IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 3642/2008

THULISILE NYAKURA (born SIMELANE) Applicant

And

THE CHAIRMAN OF THE ELECTIONS
AND BOUNDARIES COMMISSION
AND 40 OTHERS Respondents

Coram: S.B. MAPHALALA – J

For the Applicant: MR. M.NKOMONDZE

For 1st and 2nd Respondents: MR. B. TSABEDZE

For the Respondents: MR. FAKUDZE

JUDGMENT
23rd October 2008

[1] This is an application brought on a Certificate of Urgency for an order for the disqualification of the 4th to 41st Respondent from voting for Bucopho under Luhlangotsini Umphakatsi on the basis of it being irregular and not being free and fair; that 1st Respondent conducts fresh elections for Bucopho under the Luhlangotsini Umphakatsi and that 3rd Respondent must not assume any official duties for the office of Bucopho for Luhlangotsini Umphakatsi.

[2] Applicant has filed a Founding affidavit in support of the application where she outlines the material facts in this case.

[3] The 1st Respondent has filed its opposition in an affidavit of one Thandiwe Nxumalo - Dlamini who was the Presiding Officer for Luhlangotsini Umphakatsi under Piggs Peak Inkhundla where points *in limine* are raised. These points *in limine* are the following:

Urgency

4.1. This matter is not urgent. If there is any urgency at all, it is one which is self-created in that the elections of Bucopho were conducted on the 23rd August 2008 and Applicant has only served us on the 18th August 2008, 21 hours before the date and time of the secondary elections on the 19th August 2008.

4.2. Objections to the inclusion or retention of a voter(s) in the voters list are dealt with in terms of section 13, 14 and 15 of the Voters Registration Order,

1992. Applicant ought to have first exhausted these remedies before running to court.

4.3. A copy of the voters list for Luhlangotsini Inkhundla was kept as lying open for inspection by members of Luhlangatsini Chiefdom at the Chiefs kraal and Applicant ought to have scrutinized the voter's list threat and made copies for herself, which copies are made free of charge in terms of section 12 of the Voters Registration Order, 1992.

4.4. A voter who objects to the inclusion or retention of a voter(s) in a voters list should lodge with the electoral officer for the Inkhundla concerned his/her objection in the approved form No. 7 in terms of section 13 of the Voters Registration Order, 1992. Applicant did not file any objection with the Elections officer concerned protesting the inclusion of the people she is now complaining voted at Luhlangotsini area, an area Applicant alleges they are not from. Nor has she shown in her papers that she complained about their inclusion and nothing was done.

[4] 1st and 2nd Respondents also addressed the merits of the case.

[5] The 3rd Respondent also filed an Answering Affidavit raising points *in limine* and the merits of the case. The points *in limine* are the following:

4.1. The Applicant is seeking to rely on self created urgency something which is not allowed by the law.

4.2. The Applicant has failed to join the winners of the primaries, under the same Umphakatsi, in the categories of Member of Parliament and Indvuna Yenkhundla who have a substantial interest in the outcome of this matter.

4.3. The Applicant failed to lodge an objection to the registration of any

voter according to the provisions of the Voters Registration Order 2/1992 in particular Section 13.

4.4. Where a person has been resident within a particular Inkhundla for a period of more than three months he becomes eligible to register and vote under the Inkhundla as provided for in Section 6 of the Voters Registration Order 3/1993.

[6] I must mention that in arguments before me on the 8th and 9th October 2008 the attorneys argued both the points *in limine* and the merits of the case. The points *in limine* raised by the Respondents can be summarized as follows:

(a) urgency

(b) exhaustion of local remedies

(c) copy of voters list kept at the Chiefs kraal

(d) objections in terms of section 13 of the Voter's Registration Order, 1992

(e) joinder.

[7] I shall proceed to address these points *ad seriatim* as follows:

(a) Urgency

[8] The argument in this regard is that the matter is not urgent. If there is urgency at all, it is one which is self-created in that the elections of Bucopho were conducted on the 23rd August 2008,

and Applicant has only served the Respondents on the 18th August 2008 twenty-one hours before the date and time of the secondary elections on the 19th August 2008.

[9] On the other hand Applicant contend that she has proved urgency as reflected in paragraph 21, 22, and 23 of her Founding affidavit. At paragraph 23 thereof she sought condonation of the late filing of this application in paragraph 23.1, 23.2, 23.3, 23.4 of her Founding Affidavit

[10] Having considered the arguments of the parties in this regard I am inclined to agree with the Applicant that on the facts she has proved urgency in accordance with the rules of this court and I will therefore dismiss this point *in limine* forthwith.

[11] I must further add in this regard that Applicant lodged her complainant with the Respondents and was ignored. This was done within the time stipulated. Furthermore her initial attorney withdrew such that she had to instruct the present attorneys, thus further delaying the matter.

(b) Exhaustion of local remedies.

[12] In this regard the Respondents have taken the view that objections to the inclusion or retention of a voter(s) in the voters list are dealt with in terms of Section 13, 14 and 15 of the Voters

Registration Order, 1992. Applicant ought to have first exhausted these remedies before running to court.

