IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1513/2013

In the matter between:

SIFISO ZWANE	**1st**	**Applicant**
GUGU MABASO	**2nd**	**Applicant**
BIG BOY MAMBA	**3rd**	**Applicant**
562 OTHERS		

And

ELECTIONS AND BOUNDARIES COMMISSIION	**1st**	**Respondent**
DUMISANI NDLANGAMANDLA	**2nd**	**Respondent**

Neutral citation: ***Sifiso Zwane & Others v Elections & Boundaries Commission and Another (1513/2013) [2013] SZHC 240 (17th October 2013)***

Coram: **M. Dlamini J.**

Heard: **15th October 2013**

Delivered: **17th October 2013**

In matters challenging election petition should be file – court however not to dismiss such application on failure to comply with procedural aspect – costs should be meted out to send message that legislative procedures are meant to be

observed – duty of court to scrutinize presence of irregularity and as an underlying factor to examine whether such irregularities are of a nature that the result of the election could be said to be or might be negatively affected

Summary: The applicants have applied for an order declaring the election held at Ngudzeni Constituency invalid by reason of a number of irregularities.

Parties description:

[1] The 1st and 2nd respondents are registered voters for Ngudzeni constituency while 3rd applicant is also a candidate contesting election under the same constituency. In terms of the election result, 3rd applicant came out second. The 2nd respondent was also a candidate competing for the elections with 3rd applicant. 2nd respondent became the overall winner. There are further 652 applicants who are all said to be voters in support of 3rd applicant according to 1st applicant.

Parties contention:

Applicants:

[2] The applicants contend that there were a number of irregularities experienced at Ngudzeni Constituency on the day of secondary elections. The applicants aver that in the morning of 20th September 2013, the date scheduled for final or secondary elections, an announcement was broadcasted over the national radio, to the effect that there was transport to ferry voters from Mhlaleni and at Nhlangano to Ngudzeni.

[3] Supporters of 3rd applicant were prevented from boarding the said transport. The said transport had been arranged by 2nd respondent and thereby 2nd

respondent had an unfair advantage rendering the election process at Ngudzeni not free and fair.

[4] After the election, applicants submit that the counting of ballot papers was done in a building which was seventy metres away from the constituency building.

[5] This on its own was an irregularity because there was no justification for relocating. The 1st applicant together with 3rd applicant and many others objected but nothing turned out from their objection as the returning officer proceeded with the arrangement of using the church building as a counting place for votes.

[6] Further, during the counting, a number of irregularities were observed: electricity went out, and cellular phones were used as a source of light. Counting of votes proceeded. During this period, the father of 2nd respondent provided a torch as a source of light. This blackout was only in the church building where votes were counted. The constituency building nearby had lights but was never used. Further the church building had a door at its back. This door was used as access. The 1st and 3rd applicants and many others protested but they were ignored. This building facilitated rigging of the votes as the blackout was a deliberate act according to applicants.

[7] Contrary to section 62 (f), the 3rd applicant was prohibited from entering the church building where counting of votes was taking place. Curtains were pulled down during the counting and those who were outside the building could not see. The situation outside was tense and potentially confrontational. The 2nd respondent, winner of the election is a member of

the church. Lastly, 2nd respondent's colleague at Ngwane College was part of those counting the votes.

[8] The deponent to the founding affidavit is 2nd applicant. 3rd applicant together with one Fikile Dlamini filed supporting affidavits. 3rd applicant deposed that he supported the 2nd applicant with regard to the radio announcement and that he personally heard the announcement. He also confirmed the relocation of the venue for counting of votes, and use of cellular phones as source of light. He further confirms that he was denied entry into the counting venue and that he left for home frustrated.

[9] Fikile Dlamini on the other hand informs the court that she became aware of the transport to Ngudzeni and personally heard the radio announcement. She states that at Mhlaleni there were many people. When she boarded the bus, her cousin, one Mbuyiseni Dlamini refused her entry to the bus on the basis that she was 3rd respondent's supporter. She, together with eight other arranged their own transport. She alleges a fresh ground that the community police and one elder of Ngudzeni area, Ntsabayi Simelane who were to ensure that all the voters were from that area were removed from the voting area.

