

THE HIGH COURT OF SWAZILAND

VULINDLELAMSIBI

Applicant

And

ELIJAH SHONGWE 1st Respondent

ATTORNEY GENERAL 2nd Respondent

CHIEF ELECTORAL OFFICER 3rd Respondent

Civil Case No. 808/2004

Coram S.B. MAPHALALA – J

For the Applicant MR. M. SIMELANE

For the 1st Respondent MR. P. DUNSEITH

For the 2nd and 3rd Respondents MR. S. KHULUSE

JUDGEMENT

17/09/2004

The relief sought.

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The relief sought in this application brought by notice of motion (in the long form) is for the disqualification of the 1st Respondent on the basis that he was disqualified from contesting the elections by virtue of his position as an Indvuna and or acting Chief in terms of the provision of Section 20 (1) (i) of Act No. 1 of 1992; that the elections for Motshane Inkhundla be declared null and void to commence de novo; such further and/or alternative relief as the court seems meet; and costs to be paid by the party opposing the application

2. The historical background.

The 1st Respondent and one Skakadza Nicholas Matsebula were candidates in the elections held under the Motshane Inkhundla in the General elections in 2003. The 1st Respondent emerged the winner of those elections and became Member of Parliament for the Motshane Inkhundla in terms of the Establishment of Parliament of Swaziland Order of 1992. He was subsequently appointed a Minister of the realm under the portfolio of Works and Communications. Mr. Matsebula was a runner up in those elections and being dissatisfied with the outcome thereof launched an application before this court under Case No. 3243/03, seeking a similar remedy as the one sought in the present application. This application was made on 12th December 2003. On the 6th February 2004, he withdrew his application on the basis that he lacked locus standi in terms of Section 28 of the Order of 1992. The issue of locus standi in terms of Section 28 of the Order came before Annandale ACJ in Case No. 2783/2003 between one Meshack Makhubu and the Chief Electoral Officer and another involving elections in the same Inkhundla of Motshane. The learned Acting Chief Justice in a written judgment delivered on the 5th December 2003, ruled inter alia on this point as follows: (at page 8 of the unreported judgment).

"The bottom line, so to speak, is that the empowering legislation which confers jurisdiction on the High Court to hear election disputes of the election of Members of the House, bestowed on the courts by

the Legislative Arm of Government, which otherwise would have determined the issue itself in Parliament, limits locus standi as determined in the Order, to the Attorney General or and elected/nominated Members of the House....",

It was because of the above legal impediment that the present applicant joined the fray, as is were. The Applicant is an elected member of the House of Assembly and

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has stated in his founding affidavit that his interest in this matter is "to ensure that the composition of Parliament is properly constituted. This is however not a personal interest but an interest to protect the public and the intergrity of the House as a whole".

Having outlined the general history of the matter I now proceed to sketch the facts founding the application itself, thus;

3. The facts founding the application.

The substantial facts of the application are contained in the affidavit of Skakadza Nicholas Matsebula which has been incorporated and adopted in the Applicant's application forming the founding papers marked annexure "A",

In this affidavit he avers that he was one of the candidates for the National Parliamentary Election held on the 18th October 2003, at Motshane Inkhundla. The outcome of the elections was that the 1st Respondent got 869 votes and he came second with 660 votes. He alleges that a series of irregularities occurred during the elections in general. Firstly, the registration process was not in accordance with the requirements of the Voters Registration Order in that the 1st Respondent was actively involved in the Voter Registration process at Ekupheleni. Secondly, there was a further violation of Section 63 of the Election Order, 1992 in that the 1st Respondent was, well knowing that he is a candidate participated in the distribution of food at a neighbouring Umphakatsi at Enduma and thus affecting the minds of the electorate. Thirdly, that some people were registered more than once. That it is inconceivable to have for example, three Ellen Shongwes of Motshane, presumably being the same person. In other instances people were registered in absentia. The fourth complaint is that Section 21 (1) of the Election Order Act No. 2 of 1992 was violated, in that the names of candidates were not arranged in alphabetical order. The fifth irregularity is that the 1st Respondent is an Indvuna of Ekupheleni and according to Section 20 (1) (i) of the Establishment of Parliament of Swaziland Order of 1992 he is precluded by virtue of his position and involvement in the preparation of the elections to run as candidate thereof. The Section reads as follows:

