IN THE SUPREME COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

CIV. APPEAL NO. 33/07

In the matter between

MUZIWETHU SIMELANE	**FIRST APPELLANT**
SANDILE SHABANGU	**SECOND APPELLANT**
AUDREY DLAMINI	**THIRD APPELLANT**
BHEKI ZWANE	**FOURTH APPELLANT**
SIZWE NDLELA	**FIFTH APPELLANT**
MFANIMPELA GAMA	**SIXTH APPELLANT**
TREVOR SIMELANE	**SEVENTH APPELLANT**

And

THE MINISTER OF HOUSING AND URBAN DEVELOPMENT	**FIRST RESPONDENT**
THE PRINCIPAL SECRETARY IN THE MINISTRY OF EDUCATION	**SECOND RESPONDENT**

CORAM **BANDA, CJ**

RAMODIBEDI, JA

FOXCROFT, JA

HEARD: 15 MAY 2008

DELIVERED: 22 MAY 2008

JUDGMENT

SUMMARY

Appeal — Local government elections — Appellants failing to obtain written approval for election — Disqualification - Section 10 (1) (b) of the Urban Government Act 1969 — Exercise of discretionary power - On appeal appellants seeking to rely, without leave of the Court, on a new ground not raised in their grounds of appeal - Rule 7 of the Court of Appeal Rules applied.

RAMODIBEDI JA

[1] The appellants who are teachers by profession were purportedly nominated for local government elections ("the elections") in their respective wards. Such elections were scheduled to take place on 3 November 2007. In terms of section 10 (1) (b) of the Urban Government Act 1969 ("the Act"), the appellants were admittedly disqualified from being elected unless they had the written approval of the head of the Government department in which they were serving, namely, the second respondent. The section in question reads as

follows:-

> *"10. (1) [A] person shall be disqualified from being elected or from continuing in office as a councillor if he:-*
>
> *(a) ...*
>
> *(b) holds an office of profit under the Government, unless he has the written approval of the head of the government department in which he is serving. "*

[2] It is not disputed that the appellants wrote to the second respondent requesting approval to participate in the elections. The request was refused in respect of each one of them. This prompted the appellants to launch an application in the High Court seeking an order, *inter alia,* declaring that section 10 (1) (b) of the Act does not apply to a nomination but to an election and/or appointment. In the alternative, they sought an order directing the second respondent to forthwith issue them with written approval in terms of the section.

[3] After hearing submissions in the matter, the High Court dismissed the appellants' application with costs on the ground that they had failed to comply with the provisions of section 10 (1) (b) of the Act. The court *a quo* correctly, in my view, came to the conclusion that the

words "nomination" and 'election" in the section cannot be read separately but that they must be read within the context of the entire Act, including the Regulations thereof. Indeed I consider it to be absurd in the extreme to suggest, in the context of the Act read with the Regulations thereof, that a person may qualify for nomination but fail to qualify for election at the same time. Nomination and election inherently go hand in hand. They are intrinsically intertwined for the purposes of the Act. An example in this regard is to be found in the provisions of Regulation 16. This Regulation reads as follows:-

> *"16. (1) An individual who is -*
>
> *(a) a voter; and*
>
> *(b) at the date of nomination and at the date of election, not disqualified under section 10 of the Act; is hereby qualified for election as a councillor of an elective authority.*
>
> *(2) An individual so qualified may only be nominated and elected for the ward in respect of which he is enrolled as a voter."* (Emphasis supplied.)

In this Court **Miss Dlamini** for the appellants abandoned this line of argument which seeks to draw a distinction between the words "nomination" and "election" in so far as local government

elections are concerned. This was a correct approach in my view.

[4] In her submission in this Court, **Miss Dlamini** concentrated on the appellants' alternative prayer for an order directing the second respondent to forthwith issue the appellants with written approval in terms of the Act. Asked by the Court whether the matter was not now merely academic since the elections in question had already taken place, both **Miss Dlamini** for the appellants and **Mr. Khuluse** for the respondents agreed that a consent order was obtained in the following terms :-

> *"1. It is agreed by and between the parties that in the event the Applicants are successful on appeal in the main matter, a fresh election is respect of Wards 1 and 2 Mbabane, Ward (sic) 1 and 5 Manzini and Ward (sic) 5 and 12 Siteki will be conducted.*
>
> *2. Pending finalisation of the appeal no bye-election will be held in respect of Ward 8, Mbabane. "*

[5] The crux of **Miss Dlamini's** submissions in this Court was that the appellants were not given an opportunity to be heard before their request for approval was refused. She further submitted that the appellants had a legitimate expectation that their request would be

approved since the second respondent had in the past given approval to candidates who were teachers. She sought to rely on the authority of **Administrator Transvaal v Traub 1989 (4) SA 731 (A)** for this proposition. The difficulty with **Miss Dlamini's** submission is that she sought to rely on a point which was not raised in the appellants' grounds of appeal. Therein the appellants only raised a single ground of appeal which was in the following terms :-

> *"1. The court a quo erred in law and in fact by (sic) dismissing the appellants' application. "*

The issue of *audi alteram partem* rule has appeared for the first time in the appellants' heads of argument.

Now, Rule 7 of the Court of Appeal Rules reads as follows :-

> "7. *The appellant shall not, without the leave of the Court of Appeal, urge or be heard in support of any ground of appeal not stated in his notice of appeal, but the Court of Appeal in deciding the appeal shall not be confined to the grounds so stated. "*

The appellants did not bother to seek the leave of this Court to argue the new point of *audi alteram partem* or legitimate expectation. They are thus precluded from relying on this point.

[7] The appellants' alternative prayer directing the second respondent to forthwith issue them with written approval is equally without merit in the circumstances of this case. Properly construed, section 10 (1) (b) of the Act confers a wide discretionary power on the second respondent whether or not to issue a written approval to a teacher who intends to participate in local government elections. His decision can only be reviewed on well-known grounds such as illegality, irrationality and procedural impropriety. See for example

Council of Civil Service Unions and Others v Minister for the Civil Service [19841 (3) All ER 935 (HL); also reported in **1985 A.C. 374.** See also **Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 (A)** at 152. This is not such a case. Nor has it been shown that the second respondent acted *mala fide,* arbitrarily or for a wrong purpose. On the contrary, one must recognise that by insisting on written approval, section 10 (1) (b) of the Act has introduced a sound principle which is evidently grounded in public policy. Unless there is proper control over people who hold offices of profit in the Government service, one can

easily envisage chaos as people scramble for double pay, abandoning their posts in the process. In the case of the appellants, that would mean abandoning classes, an unconscionable act on its own.

[8] Whatever the position may be, it is of fundamental importance to bear in mind that the second respondent is entitled to allow any relevant factors to influence him in the exercise of his discretion. Otherwise he would fail to exercise control as envisaged in the Act. In this regard it is significant that he has not been challenged in his averment that one of the factors which he "must" take into consideration in the matter is the recommendation of the Teaching Service Commission which effectively employs the appellants. None of the appellants produced such a recommendation.

[9] In the light of the foregoing factors, the appeal is dismissed with costs. Such costs to be paid by the appellants jointly and severally, the one paying the others to be absolved.

M.M. RAMODIBEDI

JUSTICE OF APPEAL

I agree

R.A. BANDA

CHIEF JUSTICE

I agree

J.G. FOXCROFT

JUSTICE OF APPEAL

For the Appellants: MISS B. DLAMINI

For the Respondent: MR. S. KHULUSE