SWAZILAND HIGH COURT

HELD AT MBABANE CIVIL CASE NO. 2756/2003

In the matter between:

SANELE GINA Applicant

and

THE ATTORNEY GENERAL 1st Respondent

TIMOTHY MYENI 2nd Respondent

ROBERT THWALA N.O. 3rd Respondent

Coram ANNANDALE, A C J

For Applicant Advocate L.M. Maziya

(Instructed by Mabila Attorneys)

For First and Third Respondents Ms S. Maseko

For Second Respondent Advocate D. Smith

(Instructed by Robhson Bertram Attorneys)

JUDGMENT

(05/12/2003)

Following the recent Parliamentary elections in Swaziland, yet another outcome is sought to be challenged.
This time, the complaint is again that fraudulent voters registration papers tainted the election process, initially at the Moyeni Umphakatsi, later in the Lubuli Inkhundla.

What the applicant presently seeks to have done is to obtain a mandamus compelling the Attorney General to institute proceedings against he winner of the elections, the second respondent in terms of Section 28 of the Establishment of Parliament of Swaziland Order, number 1 of 1992. The application is brought as a matter of urgency, seeking the directive either forthwith or within such period as the court deems fit. It follows on the heels of an earlier Petition by the present applicant in terms of Section 7 of the Parliament (Petitioner's(sic)) Act number 16 of 1968, which was removed from the roll, with costs, at the end of October 2003.

At the onset of the hearing, Advocate Maziya, appearing for the applicant, requested he matter to be stood down in order to try and find a Government! Gazette which would have contained corrigenda to the initial Gazette in which King's Order - in -Council number 1 of 1992 was first published. He informed that the original text referred to a non-existent "section 10(e)"under section 28(2)(b) of the Act, as published in Government Gazette Extraordinary, volume 30, number 918 dated the 16th December 1992. The published collection of the Statutes of Swaziland, on the other hand, refers in section 28(2)(b) to the classes of persons as mentioned in section 28(l)(b) and (c), not to a section 10(e). No such corrigendum was found by Mr. Maziya.

The basis of the application rests on an allegation that statutory offences in terms of section 64(2) and 67 (being statutory offences relating to undue influence of a voter and corrupt practices at election proceedings) of the Elections Order, No. 2 of 1992, were committed, resulting in the winning of the election by the second respondent, which the applicant wants to have challenged on his behalf by the attorney General (first respondent) and the basis of his locus standi as determined by section 28 of Order No. 1 of 1992.

Section 28 reads as follows, according to issue 2, Volume 3, of the Statutes of Swaziland:
"28. (1) The High Court shall have jurisdiction to hear and determine any question whether -

(a) Any person has been validly elected a Senator by the members of the House of Assembly;

(b) Any person has been validly elected as an elected member of the House;

(c) Any person who has been elected as President or Deputy President of the Senate or as Speaker or Deputy Speaker of the house was qualified to be so elected.

(2) An application to the High Court may be made for the determination of any question -

(a) under subsection (1) (a), by any elected member of the House of Assembly or by the Attorney General;

(b) under subsection (1) (b) and (c), by any Senator or elected or nominated member of the House, as the case may be, or by the Attorney General.

Mr. Maziya's initial argument is that if the Gazette is anything to go by, there is nothing to prevent the applicant from bringing his application in person, without having to seek the Attorney General's intervention. Yet, the application seeks the Attorney General to act in his capacity of one of the three classes of persons bestowed with locus standi under section 28(2)(b) of the 1992 Order. The self destructive nature of applicant's contention results in the court being required, under a prayer for further and alternative relief, to research the applicant's case and determine if indeed the obvious mistake in the Gazette has been corrected and if the Court cannot so find, to then order that the applicant is entitled to challenge the outcome of the election in eo nomine, disregarding the statutes of Swaziland's version of Section 28(2)(b) of the Order. The practical consequence is then said to be that without having to start afresh yet again, the court is to now declare the elections null and void, set it aside and order new elections to be conducted.

The fundamental problem with this approach by the applicant is that he has come to court, for the second time, to seek an order setting aside the parliamentary elections in the voting district or Inkhundla where he was the losing candidate. In the event that

the court either does not order the attorney General to bring the matter on his behalf, as he prays, or does not already now set the elections aside, the court is then enjoined to establish grounds for his case and meet him either way. He effectively comes to court, places the ball in the court's hands and says that he does not have an answer to his problem, it is up to the court to find it for him. The approach is not helpful to the court at all. This in itself could be regarded as sufficient justification to dismiss the application outright as our law does not require the court to establish an applicant's case for him - he is to do so himself. It also is not the manner in which an opposing party is required to outguess an applicant's case as is the present case - an applicant is required to set out his case on the papers before court and that is the case which the opponent is to meet.

