THE HIGH COURT OF SWAZILAND

Civil Case No.2865/03

In the matter between:

JABULANI KHUMALO	**Applicant**
And	
TITUS THWALA	**1st Respondent 2nd**
CHTEF ELECTORAL OFFICER	**Respondent 3rd**
ATTORNEY-GENERAL	**Respondent**

CORAM	**: MASUKUJ.**
For the Applicant For the 1st Respondent For the 2nd Respondent	**: Mr Bongani S. Dlamini : Mr Manene Thwala : Mr Leo Dlamini**

JUDGEMENT 8th
March 2004

Relief Sought

This is an application which was launched on the 14th November 2003, by the Applicant on an urgent basis. The Applicant prayed for the following relief: -

1) Declaring the secondary elections conducted at Zombodze South Chiefdom on the 18th October 2003, null and void.

2) That an order be and is hereby issued directing the 2nd Respondent to conduct fresh secondary elections for the said Zombodze Inkhundla.

3) That an order be and is hereby issued declaring the Ist Respondent not a fit and

t proper person to stand for parliamentary elections by virtue of tie irregularities committed by him.

4) Alternatively, that an order be and is hereby issued declaring the Applicant as winner of the secondary elections conducted at the Zombodze Inkhundla.

5) Costs of the application

f) Further and/or alternative relief.

Preliminary Observations

Strangely, the first time that the matter appears to have served in Court was on the 12th December 2003, according to the Judges' file. No order appears to have been made on that date save postponing the matter to the contested roll of the 23rd January 2003. It therefor becomes a matter of surmise if the matter was ever heard on the 14th November, 2003, and if so, what transpired. If not, the question is why the matter never featured as the 14th November does not appear to have been substituted for any later date.

It is also worth pointing out that the representative of the 2nd and 3rd Respondents submitted that his instructions were to abide by the decision of the Court. No papers were filed by the said Respondents, who argued that they were not in any event served with the papers and there appears to be nothing to gainsay that. They were nonetheless happy for the matter to proceed.

Back ground

(i) The Applicant's case

The Applicant deposed as follows in his Founding Affidavit: That he is a male adult of Zombodze Nhlangano. It is his evidence that on the 20lh September 2003, he won the primary elections in his area, thus becoming eligible to contest for the position of Member of Parliament for his *Inkhundla.* In the final contest, there were four (4) candidates, including the 2nd Respondent.

He states further that on the 15th October 2003, at or near kaMlalati area, the 1st Respondent, accompanied by one Mdumiseni Lushaba, wrongfully and unlawfully and to his prejudice, unduly influenced a crowd of about ninety (90) people to vote for him by distributing food hampers and other household paraphernalia to the said crowd of people.

The Applicant alleges further that as the distribution exercise ensued, the 1st Respondent's agents, including the aforesaid Lushaba, contemporaneously issued pamphlets to the people, urging them to cast their votes in favour of the 1st Respondent. A picture captured by the Swazi Observer, dated 26th October 2003, is annexed by the Applicant and depicts the 1st Respondent during the aforesaid exercise. I will address its significance later in the course of the judgement.

The Applicant further alleges that the 1st Respondent indoctrinated the said crowd by masquerading as a close member of the Royal Family. He allegedly told the crowd that on the said date, he had a scheduled meeting with King Mswati HI at Embangweni Royal Residence, where he was to discuss some pressing issues with the King.

Upon seeing the above events, which the Applicant considered to be infractions of the Elections Order No.2 of 1992, (hereinafter referred to as "the Order") he caused a report of the incidents to be made to the Station Commander of Nhlangano Police Station. He also caused a letter of complaint to be written to the 2nd Respondent. It is a matter of record that the 2nd Respondent never responded to this letter. It is also a matter of observation that the letter of complaint was not copied to the alleged offender, to enable him to place his side of the story on record if he felt it necessary to negative the Applicant's assertions. In support of the allegations surrounding the events of the 15.h October, the Applicant annexed supporting affidavits of four (4) persons who allege that they were present and did see the events narrated above, which in the Applicant's view, were contrary to the letter and spirit of the Election laws.

(ii) The **1"**Respondent's case

The 1st Respondent has taken two points *in limine* and has proceeded to contest the matter on the merits. The points *in limine* are the following: -

6) that the Applicant has chosen a wrong procedure in bringing the proceedings before Court. It was his case that such proceedings ought to be brought by petition and not application as the Applicant purported to do.

