



IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 805/2018

HELD IN MBABANE

In the matter between:

**MBONGISENI CYPRIAN SHABANGU
SWAZI DEMOCRATIC PARTY
SANELISIWE TABABE DEBRA DLAMINI**

**First Applicant
Second Applicant
Third Applicant**

AND

**ELECTIONS AND BOUNDARIES COMMISSION
PRIME MINISTER OF ESWATINI
MINISTER OF JUSTICE AND
CONSTITUTIONAL AFFAIRS
MINISTER OF HOME AFFAIRS AND
IMMIGRATION
MINISTER OF TINKHUNDLA
ADMINISTRATION AND DEVELOPMENT
NATIONAL COMMISSIONER OF POLICE**

**First Respondent
Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent
Sixth Respondent**

**ARMY COMMANDER: UMBUTFO ESWATINI
DEFENCE FORCE
PRINCIPAL SECRETARY IN THE MINISTRY
OF DEFENCE
ATTORNEY GENERAL**

Seventh Respondent

Eighth Respondent

Ninth Respondent

Neutral citation: *Mbongiseni Cyprian Shabangu & 2 Others v Elections and Boundaries Commission & 8 Others* [805/2018] [2018] SZHC 169 (31st July, 2018)

Coram: M. DLAMINI, M. FAKUDZE and T. DLAMINI JJ

Heard: 20th July, 2018

Delivered: 31st July, 2018

EX TEMPORE JUDGMENT

***Civil - defective papers – First Applicant failing to make any prayers
Second Applicant only makes prayer under Interim Relief but fails to pray for an order under Final Relief – Third Applicant makes prayers under both interim and final relief but has no***

***Founding or properly drafted supporting affidavit for his case
– application dismissed with no order as to costs***

Summary: *The General import gathered from the prayers in this application is, among others, that the first respondent be interdicted from restraining first and third applicants from campaigning for elections and advocating policies and programmes under the banner and manifesto of second applicant respectively. The prayers are strenuously opposed.*

The Application

[1] The Applicants, namely, Mbongiseni Cyprian Shabangu, First Applicant; Swazi Democratic Party, Second Applicant; and Sandisiwe Taxable Debra Dlamini, Third Applicant, have filed an urgent Application and are praying for the following:-

“1. *Dispensing with the normal forms of service and time limits provided by the Rules of the Honourable Court, and hearing Part A of this matter urgently in terms of Rule 15 of the Rules of Honourable Court.*

PART A: INTERIM RELIEF

2. *Pending the final determination of the relief sought in Part B of this Application, including any Appeal in respect thereof:*

2.1 *Interdicting the respondents from preventing the third Applicant, and any other registered voters who choose to run as candidates for election to the House of Assembly, in canvassing for votes from exercising their constitutional rights to freedom of conscience, expression, and association;*

2.2 *Interdicting the respondents from preventing the third Applicant and any other registered voters who choose to run as candidates for election to the House of Assembly, in canvassing for votes from:*

2.2.1 *stating publicly and motivating:-*

2.2.1.1 *their social, economic, political and cultural beliefs, opinions and convictions;*

2.2.1.2 *their views and opinions on social, economic, political and cultural issues and matters in local, national, regional and international spheres*

2.2.1.3 *their views and opinions on social, economic, political and cultural priorities, and the policies and programmes that should be implemented to give effect to these priorities, at the local, national, regional and international levels;*

2.2.1.4 *their views and opinions on the government's performance in the international, national and local spheres;*

2.2.1.5 *calls for non-violent and orderly social, economic, political and cultural change;*

2.2.1.6 *whether or not they are members or supporters of any political, religious, cultural, developmental, labour or commercial organisations or entities and the reasons for these positions; and*

2.2.1.7 *their views and opinions on other candidates contesting elections and the principles, policies and programmes for which they stand;*

2.2.2 *holding public and private meetings, press conferences and interviews with the media (in all forms), for as long as the candidate for election considers it necessary and appropriate to do so, in order to convey their views, policies and programmes to voters and general public;*

2.2.3 *publicly associating themselves with any political party by:*

2.2.3.1 *wearing and displaying its colours, symbols and/or slogans; and*

2.2.3.2 *advocating its policies and programmes;*

2.2.3.1 *canvassing for, and receiving, financial and logistical support from any political party; and*

2.2.3.2 *canvassing for, and receiving, the endorsement of any political party;*

2.3 *Interdicting the respondents from preventing the second applicant, and any other political party which chooses to sponsor and support any candidate for election to the House of Assembly from:*

2.3.1 *publicly identifying and expressing support for, their members who are running for public office;*

2.3.2 *conducting the advocacy and public awareness activities contemplated by section 8(2) of the Elections Expenses Act 9 of 2013 (“the Elections Expenses Act”);*

2.3.3 *seconding party members to constitute a candidate's campaign team, as contemplated by section 3(3) of the Elections Expenses Act, 2013 read together with section 40(2) of the Elections Act 10 of 2013 ("the Elections Act");*

2.3.4 *making voluntary donations to any party member who is a nominated candidate, in terms of section 7(1) of the Elections Expenses Act, 2013; and*