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No person shall be qualified to be elected or appointed as a Senator or to be elected as an elected member or appointed as a nominated member of the House of Assembly who;

- (i) in the case of an elected member of the House of Assembly holds or is acting in, any office, the functions of which involve any responsibility for, or in connection with, the conduct of any election or the compilation or revision of any electoral register.

4. The opposition.

The 1st Respondent has filed an answering affidavit in opposition thereto. Various annexures are filed in support of the said affidavit. The 3rd Respondent has also filed an affidavit where he states that his office will abide by the decision of the court in and paragraph 6 and 7 of the affidavit he states the following:

"I as Chief Electoral Officer cannot intervene on the allegations specified for the reasons set out hereunder:

6.

a) The elections legislation has no express provision to the effect that an Indvuna cannot stand for elections. This remains an issue for interpretation by the courts.

b) In previous elections there has never been a dispute on whether or not an Indu Indvuna who has been elected as a Member of Parliament should be disqualified on the basis of being Indvuna, Persons in the position of Indvuna have been elected without any contrary view.

c) The appointment of Mr, Elijah Shongwe as Acting Chief, as alleged by the Applicant, is not within my personal knowledge. I am not aware of an instrument, or formal ceremony in terms of Swazi Law and Custom, appointing him to act as such,

d) Further that, the normal practice is that during the period of elections the Chief appoints two persons who are the representatives of the Chief and his Council to look into the eligibility of a voter. At Ekupheleni Inkhundla the person of John Dlamini and Absalom Mavimbela were tasked with such responsibilities.

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e) The compilation of the Electoral register is done by my office and not by any person at the Inkhundla, and therefore, the two persons were appointed only to approve of persons eligible to vote.

7.

The 1st Respondent was elected as an Indvuna in the previous elections and his election while in that capacity was never challenged, therefore my office, unless the matter is ultimately decided upon by the court, could not prevent the said Mr. Elijah Shongwe from being voted for as a Member of Parliament".

Reverting to the 1st Respondent's defence, a point of law in limine has been raised viz that as a matter of law and/or practice, the application should have been brought by way of petition. The failure to do so is a fatal irregularity. On the merits he answers each allegations contained in the affidavit of Matsebula ad seriatim. For the sake of brevity, I shall proceed to paraphrase the issues on the merits in the said affidavit. The Applicant has raised five issues upon which he disputes the validity of the 1st Respondent's election to the House of Assembly.

1. Irregularity on the voters roll.

The Applicant relies upon an unsubstantiated speculation, viz that more than one voter registered with the same name implies fraudulently duplication. The Applicant has taken no steps to verify whether any persons were registered more than once. There is no suggestion that the 1st Respondent was in any way involved in a fraudulent registration of voters.

2. Distribution of Amicaal food parcels at Enduma area.

The assertion in this regard is that Enduma area is not in the Motshane Inkhundla where 1st Respondent was elected. Therefore, it is difficult to understand the relevance of a distribution of food parcels outside the 1st Respondent's constituency. In any event, the Applicant withdrew this allegation in his replying affidavit in paragraph 3.2 therein.

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The Applicant attempts to introduce new allegations regarding a different distribution on Nereha food parcels in his replying affidavit, supported by the new affidavits of Lucky Ndzingane and Petros Shongwe. When the matter was argued it was contended for the 1st Respondent that this is highly irregular and prejudicial to the 1st Respondent and therefore these new allegations and affidavits ought to be struck out.