7) That the application is in any event defective for it does not *ex facie* disclose any allegations by the Applicant to the effect that but for the irregularities allegedly committed by the 1st Respondent, the Applicant would have been successful in the elections.

8) That the papers filed of record fail to disclose a cause of action in favour of the Applicant in so far as he has failed to show *ex facie* the papers the following material averments;

(i) The identities of the ninety (90) people;

(ii) That the said people eventually turned up to vote during the secondary elections and that they voted for the 1st Respondent; and

(iii) That in voting for the 1st Respondent, they were 'compelled' by the food hampers they received on the 15th October 2003 to do so.

On the merits, the Applicant concedes that he did distribute the food hampers but states that he did so in his capacity as the current chairman of an association known as Zombodze Smart Charity Organisation. He states that the money used to purchase the goods was donated by the members themselves. He denies that he distributed the food in order to influence the people to vote for him. The 1st Respondent states that for the Applicant to succeed, he must show that the 1st Respondent has been convicted of a breach of the provisions ofthe Order. I will address this legal question in due course.

The 1st Respondent further denies that there was a distribution of the pamphlets during the said occasion. He further denies that he ever insinuated that he was closely related to the

Royal Family. He states that this would have been an absurd and irresponsible utterance by him because the people present during the food distribution exercise knew his family roots and could not be duped by him belatedly claiming that royal blood was running in his veins. An affidavit by the headman was filed by the 1st Respondent, to confirm his story and his denials as recorded above.

It is clear, from the foregoing, that there are obvious disputes of fact that arise in this matter. It is a matter of comment that the euphoria that grips some people during elections and the partisanship that is evoked at such emotive times blind some people to the truth and often causes others to conceive falsehood in their highly fertile imagination. Oral evidence would therefor be necessary to sieve facts from fiction in this case, to separate the friends of the truth from the enemies of the truth.

After carefully analysing the case, I formed the impression that from the issues that arise, both in relation to the points *in-limine* and to the merits, certain legal issues could render the matter *caedit quaestio,* thus obviating the need to call *viva voce* evidence. This is the course that was adopted with the concurrence of counsel on both sides. I now proceed to determine the live issues.

History of Disputed Elections Matters.

Before delving into the legal issues, I find it apposite to briefly retrace the history of election matters. The starting point is to realise that our principles of election law, like those ofthe Republic of South Africa, have been heavily influenced by English law. In this regard, I refer to DE VILLIERS VS LOUW 1931 AD 241 at 267, where Wessels J.A. had this to say: -

> *"In deciding this case, it is essential to ascertain the principles upon which we ought to decide elections petitions. As the whole procedure of parliamentary elections is foreign to our common law, and is derived from English statute law, we ought to adopt the principles resorted to by English Courts except where our statute differs from English electoral statutes. "*

It is a historical fact that previously, the Legislative Arm of Government reserved to itself the right to detennine disputed elections. In England, a new course was charted it 1868 when this function was delegated to the Judiciary by a legislative enactment. It stands to reason therefor that in making a determination on an election matter, the Court must have recourse, exclusively to the legislative enactment promulgated to govern elections. In DE VILLIEPvS VS LOUW 1930 AD 426 at 430, Curlewis J.A. put the matter poignantly in the following language: -

> *"In considering this matter, it is well to bear in mind that a Court of Law can have jurisdiction in connection with an election petition only in so far as jurisdiction has been conferred upon it by the Electoral Act, and that power...to deal with an election petition...and the extent of that power, must be found within the four corners of the Act. "*

Drawing closer, home, it is clear that the Legislature conferred jurisdiction to the Courts to decide election matters through the Elections Order, No.2 of 1992, which repealed the previous legislative regime. It is accordingly clear that this is the instrument that the Court must primarily adhere to in determining this matter and then to have recourse to English law principles where a *lacuna* exists.Procedure for bringing election matters

The l[sl] Respondent contends that the Applicant has chosen a wrong vehicle to bring these proceedings. It is clear from the format adopted by the Applicant that these proceedings are application proceedings governed by the provisions of Rule 6 (1), which read as follows;

> *"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 applicant relies for relief. "*

There are pieces of legislation that come in mind in which petitions are prescribed and these are liquidation proceedings and admissions of attorneys, advocates, conveyancers

The question that arises is whether there is any petition proceedings shall be employed in and/or notaries of the Courts of Swaziland, statutory prescription in the Order that challenging election matters.