Respondents:

[10] The respondents ferociously refute the averments by applicants. 1st respondent raises *points in limine* which I shall revert to later in this judgment. They contend that they are not aware of any radio announcement. Even if there was one, they are not responsible for it. They accept that the counting of votes took place at the Church building. They submit that the Election Act No.91 of 2013 prohibits counting of votes in a

dwelling place and a church building is exclusive of a dwelling place. They point out that in as much as there was a black out, the said black out was experienced not only in the church building but around the area. Further that the cellular phone light was sufficient for purposes of ensuring that no one interfered with the ballot papers and boxes. At any rate at the time of the black out only the constituency headman ballot boxes were opened and being counted. Counting stopped when the blackout occurred. They further inform the court that there is no door at the back of the church. There is however a door on the side of the church building. This door was locked at all material times. They dispute deposition to the effect that 2nd and 3rd applicants protested and that they were ignored. They further refute that the 3rd applicant left the counting venue. Evidence that 3rd applicant was present during the whole process although did leave and came back before counting was over and results announced was that he signed the declaration form indicating the eventual winner. They contend that 3rd applicant even congratulated the 2nd respondent and undertook to work with him as a Member of Parliament.

Determination:

[11] The 2nd respondent has raised *points in limine* as follows:

- The only applicant herein is the 3rd applicant. The 1st, 2nd and other 562 do not have any interest in the matter by reason that they cannot in terms of the election laws be held to be aggrieved parties.

- The applicants have instituted Notice of Motion proceedings instead of Petition in terms of Section 7 (1) of the Parliament Petition Act 2013. This is a legislative enactment and this provision is directory.

[12] The 1st respondent refers the court to Rule 6 of the Rules of Court, and a number of cases decided upholding that matters of this nature should be by way of Petition proceedings.

[13] Section 7 (1) of the Parliament (Petitions) Act 2013 hereinafter referred to as the Act, reads:

> "*Avoidance of election or appointment of candidate on petition.*
>
> *7 (1) The election or appointment of a candidate as a member shall not be questioned except on a petition presented to the court requesting that the election or appointment be declared void."*

[14] From the above, it is correct as submitted by learned Counsel for 2nd respondent that a party intending to challenge election result should do so my means of a petition.

[15] The present application, as correctly observed by learned Counsel for 2nd respondent, was brought in terms of Rule 6 of the High Court Rules. This rule reads under subsection (1):

> "*Applications.*
>
> *6 (1) Save where proceedings by way of petition are prescribed by law, every application shall be brought on notice of motion supported by an affidavit or affidavits as to the facts upon which the application relies for relief."*

[16] It is glaringly clear that the legislature intended that parties as *in casu* should be by petition to this court. One can therefore safely conclude that the applicants have taken an irregular procedure in filing the present application.

[17] The applicants correctly conceded to this point and applied for the court to condone its irregular form. They support their application for condonation by submitting that there were a number of legislative enactments passed on the eve of the commencement of election process. These enactments were not readily available.

[18] Learned Counsel for applicants is correct that there were a number of legislation passed about the same time just before commencement of the election processes. In fact, about six pieces of legislations were passed at that time in anticipation of the elections.

[19] However, that as it may, one cannot over emphasis the trite position of our law that rules of court are not sacrosanct but meant to be observed. The wise words of his Lordship Schriener JA in **Trans-African Insurance Co. Ltd v Maluleka 1956 (2) SA 273(AD)** at 278 are always apposite in such circumstances:

> "*No doubt parties and their legal advisers should not be slack in the observance of the Rules, which are an important element in the machinery for the administration of justice.*"

[20] The Honourable judge however proceeds to highlight:

> *"But on the other hand technical objections to less than perfect procedural steps should not be permitted in the absence of prejudice to interfere with the expeditious and if possible, inexpensive decision of cases on their real merits."*

[21] Echoing the same principle, Millins J in **Chelsea Estate and Contractors cc v Speed – O – Rama 1993(1) SA 198** at 201 stated:

> *"Rules of Court which constitute the procedural machinery of the Courts, are intended to expedite the business of the Courts, and will be interpreted and applied in a spirit which will facilitate the work of the Courts and enable litigants to resolve their difference in a speedy and inexpensive a manner as possible."*

[22] T. Dlamini, learned Counsel for the 2nd respondent contended that the authorities refer to Rules and not legislative enactments. For this reason, Rules may be relaxed which legislative provisions cannot.