In the final analysis it was contended that there is no merit in this challenge.

3. Names of candidates not in alphabetical order.

This challenge is petty and technical and no prejudice to the voters or the candidates has been shown.

4. 1st Respondent intimidated voters because he is the Acting Chief of Ekupheleni.

The answer put forth in this regard is that it is impossible to reconcile the Applicant's assertions that the 1st Respondent is the Acting Chief of the area. The 1st Respondent denies that he is the Acting Chief or that he performs the functions of the Chief (per the affidavit of Solomon Dlamini in paragraph 21.1). In any event a community leader is not precluded from standing for election to Parliament provided that he does not exercise undue influence as defined in Section 64 of the Elections Order, 1992.

5. Disqualification as per the provisions of Section 20 (1) (i) of the Establishment of Parliament of Swaziland Order No. 1 of 1992.

The defence advanced in this regard is that the responsibility for the conducting of elections and the compilation and revision of the electoral register is vested in the office of Mphatsi Lukhetfo. The compilation of the electoral register is done by the office of Umphatsi Lukhetfo and not by any person at the Inkhundla.

The above therefore are the substance issues in support of the 1st Respondent's defence.

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In summary therefore the issues for determination in this matter may be classified under seven headings viz, a) that as a matter of law and/or practice, the application should have been brought by way of petition b) irregularity on the voters roll; c) distribution of Amicaal food parcels at Enduma area; d) the names of candidates not in alphabetical order, e) 1st Respondent intimidated voters because he is the acting Chief of Ekupheleni; f) disqualification as per the provision of Section 20 (1) of Establishment of Parliament of Swaziland Order No. 1 of 1992; and g) costs of suit. Counsel filed very comprehensive Heads of Argument, for which I am grateful. Both the points in limine and the merits were argued at the same time.

I shall proceed to address the issues ad seriatim and further wish to add en passant that the outcome after the examination of the point in limine will determine the future of the application on the merits. In the event that I find that the objection raised in limine is good in law, that would be the end of the matter and in that eventuality the application will fall to be dismissed forthwith.

I proceed thus; a) Procedure.

In this regard the 1st Respondent contends that the application should have been brought by way of petition. The failure to do so, he argues is a fatal irregularity. In this connection the court was referred to the unreported judgment of Jabulane Khumalo vs Titus Thwala & others, High Court Civil case No. 2865/03 (per Masuku J). Per contra arguments by the Applicant are that the point in limine ought to fail in that the present application is in part based upon the provisions of Section 28 in particular Section 28 (2) (B) which provides as follows;

"An application to the High Court may be made for the determination of any question under Sub-Section (1) (b), and (c) by a Senator or elected or nominated Member of the House as the case may be, or by the Attorney-General", (my emphasis).

The Applicant places heavy reliance on the use of the word "application" as cited above.

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The second leg of the argument in this regard is that Rule 6 (1) of the Rules of Court provides that

"save where proceedings by way of petition are prescribed by law, every application shall be brought on notice of motion". The case of Rogers Matsebula and nine (9) others vs Magwagwa Mdluli, Civil Case No. 2498/03 per

Maphalala J at page 9 was cited to in support of this assertion. The High Court case of Meshack Makhubu vs the Chief Electoral Officer and others, Civil Case No. 2783/03 as per Annandale ACJ at page 6 paragraph 3 and 4. was also cited in this regard. Without further ado, in this regard it appears to me that the correct position on the point of procedure was forcefully stated in the judgment of Masuku J in the case of Jabulani Khumalo vs Titus Thwala & others, supra where the following appears at page 8 of the judgment, and I quote:

"One thing is in my view clear from this provision, this provision removes any previously hovering scintilla of doubt whether the Parliament (Petition) Act was repealed. It is my view an ineluctable fact that this Act, if it was ever repealed before, was expressly reinstated by the Legislative. I am of the firm view therefore that a petition remains prescribed even in the new election regime promulgated in 1992 where an election is being challenged",