Before answering this vexed question, it is necessary to point out, that there are two main decisions by this Court to which I was refened and which unfortunately returned different answers. The first is the judgement of Hull C.J. in THE ATTORNEY-GENERAL VS JAMES MAJAHENKHABA DLAMINI AND OTHERS CIVIL CASE 1588/93. At page 2 of the said judgement, Hull C.J. (as he then was) came to the following conclusions;-

> *"For the reasons that I gave in writing at the time, when ruling on preliminary points, I decided that under the 1992 Order, it was open to proceed by means of a notice of application, and in the way in which this matter has in the event gone, there have been no real differences of fact on the relevant issue. However, the practice here, formerly, was to proceed by way of petition, following the practice which governs such matters in South Africa and England. There are sound reasons why that should be so and it is desirable, in my view, to reinstate the provisions formerly contained in the Parliament (Petitions) Act, 1968 (No. 16 of 1968) and the rules that were made under it, if my conclusion that that Act was impliedly repealed is correct. In the meantime, as a matter of practice, or if that conclusion were wrong, proceedings of this kind should in future be commenced by way of petition. "*

It is undoubtedly clear from the foregoing that Hull C.J., held the view that petition proceedings, although not clearly prescribed, should, as a matter of practice, thenceforth be adopted in such cases. Maphalala J. in RODGERS MATSEBULA AND NINE OTHERS VS MAGWAGWA MDLULI AND ANOTHER CIV. CASE NO. 2788/03, came to a different conclusion from that of Hull C.J. The learned Judge held the view that the Parliament Petitions Act, although not expressly repealed, appears to have been impliedly repealed by the 1973 Proclamation and the Voter Registration Order of 1992. In reference to the excerpt of Hull C.J. quoted in part above, Maphalala J. held the following at page 10 of the carefully considered judgement: -

" appears to me that the learned Chief Justice was merely making recommendation to ihe legislature and was not making law or giving an instruction and this was somewhat conceded by Mr Ntiwane in his halfhearted argument on this point. In the final analysis therefore, in the absence of any express prescription that these proceedings should be by way of petition, the application has been brought by way of motion in terms of (Rule 6 of the Rules of Court (as read with Rule 6 (25). Therefore for the above reasons the point of law in limine ought to fail. "

The central issue to both judgements in my view revolves around the provisions of 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 (Petitions) Act No.l6ofl968". One thing is in my view clear from this provision. This provision removes any previously hovering scintilla of doubt whether the* Parliament (Petitions) Act was repealed. It is in 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 therefor that a petition remains prescribed even in the new elections regime promulgated in 1992 where an election is being challenged. This conclusion in my view endorses Hull C.J.'s conclusions and also shows that his fears or apprehensions regarding the implied repeal and therefor his recommendation, would have been rendered unnecessary if his attention had been brought to Section 2 of the Order. In like manner, I am of the respectful view that Maphalala J's conclusions were made *per incuriam* in that his attention was not drawn to this important provision which is unfortunately "hidden" in the interpretation Section, whereas it would most probably have been placed in a more notorious place in the body of the legislation. Overlooking it is in the circumstances the rule rather than the exception and for that reason, both learned Judges' conclusions must be viewed in this light.

I harbour no doubts that had the provisions of Section 2 been brought to the attention of Maphalala J., he could not have arrived at any other conclusion than that petition proceedings are prescribed and therefor the provisions of Rule 6 of the Rules of Court are of no application to election matters.

I am of the view therefor that Hull C.J. was correct although my reasons for so concluding, as evident above have a legislative premise, whereas he premised his on practice and the imperative of desirability. I wish to expound on Hull C.J.'s reasoning in the excerpt quoted above. He says "there are sound reasons why that should be so and it is desirable, in my view, to reinstate in the provisions formerly contained in the Parliament (Petitions) Act 1968...". The "sound reasons" and "desirability" referred to in my view lie in the following.

