HIGH COURT OF SWAZILAND

CIVIL CASE NO.2466/03

In the matter between:

ROBERT MAGONGO	APPLICANT
AND	
CHIEF ELECTORAL OFFICER	RESPONDENT
CORAM	MATSEBULA J
FOR APPLICANT	MR. SIMELANE
FOR CROWN	MR. MSIBI

JUDGMENT

20th OCTOBER 2003

This is a matter brought by notice of motion under the certificate of urgency. On the 30th September 2003 my brother Shabangu A J granted a rule and postponed the matter to the contested roll of the 10th October 2003. On the 10th October 2003 the matter was further postponed to a date to be arranged by the Registrar. The Registrar allocated it to the 15th October 2003 and on this date it was further postponed to the 16th October 2003. By all accounts which would have been perceived and recognised by the learned Judge on the 30th October 2003 this matter had completely lost its urgency. Finally the matter was part-heard before me on the 16th October 2003. Not much progress was made because the court was flooded with other matters

of similar applications. I read through the book of pleadings and raised certain questions regarding the merits of the matter and Mr. Msibi referred me to Section 20(1)(d) of Act No.2/1992 which, in my view, has absolutely no application and relevance in this matter at hand. To follow this line of argument would simple be backing a wrong tree.

In the present case the applicant appears aspired to be an "indvuna" of an inkhundla whose requirements and prerequisite have nothing to do with anyone aspiring to be an "indvuna" of inkhundla. No (inaudible) of interpretation of statutes relating to an aspiring member of parliament can be invoked to either assist or bar a person who aspires to be an "indvuna" of inkhundla.

In my view, therefore both Parliaments Act and the Parliament's Petitions Rules are totally irrelevant to the present proceedings. It would be advisable for this court to stay as far as away from this cause as possible. The applicant's notice of motion and prayers are the following:

1. Dispensing with the usual forms and procedures relating to institutions of proceedings and allowing this matter to be heard as a matter of urgency;

2. Ordering that a rule nisi do hereby issue calling upon the respondent to appear and show cause if there is any to this Honourable Court at a time and date to be determined by the above Honourable court at a time and date to be determined by the above honourable court while order in the following terms should not be made final.

2.1 that the elections for the indvuna yenkhundla conducted on the 20th September be suspended

and/or set aside.

2.2 Staying or all steps in execution of elections outcome pending flnalisation of these proceedings;

2.3 That the election of indvuna yenkhundla be commenced de nove;

2.4 Directing the rule nisi referred to in paragraph 2 above to operate with immediate effect pending the outcome of the proceedings;

2.5 Directing that the respondent pays costs of this suit in the event they oppose same;

2.6 Granting the applicant such further and/or alternative relief as the honourable court may deem meet.

Mr. Simelane asked this court to focus its attention on the following prayers, prayers 2.1, 2.2, 2.3 and 2.4 for the simple reason that my brother Shabangu A J already dealt with the other prayers. The background to this application is set out at pages 7 to 8 of the founding affidavit and I would read that in full and then comment on the contents.

The background is as follows:

"On about the 23rd August 2003 I was nominated to stand for the elections of the position of the indvuna yenkhundla of Motshane. Pursuant to the nomination I presented myself to the Mbabane Police station for the purposes of fingerprints taken to obtain a police clearance.

5. I was of the view that all was well until on the 17th September 2003 when I was served with an application that I must submit myself for fingerprinting in connection with an earlier conviction. I was taken aback by this application and I duly instructed my attorneys to oppose it. On the day of the elections for the position of the indvuna yenkhundla being the 20th September 2003 my

photo did not appear on the ballot paper for purposes of enabling voters interested in voting for me. As a result of this omission I was never voted for notwithstanding the fact that I qualified to contest the elections.

When I enquired from the returning officer, he said he had no idea the ballot paper at the time was all that was handed to him. As he could not help me, I could not participate in the elections. It then became clear to me that the reason why my photo and my name did not appear in the ballot papers is because the police did not issue a clearance hence they wanted through the application served on me on the 17th September 2003 to comply a fresh record which would then serve to rectify the omission. The fingerprints ought to have been taken during my arrest or conviction they cannot be taken at this stage when I have been released from custody nearly two years ago. If the police do not have the fingerprints that is what the clearance should stage. To seek to have my fingerprints for an earlier offence taken at this stage is not in accordance with the procedures.

I may just pause here and point out that the applicant seems to completely have misconceived the question of the taking of fingerprints. This stands procedurally in any institution, if you seek employment this is the procedure. He cannot object to that and he cannot force the employer to take him against the wish of the employer if the employer has not been given confidential information.

