

IN THE SUPREME COURT OF ESWATINI
JUDGMENT

Civil Case No. 31/2022

HELD AT MBABANE

In the matter between:

CLERK OF PARLIAMENT & OTHERS

Appellants

And

BHUTANA SAMUEL DLAMINI

Respondent

Neutral Citation: Clerk of Parliament & Others v Bhutana Samuel Dlamini
(31/2022) [2021] SZSC 45 (22/09/2022)

Coram: **R.J. CLOETE JA;**
S.J.K MATSEBULA JA; and
M.J. MANZINI AJA

Heard: 16th & 17th August, 2022.

Delivered: 22nd September, 2022.

SUMMARY : *Civil Appeal – Senate Elections – Compliance with Section 96 (c) the Constitution - Tax Compliance Certificate issued by Commissioner of Taxes sufficient – Sufficient as proof of Compliance – Verification of Certificate not sanctioned by Constitution or Senate (Elections) Act 7 of 2013.*

Held – Returning Officer acted unlawfully in disregarding or setting aside a tax compliance certificate duly issued by the Commissioner of Taxes.

Held – Public Officers should act within the four corners of the enabling legislation.

Held – Appeal dismissed with costs.

JUDGMENT

S.J.K MATSEBULA

INTRODUCTION

[1] There was a vacant seat in Senate, the Upper Chamber of Parliament. Elections to fill this vacancy were slated for the 2nd September 2021. The Respondent had been nominated amongst other candidates to stand for the elections but the Clerk to Parliament who was the Returning Officer for the

Senate Elections disqualified the Respondent from contesting the elections on the ground that the Respondent was a tax-debtor as envisaged in terms of section 96 of the Constitution and therefore ineligible to contest the elections. The Court *a quo* found that the Returning Officer acted unlawfully in disqualifying the Respondent hence the Appeal by the Returning Officer.

- [2] The determinant issue before this Court is whether on the 2nd September 2021 the Respondent qualified “*to be appointed, elected or nominated, as the case maybe, as a Senator or a member of the House*” or not.

BACKGROUND

- [3] A vacant seat for a Senator had to be filled. The House of Assembly as permitted by law nominated the Respondent together with eight other nominees to stand for the Senate Elections. The Respondent received a majority of the votes at the nomination stage. The Clerk to Parliament who was the Returning Officer, disqualified the Respondent before the 2nd September 2021, the day scheduled for the elections. Prior to the disqualification the Respondent, like the other nominees, had submitted amongst other documents, a document (tax compliance certificate) from Eswatini Revenue Authority stating in respect of the Respondent that there

were “no tax obligations outstanding”. It is common cause that such a document cleared the person named in it in as far as owing taxes is concerned. It meant the person was not owing any taxes. It meant the person was compliant with section 96 (c) of the Constitution. This sub-paragraph reads:-

“96 (c) subject to the provisions of this Constitution, a person qualifies to be appointed, elected or nominated, as the case maybe, as Senator or Member of the House if that person has paid all taxes or made arrangements satisfactory to the Commissioner of Taxes” .

- [4] It is common cause that the Returning Officer was not satisfied with this document or its contents and unilaterally rejected it without giving any reasons or prior discussions with the Respondent. Before rejection, the Returning Officer sought and obtained another document (a letter) from the Commissioner of Police which reflected that the Respondent had an “outstanding tax of E668.20”. There is evidence (supplied by the Returning Officer in his summary of reasons for rejecting the tax compliance certificate) that he received communication that the Respondent had made arrangements with the Commissioner of Taxes to settle the tax debt. It is inexplicable why the Returning Officer disregarded this communication and preferred the second document (the letter) and held on it even when he had knowledge that

the Respondent had “made arrangements satisfactory to the Commissioner of Taxes” for the payment of this outstanding amount as per Section 96 (c) of the Constitution.

- [5] This saga was summed up by the Court *a quo* as per N.M Maseko J. under paragraphs 54 & 55 of his judgment -

“I am of the considered view that, in casu, the 1st Respondent acted mala fide and from ulterior and improper motives, because, firstly, he goes behind the back of the Applicant and question or verify a tax clearance certificate duly issued by the competent authority; secondly, having found the information that the Applicant had a tax liability of a minor debt of E668.20, he does not inform the Applicant of the existence of such information, but goes on to disqualify him (Applicant) from taking part in the elections, and when the Applicant realizes that his name is not in the ballot papers, he refuses to provide a reason or reasons to the Applicant and the House of Assembly as to why the name for the Applicant is not in the ballot papers and why he has disqualified him from taking part in the elections. This is a complete exhibition of mala fide and ulterior motives, surely his actions are irrational.