Firstly, it should be borne in mind that the Court, in sitting in such matters sits not in exercise of its residual civil jurisdiction under Section 2 (1) of the High Court Act, 1954. Elections have a special and distinct procedure and are not a civil suit. If the Rules applied, as contended by the Applicant's representative, it would mean that where disputes of fact arise, as they invariably do in election matters, and this case being no exception, the Court could dismiss the application on the grounds that the dispute of fact was not foreseeable but actually foreseen. In the ordinary order of things, this would force the "Applicant" to initiate the proceedings by way of action, a course that is foreign to election law. This would be necessary to avoid the situation where the Court would dismiss the application because of the disputes of fact and the matter would have to be governed by the lengthy time limits applicable to action proceedings. This would result in the loss of valuable time and a prolonged uncertainty over the properly elected candidate, something that does not auger well for the desired speedy finality of elections.

The petition proceedings on the other hand are designed within themselves to have a mechanism which is in built for resolving any disputes of fact and thereby allow viva *voce* evidence to be led. These are in my view prime considerations, which aside from the legislative prescriptions, ought to weigh heavily on the Court in holding, as Hull C.J. did that petition proceedings are appropriate. Any other course would be counter-productive

and unduly laborious. It is apposite to again refer to the remarks of Curlewis J.A. in DE VILLIERS VS LOUW *(supra).*

The conclusion, to which I have arrived is in my view consonant with the procedure and practice in other jurisdictions. In this regard, I refer to the judgement of FAJ3RICTUS VS VAN DER WALT 1916 AD 247 at 249, where the learned jurist Innes C.J. stated as follows: -

"It is a matter of history that in the Cape Province, as in England, the determination of election petitions challenging the validity of returns to a seat in the House of Assembly was originally retained by that body in its own hands. Jurisdiction in such matters was conferred on the Superior Courts by Act 9 of 1883 ...turning to the Transvaal.., Procedure by way of election petition was originally constituted in reference to municipal elections by Ordinance 38 of 1903. Full provision was made for the presentation of such petitions to the Supreme Court. " (Emphasis added).See also INKATHA FREEDOM PARTY VS AFRICAN NATIONAL CONGRESS
1994 (3) SA 578 (WLD).

I come to this conclusion with a measure of sympathy for the Applicant in that he was guided in his approach by the RODGERS MATSEBULA judgement *(supra).* It is however desirable, for purposes of future guidance and certainty that these conflicting judgements be placed for final and authoritative pronouncement by the Court of Appeal, as these elections matters seem to be with us, and with indications from the last elections, are likely to haunt us and to swell enormously in the next elections.

I shall not enmesh myself in the import of the provisions of Section 28 of the Establishment of Parliament Order of 1992 as it will be clear from the papers that it is not the Iˢᵗ Respondent's complaint that the Applicant has no *locus standi* to bring these proceedings in terms of the aforesaid Section. I therefor express no opinion on that matter as it is not before me.

I am of me view therefor that this legal point is well taken and the application be and is hereby dismissed with costs. In view of this conclusion, I find it unnecessary to consider and to pronounce upon the other points *in limine* raised by the 1st Respondent, save to say that they *prima facie* carry some prospect of success. I do however feel in duty bound to consider the legal issues that arise from the distribution of the food and I proceed to do so below.

Alleged breach ofthe Order bv the **1st** Respondent

In paragraph 7.3 and 7.8 of the Founding Affidavit, the Applicant alleged that the 1st Respondent "unduly influenced" the crowd of ninety to vote for him by distributing the food hampers and by uttering words to the effect that he was closely related to the Monarch. The conduct allegedly committed by the 1st Respondent in my view falls squarely within the penalty provisions of the Order, in particular, Section 63, 64 and 65. The language employed by the Applicant in the Founding Affidavit imputed "undue influence" on the part of the 1st Respondent, in respect of both infractions alleged.

"Undue influence" is described in the operative Section 64 as follows:-

> *" (1) A person shall be guilty of the offence of undue influence who, directly or indirectly, by himself or by any other person -*

9) *makes use of or threatens to make use of any force, violence, or restraint upon or against a person;*

10) *inflicts or threatens to inflict by himself or by any other person, or by any supernatural or non-natural means or pretended supernatural or non-natural means, any temporal or spiritual injury, damage, harm or loss upon or against any person; or*

(c) *does or threatens to do anything to the disadvantage of any person, in order to induce or compel such persons to -*

sign a nomination paper or refrain from signing a nomination paper, vote or refrain from voting; or

(H) *refrain from claiming registration as a voter or from offering himself as candidate for election;*

or on account of such person having -

(iv) signed or refrained from signing a nomination paper;

(v) voted or refrained from voting at an election;

(vi) refrained from claiming registration as a voter; or

(vii) refrained from offering himself as a candidate.