However, I shall procede to decide on this matter on the assumption that the initial publication in the

Gazette of the Establishment of Parliament Order No. 1 of 1992, contained a patent and obvious error by referring to a non existent subsection 10(e) in section 2S(2)(b), and that the published statutes of Swaziland, even though it does not refer to a corrigendum in the XXX correctly reflects the position of loeus standi in judicio as quoted above, namely that the validity of the election of an elected member of the House (Parliament) may be brought to the High Court for determination by any elected or nominated member, or by the Attorney General.

Both the first and second respondents raised preliminary points in law, objecting to the application. At the hearing of this matter, the merits were not dealt with and I therefore will not detail the cases of the parties any more than is necessary for the present purpose.

One such instance is in regard to the objection in limine by the Attorney General, whose intervention is sought to be ordered. Nowhere in the body of applicant's papers is there any indication whatsoever that he has sought the assistance of the Attorney General, who improperly would have refused to come to his rescue. At bare minimum, such a basic display of courtesy towards the office of the man whose help he seeks, would have been mentioned in the founding affidavit. If intervention was sought and for some reason refused, it also would have been mentioned, certainly so, as it would be crucial for applicant to be able to state that the first respondent

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improperly applied his mind and failed to exercise his discretion as he should have done.

Applicant's counsel also could not confirm any approach to the first respondent to seek his intervention, which may have been made by the applicant.

Even so, that is not the point taken by the first respondent, but in a somewhat clumsily worded notice, it is said that plaintiff/applicant is not entitled to representation by the Attorney General. As first reason, it is said that the Attorney General is part of the executive arm of Government and already represents the third respondent, the Chief Electoral Officer. The Attorney General states that it will be anomalous to represent both applicant and the third respondent, further, that only once elected to parliament, a member may be entitled to representation by the Attorney General on matters done by the member in his official capacity.

The second part of the objection is that section 91 of the Swaziland Constitution causes the Attorney General to be strictly an attorney for Government, not private individuals. Section 91 of the 1968 Constitution, as per the published statutes of Swaziland, holds that the office of the Attorney General shall be a public office, further that he may advise the King on legal matters. The remainder of the section relates to criminal matters, which are exercisable by the Director of Public Prosecutions since 1973. Although I do not read into that section the interpretation attached to it by the Attorney General, I also do not read into it that a private individual, like the applicant (or plaintiff as referred to at diverse places in the papers before me) has any entitlement to be represented by the office of the Attorney General. This equally applies in respect of section 28 of the Establishment of Parliament Order of 1992, which also not bestowed any such entitlement on a citizen.

Section 28 of the Establishment of Parliament Order of 1992 bestows locus standi on the Attorney General but it does not regulate any procedure to be followed by someone like the applicant, who seeks the umbrella of the Office to litigate on his behalf. The Act is tacit in that regard. There is also no legislation that I am aware of, that gives any guideline to the Attorney General as to how such a request is to be dealt with, should it be made.

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Applicant's counsel was very blase about the objection raised in limine by the first respondent. He argued that there is no inconsistency as alleged and that there is nothing wrong if Parliament confers such a duty on the Attorney General.

The problem with this argument is that there may very well be a conflict of interest if the Attorney General appears on behalf of both the applicant, a private citizen, and also for the Chief Electoral Officer, third respondent. The application itself repeatedly contains allegations against the third respondent, and his subordinates, concerning the manner in which the elections were conducted and the nomination process, all of which culminated in the winning of the elections by the second respondent and the non-election of the applicant. The third respondent is alleged to be accountable for these problems.

The further problem with applicant's argument is that Parliament did not confer any duty on the Attorney General at all, insofar as challenging an election goes. All it did was to confer the ability to challenge it, equally so with an elected or nominated member of the House. It is incorrect to say that the Attorney General must intervene and challenge the outcome of an election.

Section 28 provides no authority to the applicant to insist that the Attorney General must come to his aid. It does not say that the Attorney General must consider his request and act upon it. The main difficulty facing the applicant is thus his own locus standi in having the Attorney General compelled to act on his behalf. He certainly cannot rely on section 28, under which the Attorney General obtains authority to litigate in an election matter. Applicants counsel did not refer the court to any authority at all under which the Attorney General is to be compelled to act for the losing party in a contested election, such person remaining an ordinary private citizen.

The detriment to the application is further compounded by the wording of section 28 of the Order which reads that an application MAY be made, and not MUST be made by the specified persons. The use of the word MAY denotes a discretion inferred on the Attorney General. The Order as tacit as to how such a discretion is to be exercised. As mentioned, the applicant does not state that he has approached the

Attorney General, who refused to bring the application on his behalf, or that the Attorney General refused to entertain his request for such, or that indeed the Attorney General made any decision at all, that pertains to his application. Yet, he seeks a mandamus to compel the Attorney General to do so. There is no averment that the Attorney General improperly exercised his discretion, or refused to hear applicant or acted improperly. What is sought in fact is that the discretion of the Attorney General is to be exercised by the court, instead of it being done by the Attorney General.