[23] I understand learned Counsel to be saying that Parliamentary legislation are superior and therefore peremptory in their nature. Chaskalson P. sitting with Goldstone J and O'Regan J in **Fesure Life Assurance Ltd and Others 1999(1) SA 374** had this to say:

> "*Laws are frequently made by functionaries in whom the power to do so has been vested by a competent legislature. Although the result of the action taken in such circumstances may be "legislation" the process by which the legislation is made is in substance "administrative".*

[24] What their Lordships are saying is that rules, regulations or bye-laws made by administrative bodies (functionaries) enjoy equal force as legislation by Parliament by reason that they are delegated by the same authority, which is Parliament.

[25] By the above reason, the Rules should be applied with equal force as the parliamentary legislation.

[26] That as it may, I do not by any means invite litigants to ignore the provisions of section 7(1) of the Parliament (Petitions) Act No. 8 of 2013 and Rule 6(1) of the High Court Rules. The wise words cited by Hoexter JA in **Jurgens and Others v Volkskaas Bank Ltd 1993(1) SA 214** at 221 from **Quinn v Leathem {1901} AC 495(HL**) at 506 are well in order:

> *"…that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since generality of the expression which may be found there are not intended to be exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found, …. that a case is only authority for what it actually decides.*"

[27] It is my considered view that litigants who ignore such procedure as laid down should have their actions visited with costs rather than having their matter dismissed. The authority of **Shell Oil Swaziland (Pty)Ltd v Motor World (Pty) Ltd t/a Sir Motors Civil Appeal No. 23/2006** to the effect that cases should be decided on their merits rather than on procedural aspect is of precedent in my view.

[28] 2nd respondent contends further as his second *point in limine* that there is only one applicant in this proceeding. It was his submission that the 1st and 2nd applicants were voters who had no interest in the matter while the rest of the 562 applicants are not known as they have not demonstrated that they are voters or contenders of the same position as 3rd applicant.

[29] I must state from the onset that I am inclined to agree with the 2nd respondent in this regard for the following reasons:

[30] In terms of the pleadings, 1st applicant did not depose to any affidavit. The court is only informed from the 2nd applicant's founding affidavit that 1st applicant is:

> *"Sifiso Zwane, Swazi male of Nokwane area under Ngudzeni Inkhundla."*

[31] Nothing further is stated about this applicant. Nothing is said of him by any of the deponents herein. He cannot by any stretch of imagination, I am afraid be said to be a party to the present application.

[32] The 2nd applicant informs the court at paragraph 9 as follows:

> *"I am a registered voter under Ngudzeni Inkhundla in the Shiselweni Region. I am one of the many who cast their vote on the 20th September 2013. As a voter I have a vested interest in the process and the outcome thereof."*

[33] Section 8 of the Parliament (Petitions) Act No. 8 of 2013 promulgates:

> *"A petitioner under this Part may, in terms of section 105(3) of the Constitution, be presented to the court by the Attorney-General, any Member or any aggrieved person."*

[34] Any member in terms of section 2 refers to person appointed or elected as a member of the House in terms of the Elections Act 2013.

[35] The question therefore remains, is a voter under the circumstance of the case an aggrieved party? Put directly, does the 2nd applicant have any interest in the present matter?

[36] His Lordship Wessels J in **Darymple and Others v Colomal Treasurer 1910 TS** at 390 pointed as follows:

> *"The person who sues must have an interest in the subject matter of the suit and that interest must be direct interest."*

[37] He cautiously proceeds:

> *"In a wide sense every individual has an interest in every suit that is pending for he may be placed tomorrow in the position of either plaintiff or defendant in a case which the same principle may be involved. Court of law, however, are not constituted for discussion of academic questions, and they require the litigant to have not only an interest that is not too remote."*

[38] The learned judge wisely concludes on this subject:

> *"Whether the interest is remote or not depends upon the circumstance of the case and no definite rule can be laid down."*

[39] In the present case, one must look at the prayers to ascertain who has a direct interest.

