

**IN THE SUPREME COURT OF
SWAZILAND**

**APPEAL CASE
NO.63/08**

In the matter between:

**SIMON MBALEKELWA
MHLANGA VS
SIPHIWE KUNENE THE
ELECTIONS AND
BOUNDARIES
COMMISSION**

APPELLANT

1st

RESPONDENT

2nd

RESPONDENT

CORAM

2nd

RESPONDENT

**FOR THE APPELLANT
FOR THE 1st
RESPONDENT FOR THE**

BANDA CJ EBRAHIMJA
MAGID AJA MR. S.C.
DLAMINI MR. P.K. MSIBI
MR. V. KUNENE

JUDGMENT

EBRAHIM JA:

The appellant launched an application on the 10th October 2008, on an urgent basis. He prayed for the following relief:-

- "a) *that the court dispenses with the ordinary time limits from and the provisions of service as prescribed in the Rt/les of Court;*
- 2) *that the elections held in Vuvulane on the 19^h September, 2008 be declared void;*
- 3) *Costs of the petition;*
- 4) *Further and/ or alternate relief.*

The appellant deposed that in the election that his opponent, the first respondent secured 1,273 votes and that he got 1,095 votes. It was the appellant's contention "*that as a result of corrupt practices and violations of the election law a majority of the voters may have been prevented from electing the candidate they preferred namely the appellant*".

He relied on the affidavits filed in support of his assertion, by SIBONILE SIMELANE, NOMVULA SIKHOSANA, THULILE

MNISI, VUSI MHLONGO, NKOSINATHI SIMELANE and INNOCENT NCONGWANE.

SIBONILE SIMELANE in her affidavit deposed that on the 19th September, 2008 one Moses Matfunjwa approached her and told her to vote for the first respondent, because she is a woman, and that she should not vote for the appellant as he would not do anything for them and also as he was not from Vuvulane. She says he also promised to reward her if she voted for the first respondent.

Nomvula Sikhosana deposed that on 19th September, 2008 Moses Matfunjwa approached her and others and told them "*that he found out that they must vote for SIPHIWE KUNENE*" (the first respondent). He further told them that he was now working for the first respondent and that the persons who had voted for him in the primary elections should now vote for the first respondent. She also deposed that when she was in the queue to vote Moses Matfunjwa displayed a pamphlet to those persons present which had a message on it saying that people should vote for a woman. The first respondent is a woman.

Thulile Mnisi deposed that on the 19th September, 2008, Moses Matfunjwa came to her and told her to vote for the first respondent. He also requested other people who were present to vote for the first respondent. She stated that he also said that the appellant should not be elected as he is a rich man. He also promised to reward those that voted for the first respondent.

Vusi Mhlongo deposed in his affidavit that in the night of the 18th September, 2008 at Vuvulane he saw two individuals distributing pamphlets in the Vuvulane area. These pamphlets read: "*SIMON MHLANGA you should go away as you are not from Vuvulane*". He said these two persons were working for the first respondent's campaign.

Nkosinathi Simelane deposed that one Mamba came to him at Vuvulane and told him to vote for the first respondent and that he would pay him if he did that and told others to do so as well. On the 19th September, 2008 Moses Matfunjwa came to Vuvulane and told these present that he was now "*working*" for the first respondent and that all those who had voted for him in the primary elections should now vote for the first respondent.

Innocent Ncongwane deposed that he is from Vuvulane and that on 19th September 2008, that one Siphethi Dlamini dropped off pamphlets in their area. They read that "*SIMON MHLANGA was not to be elected as he is of bad character and was not from Vuvulane*".

I have in this judgment highlighted in detail the basis on which the appellant placed the matter before the court *a quo*.

It is apparent that in terms of the founding affidavit filed by the appellant and in terms of the supporting affidavits filed in support, that it is not shown that, because of the alleged threats made, the promises made to provide monies if the persons approached and voted in a certain way, or the

allegation that the appellant was a person of dubious character, that the voters voted against him and in favour of the first respondent. Nowhere in the founding affidavit or the supporting affidavits filed by the appellant has a connection been established that what transpired between those that deposed to the affidavits has led them to vote for the respondent.

There is no evidence establishing that these deponents voted against the appellant because of them having been persuaded, bribed or in anyway influenced to do so by the first respondent or his supporters.

There is nothing on the papers to support the contention of the appellant that he lost the election to the first respondent because of the improper conduct of the first respondent.

There may have been improper behaviour by others but their conduct cannot in any way be attributed to the first respondent neither is there any evidence establishing what effect, if any, this conduct had on the result of the election.

In this case it has not been shown how many votes the respondent received vis-a-vis the appellant as a result of this alleged improper conduct nor has it been shown how many persons were corruptly influenced to vote for the first respondent and how their votes affected the outcome. It has not been shown that but for their votes, the appellant and

not the first respondent would have been the successful candidate. Nothing short of the foregoing can suffice.

I am of the view that there is no evidence which would support the assertion made by the appellant that the "*corrupt*" conduct of the first respondent led to his defeat in the election. I concur with the view "*that an election cannot and should not lightly be set aside. There should be substantial grounds shown before such drastic action is taken and public interest demands that elected members of Parliament ...must not be vexed with futile litigation*". JABULANI KHUMALO VS TITUS THWALA AND TWO OTHERS CIVIL CASE NO.2865/03 as yet unreported.

See also SNYMAN VS SCHOEMAN AND ANOR 1949(2) SA 1 at page 5; MORGAN AND OTHERS VS SIMPSON AND ANOR 1974(3) A.E.R. 722.

A further valid point raised by the second respondent was that there was no prayer for the disqualification of the first respondent for alleged corrupt practices during the elections, the only prayer being that the appellant declare the election null and void. There were no allegations of improper conduct on the part of the second respondent or its officers. There is therefore no sound basis to interfere with the declared result declaring the first respondent as the winner of the election process.

In the result the appeal is dismissed with costs.

A.M. EBRAHIM <
— JUDGE OF
APPEAL

R.A. BANDA
CHIEF JUSTICE

A handwritten signature in black ink, appearing to be 'P.A.M. Magid', written in a cursive style.

P.A.M. MAGID ACTING JUDGE OF APPEAL Judgement
delivered in open court on the 18th day of May 2009.