I agree in toto, with the trenchant remarks stated by the learned Judge that the operative section in this regard is Section 2 of the Order in the Interpretation Section which defines the word "election petition" in the following language;

"Election petition means a petition referred to in the Parliament (petition) Act No. 16 of 1968". Therefore on the basis of the above the Applicant cannot succeed under the second leg of his argument. It now behoves me however, to examine the correctness of Applicant's argument in the first leg viz that in terms of Section 28 (2) (b) of the Establishment of the Parliament of Swaziland Order, No. 1 of 1992 the procedure is that an application suffices for decision of question as to membership of Parliament. The relevant Section reads as follows:

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"An application to the High Court may be made for determination of any question - 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", (my emphasis)

The operative word in the above- cited Section is the word "application" in subsection 2. The word is not defined in the Interpretation Section of the said Order. However, it is trite law that words should generally be given the meaning, which the normal speaker of English language would understand them to bear in the context in which they are used (see Cross, Statutory Interpretation 1 and G.E. Devenish, Interpretation of Statutes, Juta at page 5).

It would appear to me from what I have stated above that the court in casu is enjoined to ascribe an ordinary meaning of the word "application" and hold that the legislature intended that decisions of questions as to membership of Parliament ought to be brought by way of application.

On the basis of the afore-going therefore, I find that the point of law in limine raised ought to fail and I forthwith proceed to examine the matter on the merits, thus:

b) Irregularities on the voters roll.

On the totality of the facts presented before court on this question the Applicant relies upon an unsubstantiated speculation, viz that more than one voter registered with the same name implies fraudulent duplication. It is not shown in Applicant's founding affidavit that he has taken any steps to verify whether on a point of fact any person were registered more than once. The Applicant's averments are mere speculation and I cannot attach any evidential value on them, whatsoever.

There is no suggestion that the 1st Respondent was in any way involved in a fraudulent registration of voters. If so, to what extent that such has influenced the outcome of the election in favour of the 1st Respondent.

Therefore on the basis of the above reasons the Applicant cannot succeed under this head.

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e) Distribution of Amicaal food parcels at Enduma area.

It is common cause that Enduma area is not in the Motshane Inkhundla where 1st Respondent was elected. The affidavit of the returning Officer, Edgar Qhawe Mavuso attest to this fact. It is difficult to understand the relevance of a distribution of food parcels outside the 1st Respondent's constituency.

The Applicant has introduced new allegations regarding a different distribution of Nercha food parcels in his replying affidavit, supported by the new affidavits of Lucky Ndzingane and Petros Shongwe. This is highly irregular and prejudicial to the 1st Respondent. It is trite law that Applicant stands or falls on his founding affidavit (see Herbstein et al, The Civil Practice of the Supreme Court of South Africa, 4th ED at page 717). In view of this therefore these new allegations and affidavits are accordingly struck out.

For the afore-going reasons I hold that the Applicant cannot succeed under this head.

c) Names of candidates not in alphabetical order.

This point was not pursued in argument. This challenge is petty and technical and no prejudice to the voters or candidates has been shown. Elections can only be set-aside on substantial grounds that establish that the constituency did not in fact have a fair and full opportunity of electing the candidate of their choice.

I therefore find no merit in this challenge,

e) 1st Respondent intimidated voters because he is the Acting Chief of Ekupheleni.

In this regard I am in agreement with the submissions advanced by Mr. Dunseith for the 1st Respondent that it is impossible to reconcile the Applicant's assertions that the 1st Respondent is the Acting Chief of the area and that he is an Indvuna of the area. The affidavit of Solomon Dlamini in support of the 1st Respondent's answering

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affidavit has put the matter to rest at paragraphs 2 to 6 wherein he stated the following:

"2 The Chief of Ekupheleni is Sobiyose Dlamini. He is the child of my late brother. I am one of the senior members of the Chiefs family, known in Swazi cultures as "Bantfwabenhosr".

