IN THE SUPREME COURT OF ESWATINI

JUDGMENT

CASE NO. 67/23

HELD AT MBABANE

In the matter between:

THE ATTORNEY GENERAL N.O. Applicant

And

MKHULULI DLAMINI Respondent

Neutral Citation: Attorney General N.O. vs Mkhululi Dlamini (67/2023.)[2023].SZSC 37 (25 August, 2023)

Coram: MJ Dlamini JA, JM Currie JA and MR Fakudze AJA.

Heard: 22/23 August 2023.

Delivered: 25 August, 2023

JUDGMENT

M.J. Dlamini JA

Introduction

[1] It is apposite to begin by pointing out that this matter has been characterized and compounded by some glaring procedural lapses from inception at the hands of the EBC Officers through the Respondent and in the Court *a quo*. This matter concerns the registration and or nomination of the Respondent in general elections and for purposes of voting and or being voted to any of the elected positions. The background facts are somewhat scattered and isolated. In one instance it is said that opposition to the registration of the Respondent first appeared as far back as 8 July 2023 and for some unexplained reasons simmered for more than two weeks without being resolved, until it erupted on 22 July 2023 resulting in the judgment of the High Court delivered on 22 August 2023. Also the decision to appeal having been made as early as 2 August 2023, it is not easy to understand why it took so long to have the appeal heard on 18 August when nominations were due on 22 August 2023. The hearing of the appeal was unduly delayed gradually rendering the proceedings a lost cause.

[2] I find it unnecessary to set out in any detail or logical sequence all the events and the delay in dealing with the problem in time for any meaningful resolution. It suffices that (1) on 22 July 2023 the Elections and Boundaries Commission (the Commission) allegedly "removed the name of the [Respondent] from the voters' roll of Othandweni Primary school Polling Station without a valid objection being lodged in terms of section 18 (2) of the Voters' Registration Act, No. 4 of 2013"; (2) the voters' roll verification was closed on 12 July 2023; (3) the Commission took a decision to remove the name of the Respondent from the voters' roll "without hearing the side of the Respondent"; (4) on 3 August 2023

Respondent filed the leave to appeal to the High Court. Further in its rather mixed up notice of motion dated 3 August 2023 to the High Court Respondent states as follows:

"3.2. The [EBC] based its decision [to remove my name from the Voters' Roll] on an alleged objection received by itself on the 22nd July 2023 when in actual fact voters' roll verification was closed on the 12th July 2023 with the names that appeared on the voters' roll on the 22nd July were final and thereby misdirected itself".

[3] On 4 August 2023 leave to appeal was granted; and on 7 August 2023 the appeal was formally filed by notice which however did not list any prayer to be granted by the High Court except that the decision of the EBC of 22 July 2023 be transmitted to the High Court as required by law. (7) The objection of the Commission was filed on 10 August 2023. The objection is dated 22 July 2023. The objection as required by law was supported by Form No.6 attested to by one John Mandla Dlamini of Maphilingo and received by the Registration Officer on 8 July 2023.

[4] The record of proceedings filed by the Applicant does not bear the certification of the High Court Registrar as is the requirement. It only has the notice of appeal dated 7 August 2023, the objection filed on 10 August 2023, Judgment of Court *a quo* dated 22 August 2025, Notice to raise points of law and the Notice of application for security for costs in the amount of E200,000. It does not have the Respondent's Application of 3 August 2023 which brought the matter to the High Court requesting for leave to appeal – which leave is said to have been granted by consent.

This application

[5] This is an application in terms of section 148(1) of the Constitution. The Applicant prays for the following orders, among others –

(b) Staying the Court Order granted by the court *a quo* on Friday, the 18th August 2023, ordering the Applicant to hold a special nomination process or to include the name of the Respondent in the list of nominees of Maphilingo Umphakatsi.

(c) Intervening in terms of section 148 (1) of the Constitution as a result of the gross miscarriage of justice committed by the court *a quo* which ordered and directed the applicant to hold a special nomination process at Maphilingo Umphakatsi before noon on Monday, the 21st August 2023 to determine the nomination of the Respondent, which order has not been prayed for.