As if that is not enough when Applicant's lawyers request for these reasons, he refuses to furnish them until he was compelled to do so by this Court. The conduct of the 1st Respondent in casu can never be said to have been a due and honest exercise of his discretion. His capricious and obstructive conduct threw the Senate Election into disarray, and there is no better way to describe his actions other than to say he acted with ulterior and improper motives, such that even in his Answering Papers he can hardly advance any credible opposition in these proceedings".

THE APPEAL

[6] The Appellants' grounds of Appeal are couched in legal terms as follows:-

- "1. The High Court erred in law in holding that Respondent was entitled to a pre-disqualification hearing under section 33 of the Constitution;*
- 2. The learned Judge a quo committed an appealable error of law to the effect that 1st Appellant had no power to vet the Respondent as an electoral candidate; and*
- 3. The Court a quo erred in law and fact in its finding that Respondent has been duly cleared as tax compliant for electoral purposes".*

THE APPELLANT'S CASE.

[7] The Appellant's case is that the Respondent was not compliant with section 96 (c) of the Constitution because he was owing taxes amounting to E668.20 (Six hundred and sixty eight Emalangeneni and twenty cents) being income tax for the year 2014. For this proposition the Appellant relied on a schedule of candidates owing taxes attached to a letter dated 31st August 2021 signed by the Commissioner General and which is not addressed to him. This letter, though at variance with the tax compliance certificate is in fact addressed to the National Commissioner of Police and its purpose is vetting of candidates for vacant position in the House of Senate. We have not been made privy as to what the police would do with such information as same is not provided for under section 96 of the Constitution. We accept that the Returning Officer may have played a role in the issuance and generation of this letter but, since it would be shown later on in this judgment, it is not provided for under section 96 of the Constitution and under the Senate Elections Act, and nothing should turn on it. His belief that he was exercising discretionary powers is not supported by any legislative authority, as would be shown later in the judgment.

[8] The Appellant further contends that the disqualification happened before the 2nd of September, 2022 after the receipt of the letter showing that the Respondent was owing E668.20 tax dating from 2014. The argument is that as of the 2nd September, 2021 the Respondent was already barred or declared “disqualified”. The argument is that come 2nd September, 2021 the Respondent was already barred by section 96 (c) as the Respondent was a tax defaulter, owing the above stated amount. If this statement is correct, the next enquiry would be: does it cover the two stipulations in section 96 (c), viz: one, “*paid all taxes*” and two, “*made arrangements*” satisfactory to the Commissioner of Taxes.

THE RESPONDENTS RESPONSE

[9] The Respondent’s case is that -

1. There is a valid tax compliance certificate showing that the Respondent was tax compliant, “*no outstanding tax obligations*”, issued by the lawful authority, the Eswatini Revenue Authority.
2. The tax compliance certificate issued by the Commissioner of Taxes is valid, has not been withdrawn by Eswatini Revenue

Authority and there is no allegation it was obtained fraudulently or by any unlawful means.

3. That the Appellant knew and acknowledged that the Respondent had made arrangements with the Commissioner of Taxes to settle the outstanding debt (as per the Returning Officer's letter dated 21st September 2021) prior to the date set for the Senate Elections.

THE ISSUE FOR DETERMINATION

[10] Ground number three (3) of Appeal states -

"3. The Court a quo erred in law and fact in its finding that Respondent had been duly cleared as tax – compliant for electoral purposes".

Only a negative answer to the following question would tilt the scale in favour of the Appellant:

Was the Respondent compliant with Section 96 of the Constitution as at the 2nd September 2021, the date proposed or on which the Senate Elections were to be held?.

[11] This is the only legal issue before this Court and on it alone the appeal should be decided. Although Advocate L. Maziya, for the Appellant, also touched on the other two grounds of Appeal, it was not necessary and is of no consequence. To this end, reference is made to paragraphs marked 2 & 3 of the Appellant's Heads of Argument which reads -

"2. Wisened hereto by the law in Gugu Prudence Hlatshwayo v the Attorney General (annexed to Respondent's heads of argument), Appellants abandon the first two grounds of Appeal.