2.3.5 *campaigning across all parts of the country in support of candidates for election;*

PART B: FINAL RELIEF

3. *Declaring that the third applicant and any other registered voters who choose to run as candidates for election to the House of Assembly, in canvassing for votes may exercise their constitutional rights to freedom of conscience, expression, and association by:*

3.1 *stating publicly and motivating;*

3.1.1 *their social, economic, political, and cultural beliefs, opinions and convictions;*

3.1.2 *their views and opinions on social, economic, political and cultural issues and matters in the local, national, regional and international spheres;*

3.1.3 *their views and opinions on social, economic, political, and cultural priorities, and the policies and programmes that should be implemented to give effect to these priorities, at the local, national, regional and international levels;*

3.1.4 *their views and opinions on the government's performance in the international, national and local spheres.*

4.3 *seconding party members to constitute a candidate's campaign team, as contemplated by section 3(3) of the Elections Expenses Act, 2013 read together with section 40(2) of the Elections Act, 2013;*

4.4 *making voluntary donations to any party member who is a nominated candidate, in terms of section 7(1) of the Elections Expenses Act, 2013; and*

4.5 *campaigning across all parts of the country in support of candidates for election.*

5 *Directing that the costs of this application are to be paid jointly and severally by the respondents; and*

6 *Granting such further and/or alternative relief as may be appropriate.*

PRELIMINARY OBSERVATION BY THE COURT

[2] Before the matter proceeded on points of law which were raised by the Respondents, the court, *mero motu*, asked Counsel for both parties to address it on what each party was seeking for.

(A) APPEARANCES OF THE PARTIES IN THE RELIEFS SOUGHT

[3] The papers filed by the Applicants reveal the following:

1st and 3rd Applicants – The court noted that the First Applicant has deposed to the Founding Affidavit but does not appear as a party in any of the prayers; be it Part A which deals with the Interim Relief or Part B which deals with the Final Relief. Second Applicant only appears under Part A (Interim Relief) and does not appear under Part B (Final Relief). Instead, it

is the 3rd Applicant that appears in both Part A and Part B of the prayers.

[4] Counsel for the First and Third Applicants stated that this hurdle can be dealt with if reliance is placed on paragraph 6 of the Founding Affidavit where the First Applicant establishes its legal capacity and states that:-

“6 I bring this Application in the following three capacities:

6.1 *First, **in my** personal capacity as an individual who is eligible to vote in the elections that are to be held later this year.*

6.2 *Second, **as an individual who is** eligible to run as a candidate in the election that are to be held later and this year;*

6.3 *Third, **in my** capacity as a member and office bearer of a political party, representing all other members of SWADEPA.”*

[5] First and foremost, it must be pointed out that there was only one set of Founding Affidavit in this application. It was deposed to by the First Applicant. The Second and Third Applicants merely filed supporting Affidavits. From the above underlined and bolded words at para [4], taken from the First Applicant’s Founding Affidavit, it is abundantly clear that the First Applicant advanced his own case in his Founding Affidavit. This view is further fortified when one reads the entire Founding Affidavit. Nowhere does the First Applicant aver to the Second and Third Applicants’ case in his Founding Affidavit. It is appreciated that the Second and Third Applicants filed Supporting Affidavits to the First Applicant’s Founding Affidavit.

This was an unnecessary exercise as Applicant referred to assertions pertaining to himself *albeit* under three different hats, namely as an individual who is entitled to vote, be voted and as a member of Second Applicant. For this reason alone, the submission that paragraph 6 of the First Applicant's Founding Affidavit should be considered as evidence with regards to Second and Third Applicants cannot hold.

[6] This court is very much alive to the principle governing affidavits. It was well articulated in **Leith NO v Fraser 1952 (2) SA 33 (O)** at 36B where the court held, "*A notice of motion could in a proper case be supported by an affidavit by one not a party to it, if he were in a position to provide the necessary material to support the claim.*" Smit J proceeded to highlight in Leith, "*The fact that Heath states that he **'presents this petition in his own name'** cannot in the circumstances be said to mean that the application is made in his own name because the notice of motion is clearly in the name of both applicants and the very petition that Heath signed indicates in the heading thereof, that it is made in the matter of both the applicants against the respondent.*"

[7] Having espoused the above guiding principle the court in Leith then explained, "*Even if this were a petition the heading indicates that it is brought **in the name of both applicants** and that, **coupled with Heath's statement that he is acting with the full knowledge and consent of Leith would on the authority of Kent v Beamish and Another, 1912 WLD 129, sufficiently disclose his authority to act as the latter's agent.***"