(d) Intervening in terms of section 148 (1) of the Constitution as a result of the gross miscarriage of justice committed by the court *a quo* which ordered and directed the Applicant to include the name of the Respondent in the list of nominees of Members of Parliament for the Maphilingo Umphakatsi, which order has not been prayed for.

[6] In support of the application, the Chairperson of the Elections and Boundaries Commission has filed the founding affidavit for the Applicant in which the Chairperson avers that the Supreme Court has jurisdiction to hear the application because "the court *a quo* proceeded under a mistake of law.... causing a gross miscarriage of justice", and that the Supreme Court, as the apex court, "is empowered by the Constitution to exercise supervisory control when subordinate courts are straying".

[7] In the founding affidavit it is also alleged as follows:

"12. It is apposite to highlight at this juncture that the applicant is applying for the Honourable Court's supervisory powers to intervene in this unfortunate matter because there are no alternative remedies either through an appeal or review. The only window available for the applicant is through the supervisory powers of this Court. It is a known fact that this type of application is peculiar and has not been utilized by litigants before in our jurisdiction. I am advised and verily believe that the courts are reluctant to close [their] doors on litigants from accessing justice.

13. The applicant has identified a number of exceptional circumstances in the form of gross irregularities, injustices and/or errors of law as follows:.... in the respondent's Notice of Appeal, there is no prayer for a relief sought by the respondent... Despite that the applicant raised a point of law that there was no prayer for relief sought... the Court *a quo* overlooked that defect without lawful justification and dismissed such point of law.

15. The order [of the court a quo] is one which no reasonable person would make without regard to the grounds of appeal and the information which was before the learned Judge...:

15.1 ....The evidence before the learned Judge a quo demonstrated that an objection against the respondent's inclusion in the voter's roll ...at Maphilingo Umphakatsi was lodged in the prescribed form on 8 July 2023. Upholding the appeal on the first ground (of appeal) is irrational in that it is unjustifiable on the material which was before the judge below.

15.2 ...The material before the learned Judge below indicated that the objection to the respondent's inclusion in the voter's roll was lodged on 8 July 2023... No reasonable person acting reasonably could have found that the Commission's decision was based on an objection lodged on 22 July 2023.

15.3 ....The material before the Judge below showed that the Commission conducted a fact finding exercise and in that exercise the respondent was consulted. Upholding the appeal on the ground that respondent was not heard is unsupportable on the facts before the High Court. A reasonable person acting reasonably would have found that the respondent was given a hearing.

15.4 ....On the respondent's own showing, his nomination was incomplete in that there were disturbances before support for his nomination reached the threshold set by the Constitution. The High Court committed a patent error of law in ordering the Commission to include the respondent's name in the list of nominees as a Member of Parliament for the Maphilingo Umphakatsi.

15.5 ....On the material which was before the High Court a reasonable would have found that the respondent is not a resident of Maphilingo Chiefdom and therefore ineligible to register as a voter in that Polling division".

[8] Beside the fact that this order was not applied for, the Applicant's deponent challenges the order for a "special nomination process to determine the nomination of the respondent at Maphilingo Umphakatsi. This prayer has not been applied for... The prayer was *mero motu* granted by the Court *a quo*...." In so doing the court *a quo* acted contrary to the decision in **Justice Sibusiso Dlamini and Another v. David Themba Dlamini** [2015] SZSC 06, para [13]. The same argument goes for the other orders granted without having been prayed for.

