

IN THE HIGH COURT OF ESWATINI
JUDGMENT

Case No. 2235/2023

HELD AT MBABANE
In the matter between:

LUTFO EPHRAEM DLAMINI

Applicant

And

THE CHAIRMAN OF THE ELECTIONS

1st Respondent

AND BOUNDARIES COMMISSION

2nd Respondent

ELECTIONS AND BOUNDARIES COMMISSION

3rd Respondent

BHEKITHEMBA MAGAGULA

4th Respondent

THE ATTORNEY GENERAL

Neutral Citation: *Lutfo Ephraem Dlamini vs The Chairman of the Elections
and Boundaries Commission and Others (2235/2023)*
[2023] SZHC 267 (27/09/2023)

Coram: **J. M. MAVUSO J**

Heard: 25th September, 2023

Delivered: 27th September, 2023

RULING ON POINT OF LAW

J.M. MAVUSO – J

[1] (i) This is an application, emanating from the election nominations, held on the 22nd July 2023 at the Nkamanzi Umphakatsi, where Applicant was nominated as a Member of Parliament.

(ii) Also nominated for the position of member of Parliament is one, Bhekithemba Magagula, a teacher by profession and, as such a civil servant.

[2] In the notice of motion before Court, Applicant seeks orders, in the following terms:

“1. Dispensing with the normal forms, service (sic) time lines and hear this matter as one of urgency.

2. Declaring the 3rd Respondent’s nomination as a Member of Parliament candidate and subsequent election thereto

*unconstitutional in as far as it is in total breach of section 97
(1) (c) of the Constitution of Eswatini 2005.*

3. *That, the nomination and subsequent election of the 3rd
Respondent is hereby reviewed and set aside.*
4. *Declaring the 1st Respondent's failure to disqualify the 3rd
Respondent from being nominated having failed to produce a
leave of absence letter, unlawful and therefore render the
nominations and subsequent elections at Nkamanzi
Umphakatsi a nullity.*
5. *That the elections scheduled for the 29th September 2023 at
Ndzingeni be hereby stayed.*
6. *That pending finalization of this matter a rule nisi to operate
with interim and immediate effect in terms of prayer 1, 2, 3, 4
and 5 returnable at a date to be determined by the above
Honourable Court.*

7. *Warranting the Applicant's leave to file such supplementary affidavits if it becomes so necessary.*

8. *Costs of suit.*

9. *Such further and/or alternative remedy."*

[3] The basis of the above application is that, the third Respondent, on the date on which nominations were conducted, it being the 22nd July 2023, having been nominated, as a teacher and civil servant failed and/or neglected to file with the Second Respondent, a letter of leave of absence as required by article 97 of the Constitution of the Kingdom of Eswatini.

[4] Third Respondent has raised a point of law based on Article 97 (1) (c) of the Constitution, which is fully referred to hereunder. If the point raised is upheld, that is the end of this matter.

[5] The Constitution of the Kingdom of Eswatini is written in both English and Siswati. Article 97 (1) (c) of the English version provides as follows:

“(1) Notwithstanding the provisions of section 96, a person does not qualify to be appointed, elected or nominated as the case may be, a Senator or member of the House if that person –

(c) is a member of the armed forces of Swaziland or is holding or acting in any public office and has not been granted leave of absence for the duration of Parliament.”

Article 97 (1) (c) of the Siswati version provides as follows:

“(1) Ngekungaphikisani nemitsetfo letfolakala esigabeni semashumi layimfica nesitfupha (96), umuntfu akavumeleki kukhonjwa, kukhetfwa noma kunconywa, njengaloku-fanele, kutsi abe yimphunga noma lilunga uma ngabe loyo umuntfu-

*(c) Ulilunga leMbutfo wetekuvikela eSwatini noma
usesikhundleni noma ubambele lomunye sikhundla
ehhovisini leMbuso kantsi usengakanikwa imvume
yekushiya umsebenti wakhe ngalesikhatsi ayokuba
lilunga lePhalamende.”*

As a direct interpretation of the English version, the siSwati version is much clearer on the time, a letter of absence is expected to be presented to the Second Respondent, according to the siSwati version, a nominee is disqualified, if he or she has not received permission or the letter of absence before terminating his employment and prior to being a Member of Parliament.

- [6] (i) In the spirit of ensuring that every eligible citizen participates in an election freely without fear of losing his employment, if he or she be employed in whatever capacity, the Court is of the considered view that article 97 (1) (c) should be accorded a liberal interpretation which takes

into account, the need to give all citizens of the country an equal opportunity to participate in the national elections.

- (ii) In line with the above the Court is of the considered view that the mandatory presentations of a letter of absence to the Second Respondent, on a reading of the Article is after the primary elections hence the phrase, in the English version of the Constitution:

“....has not been given leave of absence for the duration of Parliament.”

- (iii) The Court finds that it would be absurd for one to have and present a letter of absence, on the day of nominations because one attends not knowing whether or not he will be nominated and garner the required number of voters in favour of his nomination.

[7] Similar to the present case, though pertaining to Municipal elections is the recent case of Maduduza Gabriel Zwane N.O & Another v Minister of

Housing and Urban Development & 2 Others (1733/23) [2023] SZHC 243

(01 September 202).

Under contestation in the above case was section 10 (1) (b) of the Urban Government Act of 1969 which provides that a person is disqualified if that person:-

“holds an office of profit under the Government, unless he has the written approval of the head of the government’s department in which he is serving.”

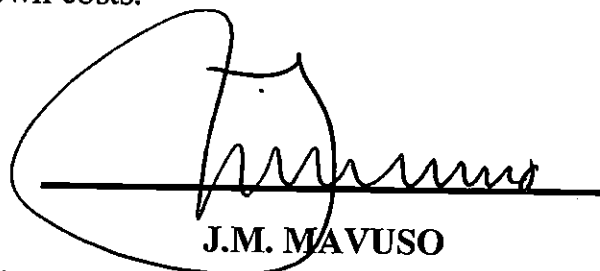
In somewhat similar fashion to the 3rd Respondent herein, Mpumelelo Cyprian Shongwe in the above cited case did not have a written letter of approval from the government department he was under. His eligibility as a candidate in the elections was impugned, on the basis of the above.

- [8] After noting that in terms of section 9 of the Urban Government Act of 1969, the letter was supposed to be presented to the Town Clerk, at paragraph 20 of the Judgment the Court opined, as follows:

“How would one know he will be appointed such that he is required to get a letter of approval before the appointment is published?”

The Principal Judge went on to discharge the *rule nisi* she had earlier granted and directed each party to pay its own costs. The foregoing is in tandem with this Court’s view on this matter.

- [9] Accordingly, the point of law raised by 3rd Respondent is upheld, each party is to pay its own costs.

A handwritten signature in black ink, consisting of a large, stylized initial 'J' followed by a series of loops and a horizontal line, positioned above the printed name 'J.M. MAVUSO'.

J.M. MAVUSO
JUDGE OF THE HIGH COURT OF
THE KINGDOM OF ESWATINI

For the Applicant: SITHOLE & MAGAGULA ATTORNEYS

For the 1st, 2nd and 4th Respondents: THE ATTORNEY GENERAL

For the 3rd Respondent: NKOMONDZE ATTORNEYS