3. I am informed that it has been alleged that during the time of Parliamentary elections in 2003, whilst the Chief was indisposed due to illness, the Indvuna of Ekupheleni are Elijah Shongwe acted as Chief and performed the functions of the Chief.

4. This is completely false.

5. The Chief was in hospital for about 3 months at the time of the elections. His duties and functions were performed by my elder brother, Mabasa July Dlamini, as the most senior of the "Bantfwabenhosi", in accordance with Swazi Law and Custom.

6. It would be highly irregular in Swazi Custom for the Indvuna to usurp the functions of the Chief, and this did not in fact happen.

A community leader is not precluded from standing for election to Parliament provided that he does not exercise undue influence as defined in Section 64 of the Elections Order.

In the final analysis therefore under this heading I find that there is no merit in this challenge.

f) Disqualifications as per the provisions of Section 20 (1) of the Establishment of the Parliament of Swaziland Order No. 1 of 1992.

An elected Member of the House of Assembly is disqualified if he "holds or is acting in any office, the

functions of which involve any responsibility for, or in connection with, the conduct of any election or the compilation or revision of any electoral register" (per Section 20 (1) (i) of Order No. 1 of 1992). It is common cause that the 1st Respondent is an Indvuna of Ekupheleni under Motshane Inkhundla. The question which presents itself is whether the customary office of Indvuna is vested with the functions described in Section 20 (1) (i).

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In argument Mr. Simelane made submissions at great length on this aspect of the matter as befits the importance of this vexed question. The thrust of his argument simply put is that the 1st Respondent is a member of the Chief's Council as an Indvuna. In casu, the 1st Respondent is the person that holds the office the functions of which involve any responsibility for or in connection with the conduct of any election, as amplified by Section 2 (a), 5(1) and (2) of the Voters Registration Order of 1992 and Section 2 (a) of the Election Order No. 2 of 1993. 1st Respondent's office as an Indvuna involves functions of any responsibility for election.

Mr. Dunseith for the 1st Respondent argued that an Indvuna is not included in the office of Umphatsi-Lukhetfo and he has no functions under such office. The legislation regarding elections does not prescribe nor vest any responsibility for, or in connection with election (or the electoral register) in an Indvuna. That the only direct reference to an Indvuna appears in the definition of a "competent witness" under Section 2 of the Voter Registration Order, 1992. The definition embraces a variety of offices of authority or trust, including chiefs, tindvuna, town clerk, attorneys etc but is qualified at the end by a rider that competent witness "does not include candidate for election or election agent the only reasonable inference to be drawn is that the legislature envisaged an indvuna being a candidates for election.

It appears to me that the case for and against the Applicant hinges on the meaning to be ascribed to words "any responsibility for" used in Section 20 (1) (i) of Order No. 1 of 1992, put differently, the question is whether the customary office of Indvuna is vested with the functions described in Section 20 (1) (i) of the Order. According to Sections 3 and 4 of the Electoral Office Order, 1998 responsibility for the conducting of elections and the compilation and revision of the electoral register is vested in the office of Umphatsi-Lukhetfo. The said Sections mentioned that the office of Mphatsi-Lukhetfo consists of

- Chief Electoral Officer
- Electoral Officers
- Registration Officers
- Returning and other Election Officers

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(See the Electoral Office Order, 1998 (Section 3 (1) Voter Registration Order and Election order 1992 Section 3). The above listed officers it would appear to me are the persons referred to in Section 20 (1) (i), "the functions of which involve any responsibility for, or in connection with, the conduct of any election ...". An Indvuna is not included in the office of Umphatsi-Lukhetfo and he has no functions under such office. In this regard I agree with the submissions made by Mr. Dunseith that the position of Indvuna is a traditional or customary office. Swazi custom does not prescribe any responsibilities in connection with elections to an Indvuna.