11) *A person shall also be guilty of the offence of undue influence who, by abduction, duress, or fraudulent device or contrivance impedes or prevents the free exercise of his vote by a voter or thereby compels, induces, or prevails upon a voter either to give or to refrain from giving his vote at an election.*

12) *Any person convicted of an offence under sub-section (I) or (2) shall be liable on conviction to a fine of five thousand emalangeni or to imprisonment for five years, or both. "-*

It would appear to me, regard had to the allegations made on the one hand and the above statutory interpretation on the other, that there is no evidence that any undue influence can, from the alleged infractions, be properly ascribed to the 1st Respondent. Undue influence is therefor a misnomer and I find that the Applicant has to fail on this score as well. There is no allegation or indication that the l5t Respondent threatened to use force, violence or restrain any person, nor is it alleged that he inflicted or threatened to inflict any injury on any person. It is also clear that no allegations of threats to do anything in order to induce or compel the people to vote for him or to refrain from voting for others are made. It was vitally important for the Applicant to have recourse to the provisions of the Order and to carefully and closely scrutinise the same before formulating a case, which must in the final analysis, be based on the provisions of the Order as aforesaid.

I should hasten to add in this regard that faced with the insuperable difficulties in his way, given the Legislative nomenclature, Mr Dlamini for the Applicant made a startling proposition, whose impact still reverberates to the present moment. He submitted that the Court should not consider this case in the light of the provisions of the Order, but should consider it in the light of what he termed "public policy", which is in my view a Pandora's box, with a limitless abyss.

Such a course is obviously untenable for a variety of reasons, chief of which is that as was once pointed out by an eminent jurist, "public policy is a restive horse and when once one gets astride of it, there is not knowing where it will carry you." Secondly, as indicated earlier, the Court is bound to give effect to legislative solicitudes reflected in the language used. It is not open to the Court to have regard to principles falling outside the ambit of the language of the enactment, particularly so where these are fully and exhaustively provided for. See De VILLIERS VS LOUW *(supra)*, per Curlewis J.A. I cannot therefor accede to this line of reasoning and jettison the Legislative intent apparent from the wording of the Order in favour of the nebulous phenomenon called public policy.

I am however of the view that this should however not mark the end of the matter. The Court is in my view entitled, from the allegations made to consider whether or not the conduct alleged against the 1st Respondent does fall within the ambit of any of the other penal provisions.

It would appear to me that the distribution of the food should be properly considered under the offence of "treating" as defined in Section 63. It is defined as follows: -

> *"A person who corruptly by himself or by any other person either before ... an election, directly or indirectly gives or provides ...any food, drink, ...to or for a person for the purpose of corruptly influencing that person...to give...his vote at an election...shall be guilty ofthe offence of treating. "*

It is worth noting the 1st Respondents' response. He says that he did not distribute the food in his personal capacity but did so in an official capacity and to a defined group of people i.e. members ofthe Charity Organisation, who had contributed the money.

Given the 1st Respondent's explanations can it be said, subject to my consideration of Section 67, that the 1st Respondent "corruptly" influenced the ninety to vote "foTTiim "i think not. It is clear that this was an activity for a specific organisation to which the members thereof contributed. This cannot in my view be gainsaid I am not convinced that the corrupt intent, necessary to be shown under this section has been demonstrated in the light ofthe 1st Respondent's case.

Furthermore, it is clear on the Applicant's own case that this activity continued even after the elections, not for the purpose of extending his gratitude to the ninety for their votes (if they voted for him), but to continue with the Charity Organisation's distribution activities. I refer in this regard annexure "JK2" of the Founding Affidavit, being an article from the Swazi Observer, dated 20th October 2003. The onus on the one who alleges is very high and must, considering that this is a penal provision, be discharged beyond a reasonable doubt.

It is my considered view that the Applicant countered the 1st Respondent's story by filing the Affidavit of his attorney, where it is alleged that the Charity Organisation is not registered and is therefor unlawful, thereby rendering the distribution itself illegal.