[13] The Applicant on the other hand contend that the fact that she did not lodge her complaint objecting to the registration of the 4th to 41st Respondents in accordance with Section 13 of the Voters Registration Order, 1992 does not exclude this court in determining the application. There is nothing in the order that precludes the court's jurisdiction in determining the matter. In light of section 151 of the Constitution of the Kingdom of Swaziland the court has jurisdiction to hear this matter.

[14] Section 151 of the Constitution provides for the following:

(1)The High Court has:

(a) unlimited original jurisdiction in civil and criminal matters as the High Court possesses at the date of commencement of this Constitution;

(b) such appellate jurisdiction as may be prescribed by or under this Constitution or any law for the time being in force in Swaziland;

(c) such revisional jurisdiction as the High Court possesses at the date of commencement of this Constitution; and

(d) such additional revisional jurisdiction as may be prescribed by or under any law for the time being in force in Swaziland

(2) Without derogating from the generality of subsection (1) the High Court has jurisdiction:

(a) to enforce the fundamental human rights and freedoms guaranteed by this Constitution; and

(b) to hear and determine any matter of a constitutional nature.

(3) Notwithstanding the provisions of subsection (1), the High Court:

(a) has no original or appellate jurisdiction in any matter in which the Industrial Court has exclusive jurisdiction;

(b) has no original but has review and appellate jurisdiction in matters in which a Swazi Court or Court Martial has jurisdiction under any law for the time being in force.

(4) The High Court has no power, in a trial for the offence of treason, to convict any person for an offence other than treason;

(5) A Justice of the High Court may, in accordance with rules of court, exercise in court or in chambers all or any of the jurisdiction vested in the High Court by this Constitution or any other law;

(6) For the purposes of hearing and determination an appeal within its jurisdiction and the enforcement of a judgment or order made on any appeal, the High Court shall have all the powers, authority and jurisdiction vested in the court or tribunal from which the appeal is brought.

(7) In this section any reference to "revisional jurisdiction" shall be construed as including a reference to jurisdiction to determine reserved questions of aw and cases stated.

(8) Notwithstanding subsection (1), the High Court has no original or appellate jurisdiction in matters relating to the office of Ingwenyama; the office of Indlovukazi (the Queen Mother); the authorization of a person to perform the functions of regent in terms of section 8; the appointment, revocation and suspension of a Chief; the composition of the Swazi National Council, the appointment and revocation of appointment of the Council and the procedure of the Council; and the Libutfo (regimental) system, which matters shall continue to be governed by Swazi law and custom.

[15] The arguments in support of the Respondents case are based on the Court of Appeal case of *Swaziland Manufacturing and Allied Workers Union vs Swaziland Bottling Company* where the following *dictum* was expressed by Beck JA:

> "The role to play by the Labour Commissioner in terms of the statute is undoubtedly an important one. It is most desirable that industrial disputes be settled, if possible, by means of conciliation rather than determined in the more formal surrounds of a court and no doubt the existence of a statutory conciliation procedure saves the Industrial Court from hearing many time- consuming cases which are capable of resolution with the assistance of a neutral and expert third party. The importance of the labour commissioner's role is such that the duties imposed on him by Part VIII of the Industrial Relations Act should, in my view, by strictly observed".

[16] Counsel for the Respondents contended that although the above-cited dealt with conciliation in a labour environment but the principle enunciated therein find application in the machinery brought forth by the Act in the present case in Section 13 to 15.

[17] In my assessment of the arguments of the parties it appears to me that the Applicant lodged her complaints with the Respondents but she was ignored by the Respondents. The most logical thing to do for her was to approach this court as she did and she cannot be faulted for this. On these reasons I find that the point of law *in limine* by the Respondents also fails. I further agree with the Applicant on the points regarding (c), (d) and joinder. In this respect the points *in limine* on those points fail.

[18] Having dealt with the points *in limine* and found that they have no merits I now proceed to examine the merits of the case.

Before the matter was argued on the merits Counsel for the Applicant stated that he wished to call *viva voce* evidence of a witness who is one of the Respondents. Counsel further stated that it was not the Applicant who is calling this witness but it should be the court to clarify the issues before it. Counsel for the Respondents opposed this that Applicant's case should be viewed from the affidavits filed before court and no more.

[19] It is trite law that where, at the hearing of motion proceedings, dispute of fact on the affidavit cannot be settled without the hearing of oral evidence, the court may, in its discretion, (a) dismiss the application; (b) order oral evidence to be heard on specified issues in terms of the Rules of court; or (c) order the parties to trial, (see *Room Hire Co. (Pty) Ltd vs Jeppe Street Mansions (Pty) Ltd 1949 (3) S.A. 1155(T) at 1163.*

[20] It is also a trite principle of law that the Applicant should have realized when launching his application that serious dispute of fact was bound to develop, the court may dismiss the application with costs (see *Adbro Investment Co. Ltd vs Minister of Interior 1956 (3) S.A. 345 (A)* at *350).*

[21] In the present case when the matter was argued it became apparent to me that there are disputes of facts as conceded by Applicant's Counsel that *viva voce* evidence of one of the Respondents be called. Counsel for the Applicant was aware of

this state of affairs even before the last day for arguments. He stated that he would like to call this witness to

give *viva voce* evidence. It appears to me therefore that on the basis of the *dictum* in *Adbro (supra)* the application ought to be dismissed with costs, and so it is ordered

S.B. MAPHALALA

PRINCIPAL JUDGE