[9] On the papers before Court it would appear that the registration of the Respondent at Maphilingo royal kraal was on 8 July 2023 objected to by one John Mandla Dlamini who submitted a completed Form No. 6 to the Registration Officer. Consequent upon the objection, the Chairperson states that the Commission conducted a fact-finding exercise involving the Respondent and other sources, and determined that Respondent did not qualify for registration at Maphilingo Umphakatsi as he was "not formally introduced at the Maphilingo Umphakatsi." This information is contained in the Commission's Objection to the Registration of the Respondent at Siphofaneni Inkhundla dated 22 July 2023. The document is accompanied by the formal objection required by the law, set out

in Form No.6, duly completed. The same Form 6 is said to have been received by the Registration Officer on 8 July 2023. The fact-finding mission must have taken place between 8 July and 22 July 2023, in particular as on 12 July the Voters' Roll was supposed to be closed. It would seem therefore that on 22 July 2023 Respondent's name could not have been on the Voter's Roll, except by some inexplicable error on the part of the Commission. Further, following the fact-finding exercise, Respondent must have known where he stood in regard to his registration status by 22 July 2023. Of critical pertinence, the Respondent did not answer to this application but chose to stand or fall on his points of law.

[10] In his Notice of Motion for leave to appeal dated 2 August 2023 the Respondent states: "3.2 The 1st Respondent (i.e. the Commission) based its decision on an alleged objection received by itself on the 22nd July 2023 when in actual fact voter's roll verification was closed on the 12th July 2023 with the effect that the names that appeared on the voter's roll on the 22nd July were final and thereby misdirected itself."

[11] With respect, from the papers before Court, it is not clear when exactly the official decision to object to Respondent's registration took place. The Chairperson says a fact-finding exercise was done following the objection on 8 July and it determined that Respondent did not qualify to be registered at Maphilingo and that his name, showing that he had indeed been erroneously registered, would be removed from the roll under Maphilingo. As early as 8 July objection to the registration of Respondent had been flagged but seemingly nothing final was done until 22 July 2023. When exactly the fact-finding exercise was completed is not stated – whether before or after 12 July. But on 12 July, the verification deadline, the name of Respondent was still on the voters' roll at Maphilingo. Yet the Form 6 officially stated that the Respondent did not belong to Maphilingo.

[12]. Respondent himself says that he "acquired land sometime in January 2022" and has since July 2022 established a homestead at Maphilingo. Respondent does not say how he 'acquired' the land and 'established' his homestead when the Kraal Indvuna categorically

denies that Respondent has any homestead at Maphilingo Chiefdom. The reality of it is that no one on Swati Nation land can own land or own a home without being known by the Umphakatsi. Until the royal kraal is shown to be mistaken this Court must accept their version on a matter like the present. *Kukhonta* is the way. A situation is reached where the decision has to be made clear whether Respondent belongs or does not belong to Maphilingo or whether he could lawfully contest any election there in light of the incomplete information before Court. If the registration was objected to and as early as 8 July, how did the name of Respondent get to be on the voters' roll at Maphilingo? No explanation. Had the fact-finding and verification exercise been done on time the disturbance resulting to incomplete nomination of Respondent would not have occurred.

[13] In challenging the Order of the Court *a quo,* the Chairperson also avers:

> "21. The Court granted the prayer for a special nomination process without considering that the nominations that were held at Maphilingo Umphakatsi on the 22nd July 2023 were not nullified through a court order, thus still stand. This puts the other nominees in a precarious situation since they were not cited in the proceedings before the court *a quo*....
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> 22. The order of the court *a quo* will surely put the whole election in disarray resulting in the timeline for holding elections within sixty days...not being met, thus rendering the whole election unconstitutional. In addition, there is a likelihood of lawsuits ensuing against the Applicant if the order of the Court *a quo* is to be implemented.
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> 23. The order of the court *a quo* is unenforceable because not only is it tantamount to imposing the respondent on the people thus taking away the right of the people of Maphilingo to be represented by their own freely chosen representative much against the spirit of Section 84 (1) of the Constitution. The order also presents another hardship because all ballot papers and election

material have already been procured and printed and there is no budget that is specifically set aside for the Respondent.

24. The election process is no longer at nomination stage and has progressed to primary election..."

[14] The appeal was heard on 18 August and judgment delivered on 22 August 2023. The Order of the Court *a quo* is as follows:

"1. The decision of the Election and Boundaries Commission dated 22nd July 2023 is hereby set aside and the applicant's name reinstated on the Voters' Roll of Maphilingo Umphakatsi.