3. Those two relate to the judicial reasoning in the Judgment, against which no appeal lies. The third concerns the substantive decision that the Court came to, which is appealable".

Submitting on the two discarded grounds of appeal would make the Appellant seem to be blowing hot and cold, approbate and reprobate, attract the legal maxim: *quod approbo non reprobo*. Meaning one cannot approve and disapprove. This Court will therefore concern itself with ground three of the Appeal.

[12] The Respondent argues that as of the 2nd September 2021, he was compliant with Section 96 of the Constitution. To prove his case he submits a tax

compliance certificate issued by the office of the Commissioner General (Commissioner of Taxes). This document is date stamped 19 August 2021, days before the proposed elections which were slated for the 2nd September 2021.

- [13] The Respondent's argument is that the Commissioner General has not withdrawn this document, the tax compliance certificate. The Court notes that contrary to withdrawing it the Commissioner of Taxes added a similar one, in shape and content, dated the 29th September, 2021.

THE APPLICABLE LAW

- [14] Section 96 of the Constitution states as follows:-

"Qualifications for Membership of Parliament

96. Subject to the provisions of this Constitution, a person qualifies to be appointed, elected or nominated, as the case maybe, a Senator or a member of the House if that person :-

- (a) *is a citizen of Swaziland;*
- (b) *has attained the age of eighteen years and is a registered voter;*
- (c) *has paid all taxes or made arrangements satisfactory to the Commissioner of Taxes; and*

(d) is a registered voter in the inkhundla in which that person is a candidate (in the of elected members).

[15] The *chapeau* of section 96, which is, **“subject to the provisions of this Constitution”...** means only the provisions of this Constitution shall apply and anything done outside these provisions may not be lawful or have the force of law. Unless fraud, mistake or error is alleged, a tax compliance certificate issued by the Commissioner of Taxes is valid on its face from the time of its generation, issuance and presentation. This should be the document recognised by section 96 (c) of the Constitution and also if we are to give effect to the *chapeau*. The Constitution has not bestowed any powers to the Returning Officer to set aside or disregard any document required under section 96 of the Constitution especially paragraph 96 (c) of this section. The Appellant or Returning Officer will have to show this Court the provisions that gives him the power to verify or disregard a tax compliance certificate duly issued by the Commissioner of Taxes, which he has failed to do. In the absence of fraud, mistake or some other legal excuse sanctioned by law the Returning officer is constitutionally mandated to accept the tax compliance certificate on presentation as valid on its face.

FINDINGS

[16] To satisfy the requirements of section 96 (c) of the Constitution, the Respondent submitted a tax compliance certificate duly issued by the Commissioner of Taxes. This document was alive on the 2nd September 2021 as its validity was until the 19th September, 2021 and it says the Respondent has “no tax obligations outstanding”. This document cannot be said to be ambiguous in meaning and purpose, as on the face of the document is written *“Clearance Restricted to: Elections (Senate), is that Bhutana Samuel Dlamini (the Respondent) is tax compliant, is cleared for Senate elections”*. Nothing has been pointed out to be amiss with this document and it is not challenged neither for its issuance nor for its contents. We accept that there is no allegation of unlawfulness, no fraud or dishonesty or error and was issued by the lawful authority and for a lawful purpose. The document itself is unassailable.

[17] The Appellant, for no lawful excuse, disregarded this document and sought and obtained another document from the office of the Commissioner General (Commissioner of Taxes) which must have suited his motives, which has not been revealed to the Court. This document says the Respondent is owing taxes amounting to E668.20 and is dated 31 August 2021. This document which

was attached to a letter signed by the Commissioner General says nothing about the earlier document nor is it revoking it but instead complains about the pressure or short time exerted on the Commissioner to come out with the document.

[18] We hold that the Appellant (Returning Officer) disregarded the tax clearance certificate without lawful excuse, and to this end he has failed to provide the legislation that authorizes him to disregard the Commissioner General's tax compliance certificate even on the pretext of verification or any other reason. It would seem he elevated himself above the election laws and the relevant Constitutional provisions, especially section 96 of the Constitution. He acted outside section 96 of the Constitution. Section 97 has no relevance to the Respondent. For the Returning Officer to say he had to verify the content or truthfulness of the tax compliance certificate is unjustifiable in the circumstances, and we hold that he needed an enabling legislation to carry out his verification exercise and without which the exercise was unlawful.