- [8] Turning to the present application, the deponent to the founding affidavit (First Applicant) is not a party or an applicant to the present proceedings by reason that there are no prayers in the Notice of Motion by him. However, could he be said to be a witness for or on behalf of the Second and Third Applicants? The answer is a straight no by reason that the First Applicant (so to speak) has neither asserted in his Founding Affidavit that he is acting with the full knowledge or authority of the Second and Third Applicants as per the *ratio decidendi* in Leith's case nor is the Founding Affidavit couched in such a manner as to be reasonably inferred to refer to the Second and Third Applicants' case.
- [9] Counsel further elaborated by saying that much as reference has only been made to the third Applicant in both Part A and Part B of the prayers, the court should consider the words "*third applicant and other registered voters*" appearing throughout Part A and Part B of the prayers to include the 1st Applicant. First Applicant must be considered to fall under "*other registered voters,*" according to learned Counsel.
- [10] If the drafter of the prayers had intended including the 1st Applicant in the prayers, he would have qualified the words "*third applicant and other registered voters*" to include a member or members of the Second Applicant. This is not the case. The court is therefore compelled to apply the principle of interpretation of statutes and legal instruments that words must be given their ordinary or literal meaning in coming to its conclusion. See **Natal Joint Municipal Pension Fund V Endumeni Municipality 2012 (4) SA**

593 (SCA) at p. 18. . In this way First Applicant cannot be considered as a party to the present proceedings following that he has not made any prayer both under Part A and Part B. Now that his Founding Affidavit is in support of his own case, it stands to follow him.

[11] Counsel for the Respondents argued that the Founding Affidavit and the prayers are not in harmony. The Third Applicant is the one who is applying for an interdict against the Respondents. She should therefore have been the one to depose to the Founding Affidavit. The Application should therefore be dismissed.

[12] The other aspect worth noting is that even if it were to be accepted that the Third Applicant is cited in her capacity as a representative of the Second Applicant, paragraphs 10 and 11 of the First Applicant's Founding Affidavit paint a different picture altogether. The paragraphs state as follows:

"10 Ms. Dlamini is a registered voter in the Madlangempisi Inkhundla. She registered to vote on May, 2018. Her voter number is 201851613690038. A copy of her registration card is attached as Annexure "FA 3."

*11. Ms. Dlamini is an ordinary member of SWADEPA, as well as a member of the executive committee of SWADEPA's Women's League. **She brings this application in her personal capacity as an individual who***

11.1 is eligible to vote in the elections that are to be held later this year; and

11.2 intends to run as a candidate for election to the House of Assembly in the election that are to be held later this year."

[13] From the above, it is again abundantly clear that the First Applicant's Founding Affidavit cannot be used to support the case of the Third Applicant. Further, no mention is made of the fact that she is seeking the prayers in her capacity as a representative of the Second Applicant.

(B) INTERIM RELIEF

[14] Second Applicant appears in the interim relief and does not appear in the final orders sought. There was no *rule nisi* prayed for. When asked as to how would the interim relief sought by Second Applicant assist it in the absence of a *rule nisi* or a prayer by it in the final relief, learned Counsel submitted that in fact the relief under Part A was not interim in the sense that once granted, Second Applicant would enforce it in the upcoming elections (2018).

[15] The question then is why frame Part A as Interim Relief when in fact it is a final prayer. This question is pertinent to this proceeding because the principles governing interim reliefs are different from those applicable in final orders. A litigant intending to be granted an interim relief, must establish factors different from a party seeking for a final order. In other words, the respondent in an application where an applicant seeks an interim relief is expected to come to court prepared to argue its opponent's case on principles governing interim relief. Where a party changes tune to say in fact it is seeking a final order contrary to the wording of the prayers in its Notice of Motion, this would amount to waylaying its opponent. Justice cannot allow this.

[16] Further, justice dictates that an interim relief must remain interim until pronounced to be final by a court of law. If therefore, at the end, the court would grant Second Applicant Part A of the prayers, this would be tantamount to granting Second Applicant a final relief under the guise of an interim relief. This would be a travesty of justice.

[17] In the analysis, the application was found to be defective. It is apposite to mention that in the process of learned Counsel for the First and Third Applicants' submission, he conceded to the defects in Applicants' papers. He then pointed out that had the Respondents raised the point on defects, Applicants would have amended the papers by then. He also prayed that should the court be inclined to grant time frames upon each of the parties, they would amend the papers. At that juncture, the court pointed out that it was inclined to grant the Applicants leave to amend their papers but would like to hear from the Second Applicant's and Respondents' Counsel as well before entering any order on the pleadings. At that point, learned Counsel for the First and Third Applicants applied for a short adjournment in order to consult with Second Applicant's attorney. Without any further ado, learned Counsel's request for a short adjournment was granted.

[18] When the court resumed, learned Counsel for the First and Third Applicants insisted that the court should consider the First Applicant's Founding Affidavit and allow the case to be argued on the papers as they stood.

[19] Respondents argued that the application should be dismissed with costs. The court considered the submissions by both parties and held the view that

the Applicants' application was defective and therefore ought to be dismissed for the reasons herein. On the question of costs, the court was not inclined to exercise its discretion in favour of the Respondents because Respondents failed to raise the point on the defective papers by the Applicants as correctly pointed out by learned Counsel for the First and Third Applicants. For this reason, the court dismissed the application with no order as to costs.

M. FAKUDZE J

M. DLAMINI J

T. L. DLAMINI J

For the First and Third Applicants: P. Hathorn SC instructed by SA Nkosi & Co.
For the Second Applicant : J. Berger instructed by SA Nkosi & Co.
For the Respondents : S. Khumalo – Attorney General's Chambers