[40] The prayers as highlighted in the Notice of Motion read:

> *"2. The Election process and election result for Member of Parliament which took place at Ngudzeni Inkhundla on the 20th September 2013 be and is hereby declared null and void.*
>
> *3. The First Respondent be and is hereby ordered and directed to cause re-election of Member of Parliament for the Ngudzeni Inkhundla as soon as possible;"*

[41] It is common cause that the 2nd applicant was not a candidate for the election. She did not compete with the 3rd applicant or the 2nd respondent. She cannot be held therefore to have any interest in this matter. If she has an interest, it is too remote in the circumstance of this case. She is not an aggrieved party by reason that she never contested the parliament seat. She belongs to a different category of persons than 3rd applicant and 2nd respondent. The person who has a direct interest in this matter is the 3rd applicant. In law 2nd respondent has no *locus standi.*

[42] Fikile Dlamini has identified herself in the affidavit deposed by her as:

> *"an adult Swazi female of Nokwane under Ngudzeni Inkhundla".*

[43] She does not state as did 2nd applicant that she is a registered voter of Ngudzeni area. I note that her name does not appear in the list of names of applicants nor in the citation of the application. Even if I were to assume that she is a registered voter, she should be treated as 2nd applicant in that she does not have any substantial interest in the matter. She is not, in the words of the legislature, an aggrieved party.

[44] The 2nd applicant has referred in her founding affidavit to a list of 564 names of persons. She states:

"The 562 other applicants are as listed in the annexure"

[45] Nothing further is stated about these 564 persons. There are no supporting affidavits to indicate that there are part of the applicants herein. They stand in the same footing as the 1st applicant. Their status and averments are unknown. They do not for these reasons have *locus standi* in the present application. What is worse is that in the answer some who are enlisted disassociated themselves from the application.

[46] It is worth to mention that the 3rd applicant who has been found to have a *locus standi* herein, has not deposed to a founding affidavit but a confirmatory. Having found that the deponent to the founding affidavit has no *locus standi*, it becomes difficult to see how the case of the 3rd applicant remains to be argued. Learned Counsel for the Applicant urged this court to consider the deposition of the 2nd applicant as evidence.

[47] For the proposition of our law that courts must have all the material evidence before it on which to form an opinion, as per Centlivres JA in **Collen v Rietfontein Engineering Works 1948(1) SA 413**, I am inclined to admit the affidavit of Gugu Mabaso.

Ad merits

Legal principles:

[48] Section 16 of the Act reads:

> *"For the purposes of section 3(2)(c) and 7(2)(c)where, upon the trial of a petition respecting an election, the court finds that there was a failure to comply with a provision of the Constitution, the Senate Act or of the Election Act and the court is satisfied, after giving the Attorney-General an opportunity of being heard, that the election was conducted in accordance with the principles laid down in the appropriate Act, and that the failure did not affect the result of the election, then, by reason of the failure, the court shall not declare the election of the successful candidate void nor shall the successful candidate be subjected to any incapacity."*

[49] From the reading of the above section, one can infer that there are at least three enquiries that a court faced with an application challenging election should embark upon. Firstly, whether there was a failure to comply with the provision of the Constitution, Senate Act or the Act. Secondly, whether the election could reasonable be said to have been conducted in accordance with the principles laid down in the relevant legislation. The evidence of the Attorney-General is to be judiciously considered in this enquiry. Thirdly, and this is the underlying enquiry, should the court come to the conclusion that there was a failure in observing the laid down provision, whether such affected the result of the election. These enquiries were adopted in **Snyman v Schoeman and Another 1949 (2) SA 1.**

[50] Section 85 (1) of the Constitution of the Kingdom of Swaziland Act No. 001 of 2005 postulates:

> *"Subject to the provisions of this Constitution, every Swazi or person ordinarily resident in Swaziland has a right to vote at any election of members of the House or members of the Bucopho."*

[51] From the above constitutional right, emanates the principles of election which are well defined in **de Villiers v Louw, 1931 AD 241** at 266 and cited with approval in **Beckmann v Minister of the Interior & Others 1962 (2) SA 233** at 241 as follows:

> *"It is, after all in the public interest that every person whose name is on the voters' list shall record his vote, and the policy of the Act is to give every voter the opportunity of voting, whether he can be present at the poll or not. The Act and the Regulations are mainly concerned with two cardinal principles in connection with an election, one being that it shall be by secret ballot, and the other being that a person who records a vote is a person of that name and no other, appearing on the voters' list."*

[52] Van den Heever JA in **Snymann** (*supra),* at page 9 heating the nail on the head on the principles of elections cites de Villiers J as follows:

> *"In my judgment an election is conducted in accordance with the principles of the Election Act if the electors concerned entitled to vote had had a full, fair and free opportunity of expressing by a majority of votes secretly and by ballot their choice of parliamentary representative."*

[53] His Lordship Van den Heever JA sums the enquiry by referring to Lord Coleridge CJ in **Woodward v Sarsons (1875, LR 10CP 733** at 744 as follows at page 8:

> *"If this proposition be closely examined, it will be found to be equivalent to this, that the non-observance of the rules or forms which is to render*

the election invalid, must be so great as to amount to a conducting of the election in a manner contrary to the principle of an election by ballot, and must so great as to satisfy the tribunal that it did affect or might have affected the majority of the voters, in other words, the result of the election."

[54] In **Sikwane v Viviers and Others 1965 (3) SA 557** at 560-561 Honourable De Vos J applying the above *ratio* by Lord Coleridge eloquently stated:

"In cases where the disregard of the provision is merely technical and no prejudice results, there seems to be no resultant impropriety if the acts be allowed to stand. In each case the test will therefore be, on the basis that the provisions concerned are only directory whether the irregularity was calculated to prejudice the party complaining about it and if so, whether it is clear that no prejudice resulted therefrom".

[55] The rationale behind the requirement that for an election to be set aside, the irregularities complained of should be shown to have or *might* have affected the results was pointed out by Wessels J as cited in **Beckmann** *supra* at page 242:

"It has always been the practice of the English Courts not to disturb an election when it is clear that the person who voted were entitled to vote, that no one entitled to vote has been debarred from voting, and that all the requirements of the Electoral Act have been substantially complied with…. To reject the votes of voters legally on the roll and qualified to express the voice of the constituency may result in the minority being represented, which is quite contrary to the fundamental object of an election…It must be the policy of the law to uphold the vote of a voter who is entitled to express his wish for a particular candidate to represent his constituency…"

Adjudication:

[56] I must state from the onset as correctly observed by the learned Counsel for the applicants that there are disputes of fact *in casu*. However, it was common cause between the parties that in as much as there are disputes of facts, the application could be decided as it stands. For the reason that there are disputes of facts, I do not intend embarking on the enquiry as to whether the irregularities observed by the applicants are factually correct. My main focus will be assuming those irregularities were observed, did they affect the result of the elections? I take this approach because owing to the urgency attached to applicants' application it would result in injustice to embark on an enquiry whose further scrutiny at the end of the day might be found to have not affected the results of the election. It is my further considered view that the enquiry should commence with the question as posed herein and it is only where one finds that the irregularities did affect the result that the next question should be whether there were irregularities. I take this approach because to ascertain whether there were irregularities might call for *viva voce* evidence in some instances as *in casu.*

[57] The first contention relates to the radio announcement. Of note is that in as much as the averment points to the 2nd respondent as having arranged the transport, this was not based on any evidence, except to infer that the transport was arranged by 2nd respondent by virtue of the transport belonging to a Ndlangamandla who happens to share a similar surname with the 2nd respondent. On the other hand the 1st respondent informs the court that it should also be inferred that transport operators may have taken advantage that it was a holiday and rescheduled their routes to suit the travelers. By 3rd applicant's own showing, 2nd respondent is not the author

of the announcement. He again calls for the court to draw an inference that since the transport belongs to a Ndlangamandla, he must have arranged it. The evidence shows that Swaziland Posts and Telecommunication is the source of the announcement and that the name of the transport was not broadcasted. **Jones v Great Western Railway Co. (1930) 144 L.T 194** at 202 referred to **Fraind v Nothmann 1991(3) SA 837** at 840 warned on what in law is defined as inference and conjecture as follows:

> *"The dividing line between conjecture and inference is often a very difficult one to draw; but it is just the same as the line between some evidence and no evidence. One often gets cases where the facts proved in evidence – the primary facts – are such that the tribunal of fact can legitimately draw from them an inference one way or the other, or, equally legitimately refuse to draw any inference at all. But that does not mean that when it does draw an inference, it is making a guess. It is only making a guess if it draws an inference which cannot legitimately be drawn: that is to say, if it is an inference which no reasonable person could draw."*

[58] Further, it is not alleged that this radio announcement singled out 2nd respondent's voters as entitled to board the transport. I appreciate that Fikile Dlamini deposed that she was denied boarding the said transport as one Mbuyiseni Dlamini, her relative recognized her as 3rd applicant's supporter and that there were eight others who were in a similar situation as hers. However, it is not alleged that this Mbuyiseni Dlamini knew all the supporters of 3rd applicant and proceeded to decline them the opportunity to board the transport. What is notable further, which did not have negative bearing on the election result, is that Fikile Dlamini together with the eight others proceeded to get an alternative transport and went to Ngudzeni to

cast their votes accordingly. No mayhem which may be said might have affected the election results was observed during the casting of votes.

[59] The irregularity on the radio announcement cannot therefore stand.

[60] I now turn to the averment that the venue was changed.

[61] Section 19(1) of the Elections Act reads:

> *"A returning officer may require that any convenient building, other than a dwelling house, be used for the purpose of taking a poll."*

[62] The Act empowers the returning officer to exercise his discretion on the venue for election. In this regard there was no irregularity *per se in casu.*

[63] However, I understand the 3rd respondent to be saying that this venue provided:

> *"convenient location that facilitated vote rigging"* (see paragraph 28 at page 11 of the pleadings).

[64] The 3rd applicant supports this by stating that lights went off and this was *"self orchestrated"* and a door which was at the back of the church building was:

> *"a hive of activity" (*paragraph 27 page 11*)*

[65] **Brome J** in **Petterson v Burnside 1940 NPD 403** in his wisdom observed:

> *"I may say that the petitioner does not allege that any members of the electrorate were in fact deceived by the misleading statements and were induced thereby to record votes in favour of the respondents"*.

[66] Similarly, 3rd applicant does not say that votes were rigged as a result of the above conditions. At any rate in relation to the lights, he says that there was light provided in a form of cellular phones and a torch. He objects to such as the source of light. The reason seems to be that such is primitive. He does not say that such light was insufficient and therefore the ballot papers were interfered with nor does he suggest a possibility of interference. On a similar scenario, the learned Van den Heever JA in **Snyman** (*supra)* at page 7 states:

> "- *in other words conditions must have prevailed which negative the concept: free election. Sporadic assaults and acts of intimidation will not justify the setting aside of an election."*

[67] *Fortiori,* that the lights went off and that the situation outside was tense as averred is not sufficient on its own without proof that such influenced the outcome of the votes.

[68] 3rd applicant ends by stating:

> *"when I was denied entry into the church house for counting, I left the process and went home in abject frustration."* (see paragraph 3.2(e) at page 16 of pleadings).

[69] I have already stated that respondent disputes preventing or denying 3rd applicant entry into the counting venue. Respondents support this by stating in their answer that applicant was present throughout the proceedings as demonstrated by his signature which he appended to the declaration forms indicating the overall winner. Even where he left, it was for a short while and this was not propelled by the respondents.

[70] This was not disputed by 3rd applicant or on his behalf in the replying affidavit. For the principle of our law that unchallenged evidence must be held to be admitted, I find that 3rd applicant was not denied entry into the counting venue.

[71] In the totality of the above I find that no conditions prevailed at Ngudzeni which negative the election principle: full, fair and free elections.

[72] For the aforegoing, the following orders are entered:

1. Applicants' application is dismissed.
2. Applicants are ordered to pay respondents costs of suit jointly and severally, one to pay the other to be absolved.

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M. DLAMINI

JUDGE

For Applicants: **T. Mlangeni**

For 1st Respondent: **T. Dlamini**

For 2nd Respondent: **M. Mkhwanazi**