In paragraph 3 of the said Affidavit, the Applicant's attorney, Mr Dlamini makes the following deposition: -

> *"On the 19th December 2003,1proceeded to the Registrar of Companies at 3rd Floor, Justice Building, Mbabane, District of Hhohho to make enquiries as to whether an association called "Smart Zombodze Charity Organisation was registered and the results were in the negative. "*

The Court *suo motu* raised this issue that this paragraph apparently contained inadmissible hearsay evidence for the reason that Mr Dlamini deposes to what he was told and is not able from his knowledge to testify as to the truth of the results. It is my view that an affidavit from a relevant official and who maintains the records at the Registrar of Companies would have sufficed. The fact that this was never raised by the Respondents is of no consequence. Inadmissible evidence does not become admissible only for the reason

that it is not contested as such. See ISAAC S. SHABANGU VS COMMISSIONER OF POLICE AND TWO OTHERS CIVIL APPEAL CASE NO.4795 ~

At page S, Schreiner J.A. (as he then was) had this to say:-

> *"T)ie failure to give notice of intention to argue the admissibility of evidence cannot, in my view render hearsay evidence, which is not evidence at all, admissible. The Court cannot inver (sic) from the mere failure to object that the other party accepts the correctness of the hearsay allegations. "*

I note *in casu,* that the affidavit of the Applicant's attorney was filed with the Replying Affidavit, when ordinarily there is no opportunity for the Respondents, outside of making an application to file a further set of affidavits, to contest it. I am of the view that even if the other side does not object to the admission of hearsay evidence, the Court should not allow hearsay evidence, which as noted above, is not evidence at all, to be admitted only for the reason that the other side has recorded no objection to its admission.

I am of the view that in any event, even if that affidavit had been filed by the proper official, the fact of the non-registration of the organisation does not necessarily render the distribution illegal. The association ma? be illegal *de jure* because of non-registration, but its *de facto* existence and activities cannot on the papers be successfully denied. The illegality of the organisation cannot in my view be equated with the illegality of its activities for it is common cause, particularly in rural areas like where the parties herein live that associations are formed in oblivion of the legislative requirements. This is in my view a notorious fact in respect of which I am entitled to take judicial notice.

In any event, it was correctly submitted on the 1st Respondent's behalf that in respect of either of the alleged infractions, a criminal conviction is a *sine qua non* for an application to setting aside an election on the basis of the contravention of Sections 63, 64 or 65. In support of this submission, Mr Thwala referred this Court to the provisions of Section 67 (2) ofthe Order, which have the following rendering: -

> *"A person who is convicted of a corrupt practice is thereby disqualified for a period of seven (7) years from the date of his conviction....from being elected*

a member and, if at that date he has been elected a member, his election shall be deemed void as from the date of conviction. "

It is clear from the foregoing in my view that a criminal conviction in respect of corrupt practices must be returned before a person can be ordered disqualified. This is in my view plain from the Legislative nomenclature. To find otherwise would in my view result in the fracture or the subversion of clear and unambiguous legislative intent, apparent from the language used.

In casu, it is abundantly clear that that no criminal proceedings were instituted, let alone a conviction returned. I am of the view that the Applicant has put the cart before the horse and he should therefor fail. The penalty carried under this section is very severe and has very grave consequences for a person accused of contravening the Order, because it takes away his right of enfranchisement and for a lengthy period of time. The exercise of this basic right cannot therefor be abrogated on the basis flimsy and unsubstantiated allegations. This in my view was the policy consideration in putting this legislative regime in place and requiring the high standard of proof applicable to criminal matters.

Mr Dlamini submitted that this provision is not conectly interpreted for it collides with the celebrated rule in the case of HOLLftNGTON VS. F. NEWTHORN & COMPANY LIMITED [1943] 2 ALL ER 35. It is clear from the reading of the head note that this case dealt with certificates of previous convictions and their value when tendered in civil proceedings. Whatever the finding of the Court was, I am of the view that the common law position stated in that case has been overridden by a legislative enactment in this'case. This Court must in my view give effect to the laws of Swaziland at is finds them. The intention in my view is that Parliament intended that a certificate of previous conviction for an infraction of the electoral law can be admitted in evidence to support an application for a disqualification. I however note that this is a question that is not properly raised for there is no certificate of a conviction that is being relied upon for the disqualification.