The legislation regarding elections does not prescribe nor vest any responsibility for, or in connection with elections (or the electoral register) in an Indvuna.

The only direct reference to an Indvuna appears in the definition of a "competent witness" under Section 2 of the Voters Registration Order, 1992.

The Section provides as follows:

"Competent witness" means

- (a) a Chief or an Indvuna of the Chiefdom;
- (b) a person who, within Swaziland, holds the office of, or appointment as, an Assistant

Regional Officer, registration officer, returning officer, or a town clerk of a municipality or a Chairman or secretary of a town council or town board or police officer of or above the rank of sub-inspector; or

e) an Ambassador, High Commissioner or Trade Representative or a member of his staff outside Swaziland who has been appointed by him as a competent witness.

d) A person who, within Swaziland, is or holds the office of, or appointment as, an advocate, attorney, magistrate, bank manager, consular officer of a country or territory of the Commonwealth, commissioner of oaths or justice of the peace, but does not include candidate for election or election agent

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The above definition embraces a variety of offices of authority or trust, including chiefs, tindvuna, town clerks, attorneys, etc but is qualified at the end by the rider that competent witness "does not include candidate for election or election agent". In other words, an Indvuna is a "competent witness" unless he is a candidate for election.

It appears to me further that reliance by Applicant on Section 5 (1) of the Voters Registration Order, 1992, as attributing functions of an Indvuna involving responsibility for the conduct of an election cannot be sustained on a number of grounds. Firstly, a libandla or Chiefs council is an advisory body. Any responsibility for decisions taken vests in the Chief, not the members of his council providing relevant information regarding eligibility of voters may be a function relating to an election but it does amount to "responsibility for, in connection with, the conduct of any election or the compilation or revision of any electoral register" "Responsibility" means that a person is held accountable.

Secondly, it is also clear that the 1st Respondent as a matter of fact exercised no functions with regard to responsibilities for the election or the voter registration.

In sum, therefore I am of the considered view, that every eligible registered voter in Swaziland has a fundamental right to stand for election to parliament unless expressly deprived of that right by a clear provision of the statutory law. The provisions of Section 20 (1) (i) in the circumstances ought to be interpreted restrictively to safeguard such rights. In the instant case, the Applicant has failed to discharge the onus of proving on a balance of probabilities that the legislature intended to deny an Indvuna the right to stand for elections.

For the above reasons therefore the application ought to be dismissed. g) The question of costs.

Mr. Dunseith argued on behalf of the 1st Respondent that in the event I find against the Applicant I ought to levy costs at a punitive scale. It was submitted that the Applicant lent his status as a Member of Parliament to a defeated candidate to enable

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the latter to challenge the 1st Respondent's election, without exercising any personal discretion.

Secondly, it was submitted that the Applicant did not make any effort to satisfy himself that there was merit in the application, nor did he even allege that he believed the allegations of Skakadza Matsebula. Such conduct by a Member of Parliament is an abuse of office and a dereliction of duty warranting a penal order for costs on the attorney-client scale.

Mr. Simelane for the Applicant advanced au contraire arguments in this regard.

According to the authors Herbstein et al, The Civil Practice of the Supreme Court of South Africa, (4

ED) at page 717 an award of attorney-and-client scale will not be granted lightly, as the court looks upon such orders with disfavour and is loath to penalize a person who has exercised his right to obtain a judicial decision on any complainant he may have (see cases cited at folio 146 therein).

In my assessment of the facts of the present case I cannot find any fault on the part of the Applicant that he has abused his office as a Member of Parliament as contended by the 1st Respondent. Therefore, I would levy costs at the ordinary scale.

The court order.

- ii) The application is dismissed and the costs to follow the event,
- iii) The costs levied at the ordinary scale.

S.B. MIAPHAL A1 A

JUDGE