I have sympathy with the applicant's dilemma. On the one hand, the Establishment of Parliament Order which regulates the locus standi of persons who may come to the High Court and lay challenge to the outcome of an election, does not bestow legal standing to an aggrieved loser of an election. On the other hand, it does bestow legal standing to a specifically mentioned class of people who may do so, namely the Attorney General, and elected or nominated members of the House. If they chose not to come to his assistance, he ends up in dire straits, as presently. The only way to salvage the dilemma is what he now wants to have done, for the court to step in and compel a party with legal standing conferred by the Order, to do so on his behalf. However, the one authorised person he chose to do so, the Attorney General, objects and says he cannot do so as he is government's attorney, already representing one respondent apart from himself, further that the applicant qua ordinary citizen is not entitled to representation by Government's Attorney.

The fact that remains is that the legislature did not include in section 28 either a voter or a losing candidate amongst the people that have the standing to challenge the outcome of an election, i.e. whether "any person has been validly elected as an elected member of the House". The Parliament Petitions Act, 1968 (Act 16 of 1968) had it otherwise. Therein, section 8(a) provided that a person entitled to vote in the election to which a petition relates, was able to present a petition to the court to decide a question relating to the valid election of a member of the House. Whether that act was repealed, expressly or impliedly, is not the question to decide at present. Section 59(2) of the Establishment of Parliament Order, 1992 nevertheless reads; that:

"All existing laws shall continue to operate with full force ana' effect but shall be construed with such modifications, qualifications and exceptions as may be necessary to bring them into conformity with this Order. "

Thus, even if it was so that it could be argued that the 1968 Act was not repealed at all, the applicant still cannot overcome the hurdle of the 1992 Order, Insofar as locus standi is concerned. The legislature closed the door on him. Furthermore, it failed to provide any mechanism as he now seeks, to have the Attorney General compelled to come to his rescue.

Accordingly, on this point also, he cannot be found to be able to succeed in having his application heard on the merits.

Further points in limine were raised by the second respondent, which I shall not deal with in detail, due to the abovementioned two grounds which already are detrimental to the application. I will deviate from the stated grounds as set out in the second respondent's answering affidavit and responded to by the applicant, and limit it to what was argued in court.

One issue that arises from the affidavits that needs to be addressed at the onset is the outcome of the initial petition. It is incorrect for the second respondent to take the position that the court considered the matter and dismissed it on merit.. Due to various deficiencies in the matter, such as it being brought effectively ex parte and without setting out in which manner and by when it may be opposed, it was removed from the roll and not dismissed, with costs. Quite correctly so, second respondent's counsel did not argue the issue of estoppel, also not whether the application is premature due to non-finalisation of a police investigation against the second respondent.

The second respondent's counsel argued various further points in limine, which I will not fully deal with, in light of the above. Advocate Smith holds a different interpretation of section 28 of the Order from what I read the Order to say. His argument is that it impacts on the qualifying aspects of a member, to be validly elected as an elected member of the House, i.e. whether the member qualifies to hold

office or not. This contrasts with the wording of the Order, the relevant part of which reads:

"(b) Any person has been validly elected as an elected member of the House."

This point does not affect the outcome of the matter and in itself is not decisive. Advocate Smith raised a further issue which would come into play in the hypothetical situation where the court would accede to granting of the relief sought. Such a scenario would entail the Attorney General to intervene, with the aim of causing the second respondent found guilty of Election Fraud or fraudulently winning the election due to irregularities caused by him. A factual dispute would then have to be resolved. As matters now stand, on the basis of the affidavits before court, a substantial dispute of facts is said to be present, with a voter's roll allegedly improperly compiled and whether fraudulent votes were cast or not. In turn, it is argued that on the papers before court, from which a serious factual dispute emerges, it cannot form a basis from which the Attorney General could be ordered and forced to bring an application which in itself will be unable to-be resiaved on the papers alone.

As this argument in limine also does not determine the outcome of the matter, I do not propose to decide it on its own merits. The same applies to the question of urgency. Whether urgent or not, the reasons for not granting the relief are as set out above and not based on the question of urgency.

It is therefore ordered that the application to compel the Attorney General to intercede and come to the assistance of the applicant, either forthwith or within such other period as may be ordered, to institute proceedings against the second respondent in terms of section 28 of the Establishment of Parliament Order, 1992 (King's Order - in -Council No. 1 of 1992), be dismissed, with costs. Costs of counsel are

certified to be in compliance with the provisions of Rule 68(2).

It is further ordered that in the event that the applicant wishes to bring |a further matter to court, relating to the same cause herein, that the taxed costs of both related applications first be paid.

ANNANDALE, A C J