Regarding prayers a), b) and c) of the Notice of Application, I am of the considered view that there is a paucity of evidence which could support the drastic Orders sought. It should always be remembered that an election cannot and should not lightly be set aside. The guiding principle is that elections can only be set aside on substantial grounds shown and

the public interest demands that elected members of Parliament, as is the 1st Respondent herein, must not be vexed with futile litigation - See SNYMAN VcTSCHOEMAN AND ANOHER 1949 (2) SA 1 at 5 and MORGAN AND OTHERS VS SLMPSON AND ANOTHER 1974 (3) ALL ER 722.

I find it apposite, in this regard, to cite with approval, the following cases as enumerating the principle admirably. In THE ELECTION FOR THE DARWEN DIVISION OF MNCASHIRE (2 TLR 220), the following extract appears: -

> "77ze *Legislature, though determined that there should be the fullest opportunity, within certain limits, of questioning elections, had thought it right that they should not be questioned without some guarantee of* ***bona fides of*** *the Applicant as regards his belief that there was a ground for upsetting the election. "*

In DE VTLLIERS VS LOUW 1931 AD *(supra)* at page 264 Curlewis J. summed up the applicable position, having had due regard to principles enunciated in English law cases, as follows: -

> *"We may therefore conclude that the Legislature did not desire an election to be set aside lightly; it regarded ifias a matter in which the Court should act with particular caution and circumspection; no matter how grave the mistake or noncompliance, may be, the Court may not declare an election void except in the event mentioned in the section. From this we may infer that the principle which the Legislature intended the Court to act upon in considering the validity or invalidity of individual votes posed on a breach of the Act or of the Regulations where the Legislature has not enacted what effect of such breach shall be, is that such breach should not invalidate the vote unless the breach be of such a nature as to amount to a violation of a principle either in the Act or the Regidations on which an election shall take place or a vote be recorded. "*

It is clear that what should influence the Court in reaching such a decision is that it is proved that the constituency did not in fact have a fair and full opportunity of electing the candidate they might have preferred. The sore heart, wounded emotions, failed projections

and shattered dreams of a loser, no matter how deeply and sincerely felt cannot on their own be sufficient grounds for upsetting an election. - " "*

"In casu, it has not been shown how many votes the Applicant obtained *vis-a-vis* the 1st Respondent; nor has it been shown that the ninety persons were not only corruptly influenced to vote but that they did vote for the 1st Respondent and how their votes affected the outcome. It must, in this wise be shown, as conectly submitted by Mr Thwala that but for their votes, the Applicant and not the 1st Respondent would have been the successful candidate. In my view, nothing short of the foregoing can suffice.

I am of the view, in appreciation of the foregoing that the Applicant's application should fail. For the avoidance of doubt, the costs are mulcted against the Applicant only. The **2nd** and 3rd Respondents did not file any opposition nor did they apply for an Order of costs in their favour.

In conclusion, I need to state the following for the record. This judgement must not be construed as licensing candidates to bribe, treat or unduly influence potential voters. This judgement must be read and understood in full appreciation of its peculiar set of facts and circumstances. No violence must therefor be done to the wording and spirit of this judgement. It is also important to note tkat I have dealt with this matter in this forum/My findings and conclusions are therefor confined to the evidence and allegations before me and should not be stretched beyond the limits of this case and its peculiar circumstances. If the case were to be brought for a criminal trial for instance, different conclusions may well be arrived at.

Secondly, the 1st Respondent ought to have contacted the office of the 2nd Respondent to obtain guidance and advice, particularly in view of how the Charity Organisation's noble cause was susceptible to misunderstood but justified attacks. Candidates ought to confer with and get an appropriate clearance from the 2nd Respondent so that incidences like the present are avoided.

Lastly, I would like, in this judgement, to formally record my indebtedness to Counsel on both sides, particularly Mr Thwala, who conscienscious ly prepared for this case and used his industry to alleviate this Court's burden. I note that generally, the standard of

preparation by some practitioners in this Court is abysmal. As a result, the Court not only has*to prepare and issue a judgement, but it also has to go into' intensive researcrf oIThe parties' respective cases, which is an unfair burden to place on a Court such as ours with no research assistants. The Court is entitled to the assistance of Counsel, who should come to Court ready to perform their role. Mr Thwala's detailed and highly relevant heads of argument and his poignant submissions are therefor appreciated and must be emulated by some practitioners in this Court.

T.S. MASUKU

Judge