow the cause"

These are the reasons for my Judgement.

- [3] This is an appeal by the Appellant, Mkhululi Dlamini in terms of Section 18 (5) of the Voters Registration Act no.4 of 2013. [the Act]
- [4] For purposes of content, the brief back ground to this appeal as may be found from the uncontroverted affidavit filed by the Appelant in his application for leave to appeal and the submissions of Counsel at the hearing is that; Appellant applied for registration in order to participate as a voter at the Maphilingo chiefdom under the Siphofaneni Inkhundla.
- [5] Appellant was dully registered and during the voters Roll Registry Varication exercise, he verified that his name was on the Voter's Roll. This exercise was closed on the 12th July 2023 and according to him, there was no objection to his name being included in the Voters Roll or that he registered under Maphilingo chiefdom.
- [6] On the 22nd day of July 2023, the day set by the first respondent as nominations day, the Appellant proceeded to the Othandweni Primary School where the polling or nomination was to take place. His name was

raised as a nominee for member of Parliament (MP) and he accepted the nomination and those who supported his nomination stood up to complete the necessary forms.

[7] The Appellant submitted that after his name was confirmed to be in the Voters Roll he was told that he was eligible to stand for elections.

[8] Apparently before his nomination was confirmed, a Mr Mndzebele who is a resident of Maphilingo stood up to object Appellants nomination on the grounds that he was not a resident of the area.

[9] In the commotion that followed, officers from the Elections and Boundaries Commission, (the commission) although having confirmed to Appellant that no formal objection had been lodged against him, stopped the nominations and left.

[10] During arguments I sought clarity from Counsel for Appellant whether this means that no-one was nominated to stand elections at that particular polling centre and the answer was that polling the nomination relating to Appellant was stopped. This perhaps demonstrates that the fact that simply because a fact is not controverted does not mean it is necessary completely true.

[11] The Appellant went on to aver that he received a telephone call from unnamed officer of the commission and was told that the commission was yet to deliberate on the reports received but appellant should be ready to re-participate in the nomination exercise. On the 24th July 2023 Appellant was called to collect a letter from the commission offices in Nkanini. That letter turned out to be the decision of the commission on objection to his registration as a Voter at Maphilingo. The gist of the letter was that the commission would remove Appellants name from Othandweni Primary School polling Station, Maphilingo uMphakatsi, under the Siphofaneni Inkhundla.

[12] It may be worth mentioning that this decision was not based on the Oral objection of Mr Mndzebele from the "floor" as it were, but from an objection noted by a Mr John Mandla Dlamini, on the prescribed form no.6. This objection was received by the commission on the 8th July 2023. The grounds of Mr John Mandla Dlamini's objection as stated in the form are ***"Asimati awakulomango futsi akazange sake abe wakulomango waka Maphilongo"***

[13] When translated into the English language the reasons could read “we don’t know him as a resident of this area, in fact he has never been a resident of Maphilingo”

[14] Appellants application for leave to appeal was called before my brother Mavuso J who granted the leave on the 4th August. On the 7th August 2023, the appellant duly noted its appeal citing four grounds of appeal.

[15] Ground of appeal number 1, the Appellant complained;

“[1] The 1st Respondent removed the name of the Appellant from the Voters Roll of Othandweni Primary School Polling Station without valid objection being lodged in terms of Section 18 (2) of the Voters Registration Act no.4 of 2013 and thereby misdirected itself.

[2] The 1st Respondent based its decision on an alleged objection received by itself on the 22nd July 2023 when in actual fact the Voters Roll verification closed on the 12th July 2023 with the effect that names that, appeared on the Voters Roll on the 22nd July 2023 were final and thereby misdirected itself.

[3] The 1st Respondent took a decision to remove the name of the Applicant without hearing the side of the Applicant and thereby committed an error of law.

[4] The 1st Respondent misdirected itself, by not including the name of the Appellant on the list of nominees for member of Parliament under Othandweni Primary School Polling station”

[16] In keeping with Section 19 (1) of the Voters Registration Act, the 1st Respondent filed with the Registrar of this court the decision of the Commission and the matter was therefore ripe for hearing.

[17] Section 18 (5) of the Act specifically provides that a person not satisfied with a decision of the Commission, may with leave of court, appeal to the High Court. What was then serving before me is an appeal as opposed to a review.

[18] In an appeal the court considers both the procedural aspect of decision making as well as the corrutness of the decision itself. After hearing an appeal the court may dismiss the appeal amend or set aside the decision

or order against which the appeal has been noted or make any other decision or order including an order as to costs.

- [19] Put in simple terms, a review will only lie where it is alleged there was injustice or irregularity and on hearing a review the court will grant those prayers contained in the Notice of review or dismiss the application if the justice of the case so demands. The learned Authors **Herbsteirn** and **Van Winsen** in the book make this point; the civil parties of the superior courts of South Africa 5th ed. Vol.2 page 1299.

“Should review proceedings be successful, the High Court will set aside the decision or proceedings that it has reviewed. The court will not, however, exercise administrative function by substituting its own direction for that of the body or official whose decision it has received.”

- [20] Now the qualification for a person to register as a voter in any particular Inkhundla is governed by section 15 of the Voters Registration Act.