[19] His Lordship, N.M Maseko J. in the Court *a quo* correctly captioned the law in this regard at paragraph [51] of his judgment whereat it reads -

“51 Professor Cora Hoexter in her master work titled ADMINISTRATIVE LAW IN SOUTH AFRICA, 2010, JUTA at page

226-227 states as follows when dealing with the concept of authority in administrative law “*The first principle of administrative law (and of the rule of law) is that the exercise of power must be authorized by law. Thus in Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC) paragraph 97 and 144, in what has become one of the most frequently cited dicta in South African public law, the Constitutional Court explained that it is “central” to the conception of our constitutional order that the legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.*

As noted in chapter 1, administrators have no inherent powers. Every incident of public power must be inferred from a lawful empowering source, usually legislation. The logical concomitant of this is that an action performed without lawful authority is illegal and ultra vires – that is to say, beyond the powers of the administrator.”

- [20] We confirm this basic principle of administrative law and which is also a tenet of the rule of law that exercise of power must be authorized by law. Public administrators must exercise power or authority within the four corners of the

enabling legislation. The fundamental principle being that public administrators may not exercise any power nor perform any function beyond that conferred upon them by law.(see *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (cc) paragraphs 97 and 144.

- [21] The Appellant (Returning Officer) ignored the tax compliance certificate dated 19 August 2021, yet this document contains the mandate to him to accept the registration of the person (Respondent) named therein for the Senate Elections. In big letters this document is written **“Tax Compliance Certificate”** normally referred to as Tax Clearance Certificate because on its face it does contain the words “clearance” and “certificate”. This document specifically says -

“I hereby certify that Dlamini Bhutana Samuel has no tax obligations outstanding.

Clearance Restricted to: Elections (Senate).

THIS CERTIFICATE IS VALID UNTIL 2021/09/19”.

This is the document one would hold as envisaged under section 96 (c) of the Constitution and certainly not the letter addressed to the National

Commissioner of Police who is generally and principally responsible for evidence-gathering for diverse purposes.

- [22] The tax compliance certificate date-stamped 19 August, 2021 remained valid until the 19th September, 2021 unless or until earlier invalidated by a Court of law or withdrawn by the Commissioner of Taxes. By the 2nd of September, 2021, the date for the Senate elections it had not been invalidated nor withdrawn as aforesaid.

As if that is not enough the Commissioner of Taxes issued another Tax Compliance Certificate date-stamped 28 September 2021 still certifying that the Respondent **“has no tax obligations outstanding”** and **“Clearance restricted to EBC & Senate elections”**. We have not been told what this second tax compliance certificate was in aid of but it is filed and it is before this Court.

- [23] In any event, the Appellant/Returning Officer to say for setting aside or disregarding the Tax Compliance Certificate dated-stamped 19 August 2021, which we hold he had no mandate to do, relied on a letter of the Commissioner of Taxes which in its schedule showed that the Respondent owed taxes

amounting to E668.20 is not true. This letter was not addressed to the Returning Officer but to the National Commissioner of Police. It therefore remained a police document and as pointed out in our paragraph [18] above that there is no enabling law or lawful authority for him to disregard the Commissioner of Taxes' Tax Compliance Certificate or that allows him to verify the tax compliance certificate, in the absence of fraud. The Returning Officer missed the boat and acted illegally, unlawfully and unconstitutionally. The Returning Officer should have accepted that the Legislature must have seen it wise not to provide another layer on elections in the form of "verification" or "further verification".

[24] Section 96 (c) requires for a person to qualify for elections or nominations, as the case maybe, to be a person who:-

“(c) Has paid all taxes or made arrangements satisfactory to the Commissioner of Taxes”. (underlining ours)

The Returning Officer makes a startling submission in his letter dated 21st September 2021 addressed to the Respondent's attorneys. The Returning Officer had been ordered by the Court *a quo* to give reasons to the Respondent for disqualifying the Respondent as per section 33 (2) of the Constitution

which says a person appearing before any administrative authority has a right to be given reasons in writing for the decision of that authority.