2. The Election 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 Appellant's name in the list of nominees for Member of Parliament [MP] for the Maphilingo Umphakatsi.

3. Costs to follow the cause".

[15] It appears that the judgment *a quo* was mainly founded on "the uncontroverted affidavit" filed by the Respondent in his application for leave to appeal. During the hearing it appeared that the leave to appeal was granted by consent; but it was not common cause as to the veracity of all the contents of the Respondent's founding affidavit. And the learned Judge *a quo* himself observed in another respect under para [10] "... This perhaps demonstrates that the fact that simply because a fact is not controverted does not mean it is necessarily completely true". There being no adequate record, it is not clear what papers served before the court *a quo*. In para [16] of the judgment, the learned Judge *a quo* states: "In keeping with section 19(1) of the Voters' Registration Act, the [Commission] filed with the Registrar of this court the decision of the Commission and the matter was therefore ripe

for hearing". It is not stated what papers, if any, the Applicant filed in opposition to the appeal; nor is it stated whether Applicants were ever required to file papers in opposition to the appeal. Surely, if the Commission had objection to the inclusion of the name of Respondent as alleged it is unlikely the Applicant would not have opposed the appeal. On the whole the judgment *a quo* reads as if it were an *ex parte* hearing. We are not told that the Applicants (Respondents then) declined to file any opposition to the appeal. Only in para [29] is Mr. Simelane for the respondents *a quo* briefly mentioned.

[16] The Chairperson's letter of 22 July incorporating Form 6 was before the court *a quo*. The judgment says nothing about the alleged fact-finding regarding the status of Respondent as a person belonging, for registration purposes, to Maphilingo. Evidently, on the basis of the fact-finding in support of the objection of 8 July 2023, the Commission determined against the Respondent. Under paras 29 - 30 of the judgment, the learned Judge implies that even if Respondent may not have qualified in terms of s 15(1)(a) as stated by John Mandla Dlamini in Form 6, Respondent may have qualified under subsection (1) (b). This leaves the matter hanging since the court *a quo* did not make a finding, as it should have.

[17] Now the *Indvuna* of the Maphilingo Royal Kraal says the Respondent "does not own any home and has never been....a resident of Maphilingo Chiefdom". This Court takes notice that as kraal head man for the Chiefdom, Hhomu Lomatiyela Shongwe, covers every aspect of the section 15 (1) requirements. How then is the order of the court *a quo* to be enforced? Can this Court, that is, does this Court have the power or competence to impose the Respondent as a nominee or even as voter on the Maphilingo voters' roll? It seems to me if the Respondent believed that he qualified to be registered and therefrom to stand for any nominations, Respondent should have approached the very *Indvuna* to clarify his position vis-à-vis the Royal Kraal. As it is the Respondent is all on his own. For this Court to support the decision of the Court *a quo* the *Indvuna* would have to be shown to be mistaken in denying that Respondent is a qualifying resident. As things stand, for the Court *a quo* to embark on that enquiry would be a waste of time. It is true that court orders must

be obeyed. Under our system of government any elected representative needs a working relationship with the various Chiefdoms forming the Inkhundla. It is therefore virtually a requirement that the elected person must have a good relationship with his own chiefdom or the chiefdom of which he is resident or has a homestead, for necessary community meetings. Without the support of the *Indvuna* such meetings would be hard to convene.

[18] The Respondent was permitted to file any other papers such as an answering affidavit beside the points of law he had raised, but declined to do so. Accordingly, before this Court Respondent stands or falls by his **Points of Law**, in terms of which he sought dismissal of the application on the basis that this Court (i) 'lacks jurisdiction over the matter' and (ii) 'the application has no legal basis and is bad in law'.

[19] The long and short of the Respondent's points of law is as follows:

> "1.1. The applicant has disregarded Section 148 (2) of the Constitution in terms of the revisionary powers given to the court. The court has only powers to review a decision made or given by it. In the present matter the decision the Applicant seek to review was given by the High Court. The above Honourable court does not have reviews but Appeal powers from matters decided by the High Court.
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> 1.2. The above Honourable court's appellant (sic) powers of decisions of the High Court is ousted in this particular matter by section 19 (6) of the Voters Registration Act of 2013. This particular section specifically states that there shall be no appeal that will be against the decision of the High Court on such matter.