Section 15 (1) Provides

“(1) Subject to this section, a person shall not be registered as a voter in any Inkhundla-

(a) Unless the person has actually resided in that Inkhundla for a continuous period of at least three months immediately preceding the date of completion of the application; or

(b) if the person did not reside as required under subsection (1) unless the person retained a home in that Inkhundla for a continuous period of at least three months preceding the date of completion of the application.”

- [20] The Appellant in arguments before me and in his affidavit in support of application for leave to appeal stated that he has homesteads in various places including Maphilingo area under the Siphofaneni Inkhundla, Khubuta in the Shiselweni Region and Hhukwini in the Hhohho Region. According to Section 15 (6) the Appellant qualified to Register in anyone of these places.

- [21] For a reason that is not disclosed nor, I may mention, is he not required to disclose he chose to register at Maphilingo. His application to no register was accepted by the 1st Respondent. He therefore had every right

to participate in the nomination exercise at the designated Polling Station, in this case Othandweni Primary School.

[22] The Appellant's right to apply for registration as a voter and remain in the voters Roll for a particular Polling Station is subject to the right of other registered voters to object to his inclusion in the voters roll of that particular polling station or chiefdom in terms of section 18 (1) (a)

[23] This section provides

" 18 (1) " a registered voter may at any time object to –

(a) The inclusions or retention of any persons name in the register of voters"

b) ...

[24] This Section does not provide the grounds on which an objection may be made. One would then in the circumstances assume that an objection may be made if the applicant does not meet the criteria laid down in Section 7 of the Act or is disqualified in terms of Section 10. An objection may also be made if the applicant for registration does not meet the criteria provided in Section 15 (1) (a), (b) and subsection 2.

[25] The objection by Mr John Mandla was based on the allegation that the appellant was not known as a resident of Maphilingo and was in fact never ever been a resident of that particular area. But there are two aspects to the objection. The second aspect is that the nomination of the Appellant was halted not because of Mandla John Dlamini's objection, but because of the objection from the "floor" of Mr Mandzebele. The Act does not make provision for an objection from the floor. It was therefore not lawful for the 1st Respondent to halt Appellants nomination on the strength of the objection from the " Floor" let alone that the ground of objection by Mr Mndzebele was foreign to the Act.

[26] What then of John Mandla Dlamini's objection. The objection was received by the 1st Respondent on the 8th July 2023 well before the closing date of the 12th July 2023. In terms of Section 18 (3) the commission has to make a decision not later than 14 days after the objection was made in this case the 14th day fell on the 22nd day of July 2023, the day of the nominations.

[27] Despite having received the objection 14 days before the date of the nomination exercise, the 1st Respondent did not advise the Appellant that an objection had been made to the retention of this name under the Maphilingo Umphakatsi. Further, the 1st Respondent did not give the Appellant a hearing before an adverse decision was taken against him. This is a clear violation of the audi alteram partem rule. Section 33 of the Constitution Act No.1 of 2005 also prohibits decision maker from making an adverse decision against a person unless such person had been heard.

Section 33 (1) provides A/

“A person appearing before any administrative authority has a right to be heard and to be treated fairly in accordance with the requirements imposed by law including the requirement of fundamental justice or fairness ...”

[28] Section 18 (3) of the Voters Registration Act enjoins the commission to make a decision no later than 14 days after the objection is made. In *casu* the written decision of the commission is dated 22nd July 2023. The Appellant averred in his affidavit that he was called on the 24th July 2023 to collect a letter from the commission on the 25th July 2023. Effectively the commission's decision was unknown to any other person besides itself on the 25th July, that is 18 days after the objection was made. Before the 25th July no decision had been communicated to the Appellant. The phrase “signed sealed **and delivered**” comes to mind.

[29] The submissions made by Mr Simelane, counsel for the Respondents, that interlineations made on the objection form No. 6 in the form of Appellants cellphone and National Identity number shows that Appellant was heard; add nothing to the argument.

[30] The objection itself was in my opinion a non – issue. Mr John Mandla Dlamini says Appellant is not a resident of the area. What if part (b) of subsection (1).

[31] Finally, the commission alludes to the fact that Appellant has homesteads in various places. It is not a finding of the commission that Appellant did not retain a home at Maphilingo Chiefdom. Whether the Appellant was formally introduced to the Umphakatsi is not in my considered opinion a matter in which the commission need concern itself with. While it is inconceivable that a homestead could be established in the Chiefdom without the knowledge of the authorities, the Election and Boundaries

Commission is not the proper body to deal with such issues, there are other structures that are better placed to intervene in matters of settlement on Emaswati Nation Land.

[32] While Section 15 (3) of the Act permits the Registration Officer to register an applicant's name in the Voter register of the Inkhundla for which the Appellant in the officers opinion, most qualified for registration in the event the applicant qualified to register in more than one Inkhundla, the time for such determination is at the time the applicant makes application for registration as a voter not on the day of nominations or three as the days after nominations . This practice goes against the spirit of the legislation. A reading of Section 15 (2), shows that the legislature intended to be as inclusive as possible. Subsection (2) permits a person to apply for registration on the basis of his/her employer's Principal place of business or branch office.

[33] For the above reasons I came to the conclusion that the decision of the commission stands to be set aside and the Appellant retained to the position he was before the decision.


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Z. Magagula

Judge of the High Court

Appearances:

Mr M.S Dlamini - for the Appellant

Mr M. Simelane - for the Respondents