[25] Under paragraph 5 of his letter, the Returning Officer states -

“On the day of the elections, we were informed that your client has made arrangement with SRA to settle the outstanding debt. It was unfortunate that at that time the decision to disqualify him had already been taken by the Returning Officer. Furthermore compounding the problem was that ballot papers were already printed”.

What comes out of this statement of the Returning Officer is this -

- (a) He had been informed on the day of the elections (or prior to the set time for the elections) that the Respondent was now compliant with section 96 (c) and therefore eligible for the elections; but
- (b) He, the Returning Officer had already made his decision to disqualify him, and since he had made his decision he could not change it even in the face of new evidence contrary to his decision; and lastly

- (c) Ballot papers were already printed. He does not tell this Court why he could not print new ballot papers or postpone the elections to a later time until the ballot papers were printed.

[26] What clearly comes out from this letter and is of paramount importance for the legal conclusion of this matter, is that, by his own hand, the Returning Officer provides, not a killer punch, but the critical and crucial evidence that he was aware prior to the set time for elections that the Respondent qualified in terms of section 96 (c) of the Constitution and at that time, even by his own thinking or perception, there were no longer any legal impediments for the participation of the Respondent in the Senate Elections but for the ballot papers which already had been printed. His concern, it would seem, was the ballot papers and not the law or the elections. If that is so, it was an improper consideration.

CONCLUSION

[27] It is the conclusion of this Court that as at the 2nd September 2021, the Respondent was compliant with section 96 of the Constitution and therefore eligible to participate in the Senate Elections.

[28] The argument advanced by the Appellant that by the 2nd September 2021, the day of the elections, the Respondent was already disqualified and therefore not eligible to participate in the elections has no merit for the following reasons -

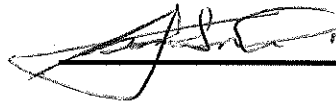
- (a) The vetting of the Respondent and the verification of the Commissioner of Taxes' Tax compliance Certificate is not sanctioned by law as stated above and therefore this exercise or action of verification which resulted in the erroneous decision was unlawful and cannot stand in law.
- (b) The Returning Officer after receiving the letter addressed to the National Commissioner of Police with the schedule that shows the Respondent to be owing E668.20 in taxes did not call before him the Respondent and thereat explain or inform him of the owed taxes and further inform or explain to him that unless there was a plausible explanation concerning the tax debt, he was disqualifying him. The disqualification could have then taken effect at that time had the Returning Officer given the Respondent a hearing.
- (c) No reasons for the decision disqualifying the Respondent from participating in the Senate elections had been given. The

Returning Officer is not truthful when he says he was waiting to be asked before he could give reasons. Evidence in the papers is that he was asked for the reasons on the very date of the elections in Parliament and later by the Respondent's attorney and he still refused to give them. It was not until he was compelled to do so by the court *a quo*.

[29] The Respondent was correct to believe he qualified as he had not been called to a hearing, had not been informed of the unilateral disqualification and no reasons were given. This behaviour of the Returning Officer is irrational and also unlawful as it offends the principle *audi alteram partem* – let the other side be heard as well, affirming that no person should be judged without a fair hearing which each party is given the opportunity to respond to the evidence against them.

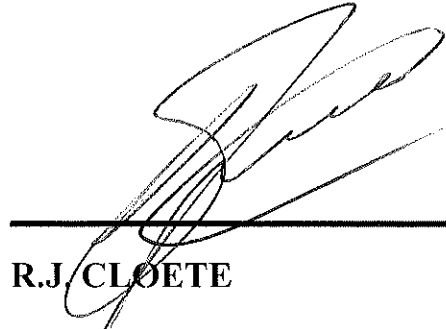
[30] In the result the Court issues the following Orders -

1. The Appeal is dismissed with costs.
2. The judgment of the Court *a quo* is confirmed inclusive of costs.



**S.J.K MATSEBULA
JUSTICE OF APPEAL**

I agree



**R.J. CLOETE
JUSTICE OF APPEAL**

I agree



**M.J. MANZINI
ACTING JUSTICE OF APPEAL**

For the Appellant: N. G DLAMINI;
L. DLAMINI; and
ADVOCATE LUCAS MAZIYA (instructed by the office
of Attorney General)

For Respondent: N.D JELE