[20] The Respondent did not file any heads of argument, but only argued from the bar. *Ex facie*, Respondent challenges the jurisdiction of this Court in that section 19(6) provides that there shall be no appeal to this Court from the decision or order of the High Court. In anticipation of this very objection, the Applicants as shown above stated that because of the statutory denial of appeal they had no alternative as review is also not available, but to

proceed on the basis of section 148 (1) to deal with the "gross irregularities, injustices and/or errors of law..."

[21] The challenge to the jurisdiction of this Court in this matter was not well thought out. What the Respondent seems to have done was to redefine the application for the supervisory jurisdiction of the court as an application for review. In terms of section 148 (2) this Court may review its own decision. In this matter from the High Court, section 148 (2) was out of the question. Under section 148 (1) this Court may exercise 'supervisory jurisdiction over all courts of judicature and over any adjudicating authority'. The only question is whether the Applicant has made out a case for the employment of the Court's jurisdiction under this subsection. How the case may be made out largely depends on the facts of each case since there are no laid down rules. From the few authorities already assembled in this jurisdiction it is clear from the other authorities cited that the supervisory power of the Court can be exercised in a variety of situations where glaring irregularities show up without a laid down procedure for dealing with them. Supervisory jurisdiction is inherent power which a superior court has in our system of law so that no manifest injustice can go uncorrected for lack of a court with competent authority.

[22] In totality of the result and the shortcomings such as the enforceability of the judgment and orders based on prayers not made cumulatively generating an untenable judicial proceeding in need of a just cause. And there being neither appeal nor review, the only way out was to seek the Court's supervisory jurisdiction. In the nature of this jurisdiction, an element of review cannot entirely be excluded as the exercise is essentially revisionary. In the case of the **Director of Public Prosecutions vs Sipho Shongwe** [2018] SZSC 23 references may be made to various paragraphs in support of the power and the circumstances in which such power may be exercised. See for instance paras [34], [37], [38], [39] and [46]. I have no doubt in my mind that this application meets the requirements for the deployment of the Court's supervisory jurisdiction.

[23] In their application the Applicant also complained that the proceedings at the High Court were also vitiated by the fact that the provision for security of costs had not been deposited as required. The point however had to be abandoned as it turned out that security in the amount of E200, 000. 00 had in fact been deposited in the trust account of MS Dlamini Legal, the Respondent's Attorney. This was unknown to Mr. S. Dlamini who appeared for the Attorney-General in this application. Even though initially apprehensive of the manner the security for costs is managed in these proceedings, I was made to understand that that was the way such security had been handled in the past and that this is with the concurrence of the Registrar of the High Court. The deposit was supported by a Nedbank proof of payment dated 14 August 2023.

[24] We have pointed out that the orders of the court *a quo* were not only not prayed for but are also not enforceable. The Commission may be ordered to comply but there is no order to enforce that compliance at the level of Umphakatsi since the *Indvuna* was not joined. It is also not certain how Respondent can enjoy and exercise his voter's rights and privileges when the *Indvuna* of the area denies Respondent's residential status. In convening meetings in whatever elected capacity, cooperation of the *Indvuna* would be necessary. Nothing binds the *Indvuna* to cooperate. And the nominations of 22 July 2023 were never nullified to make way for the Respondent as required by the impugned order.

[25] In the result and for the foregoing the following Order is made –

1. The Respondent's points of law are dismissed.
2. The Application is granted.
3. Decision of the court *a quo* reflected in paragraph [1] of the judgment *a quo* is set aside.
4. No order as to costs here and below.

MJ Dlamini JA

I Agree

JM Currie JA

I Agree

MR Fakudze AJA

For Applicant Mr. S. Dlamini.

For Respondent Mr. M.S. Dlamini