As I dealt with Section 20(1) (g) of the Establishment of Parliament Act and made a finding that it ha no application. I am not persuaded by the respondent's paragraphs 4 at page 15 which reads as follows:

"I admit the allegation in this paragraph in so far as they relate to the applicant's nomination for a position of indvuna yenkhundla and further allegation that the applicant presented himself to the police for the purpose of obtaining a police

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clearance. I am advised and do verily believe this has been the case with all candidates for the position of indvuna yenkhundla and further allegation that the applicant presented himself to the police for the purposes of obtaining a police clearance."

I am advised and do verily believe that this has been case with all candidates for the position of indvuna yenkhundla since 1993 Parliamentary Elections and was also observed the letter during 1998 elections and is currently being observed by the over 350 candidates currently contesting the elections for the indvuna yetinkhundla under the 2003 elections.

I submit and I have been verily advised, which advice I readily accept that this has developed into an established constitutional practice of law. I submit at face value, this requirement mentioned in Section 20(1)(g) of the Establishment of Parliament Orders Act 1992 seem not to be applicable to appointment of indvuna yenkhundla but further legal arguments shall be advanced on my behalf at the hearing of this application to demonstrate that it is not applicable.

As I have said I am not persuaded by the respondent's paragraph 4 at page 15 first paragraph of page 16 for the reasons stated above in my judgment. What is of importance in this matter is whether the Section is applicable to candidates of Parliament and Senate on the same footing aspiring candidates for the indvuna yenkhundla. The legislative enactment clearly indicates that is not the case.

By consent both counsel agreed that it would however be in the interest of justice for this court to involve the powers in terms of the civil proceedings and call a witness from the Correctional Services Department. This I would explain in details that the applicant was already out of prison at the relevant time. This notwithstanding that the Section 20(1)(g) of the Establishment of Parliament has no

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application in his case because he does not intend becoming or being appointed Member of Parliament. The witness has given his evidence, I hope to the satisfaction of both counsel. The court called him and either counsel was not restrained to cross-examine him. It seems to me to be common cause that either counsel is not challenging his evidence. His evidence stands therefore uncontroverted i.e. to the extent that the witness was out of prison by the year 2001.

For the purpose of this judgment there is therefore no question that the piece of legislation is of no application. The question that this court is called upon to decide is whether the provisions of the establishment of Parliament Order No.l of 1992 applies to the applicant's case.

Mr. Simelane on behalf of the applicant argued very forcefully that the order does not apply to the applicant but only applied to those aspiring and who have been nominated for positions either the House of Assembly or Senate which is clearly not the applicant's case here. He has applied for the position of the indvuna yenkhundla of the Motshane area. Mr. Simelane referred to the principles of legal interpretation by EA Kellaway at page 221 and I have consulted that. Mr. Simelane submitted that the (inaudible) position by the learned writer is very clear and there is no ambiguity. It was further, Mr. Simelane's submission, that the manner of going about the position of establishing a procedure for a person who intends to be an indvuna yenkhundla is spelt out there but the reference is to a person who was to be a member of Parliament. If it was the intention of Parliament to include the indvuna yetinkhundla, Parliament would have done so but not left the court to infer for the position of the indvuna yenkhundla would have been intended. It was Mr. Simelane's argument to have that excluded and prevented the applicant from including his photo from those who contested the position was both unlawful and illegal.

Mr. Simelane asked this court to grant prayers 2.1 to 2.3 of the notice of motion.

Mr. Msibi on the contrary's arguments was to the effect that if the applicants had not been granted the remission by the Correctional Services Department the (inaudible) of mercy by His Majesty he would have been released only in December 2001 and therefore he would not have been out of prison to be nominated for the position of indvuna yenkhundla of the area. Mr. Msibi argues that applicant has a previous conviction and therefore on that basis is excluded in terms of Section 20(l)(g) of the Establishment of Parliament Order Act No.22. Mr. Msibi argued further that this principle of exclusion is based on conversion. It has been a practice since the establishment of the Inkhundla System. The witness of Mr. Msibi's argument is that the inkhundla system or government has not been in existence from any length of time to entitle this court to either invoke conversion and base its judgment for the exclusion thereof. Mr. Msibi argued that the case in point is one in which an accused is charged with an offence under the non-bailable offences order. Mr. Msibi argued that the accused in that case was convicted and sentenced and his counsel subsequently moved a bail application on the basis that the position of the accused had changed and therefore the prohibition. to the granted bail no longer apply. On the contrary I feel that it is the reverse of this whereas the person who has been charged is presumed innocent once convicted all the innocence falls away and the law will even apply with more force than it had applied heretofore. I do not and I am not persuaded by this argument. If anything, when he the accused faced the unproven case, he was presumed innocent until proven guilty. However, once convicted, his legal position became worse, how then can he be considered for bail?

The court, in that case was perfectly correct in rejecting the evidence in advance. In my considered view the applicant is entitled in terms of

prayers 2.1, 2.2, 2.3 and 4 of the notice of motion and that is the judgment,

J.M. MATSEBULA

Judge