IN THE HIGH COURT OF SWAZILAND

Civil Case No. 893/2017

In the matter between

MBABANE CITY RATEPAYERS AND DEVELOPERS ASSOCIATION	**APPLICANT**

AND

THE MINISTER FOR HOUSING AND URBAN DEVELOPMENT	**1ST RESPONDENT**
MUNICIPAL COUNCIL OF MBABANE	**2ND RESPONDENT**
THE ELECTIONS AND BOUNDARIES COMMISSION	**3RD RESPONDENT**
THE ATTORNEY GENERAL	**4TH RESPONDENT**

Neutral citation: *Mbabane City Ratepayers & Urban Development Association v The Minister of Housing & Urban Development & 3 Others* (893/2017) [2017] SZHC 215 (October 2017)

Coram: **MABUZA PJ**
MAMBA & HLOPHE JJ

Heard: **05 October 2017**

Delivered: 25 October 2017

JUDGMENT

MAMBA J

[1] Civil law – Application for an injunction to stop Local Government Elections being conducted by Minister of Housing and Urban Development in terms of the Urban Government Act 8 of 1969.

[2] Constitutional Law – Local Government Elections being conducted by Ministry of Housing and Urban Development. Applicant alleging that elections must be conducted by Elections and Boundary Commission as per Section 90 (7) of the Constitution.

[3] Constitutional Law – Application to declare Regulation 17 of the Urban Government (Elections) Regulation as undemocratic and thus null and void – objection being that the said regulation permits self-nomination as candidate. Regulation does not permit such. Objection rejected.

[4] Constitutional Law – Section 218 (1) of the Constitution enjoins Parliament to promulgate or enact law to amongst other things, govern Local Government elections within five years of coming into force of the Constitution. Parliament failing to do so. Old order obtains and such elections governed by the Urban Government Act 8 of 1969.

[1] This Application was filed and served on the Respondents on 26 June 2017. It was accompanied by a certificate of urgency, deposed to by Counsel for the Applicant. The matter was set down for the 30th day of

June 2017. In this Application the Applicant prays for, *inter alia*, the following order:

‘1. Declaring as unlawful and setting aside the Local Government Elections called by the First Respondent on the basis that same is constitutionally invalid in so far as Sections 7 and 8 of the Urban Government Act, 1969 is inconsistent with Sections 79, 87 (4) and 90 (7) of the Constitution of The Kingdom of Swaziland as read together with the Elections Act of 2013.

2. That the Local Government Elections be stopped and held in abeyance until such time and this is heard and finally determined by this Honourable Court.

3. Applicant be granted special leave to institute proceedings in terms of Section 116 (3) of The Urban Government Act.

4. Directing the Third Respondent oversee and supervise the Local Government Elections as per its constitutional mandate.

5. Declaring unlawful, undemocratic and invalid the Local Government Elections insofar as aspiring councillors nominate themselves to serve in municipalities.’

[2] The Founding Affidavit and Replying Affidavit by the Applicant has been deposed to by Mr. Solomon Jeremiah Gubuda Nxumalo, who is the Chairperson of the Applicant. In both affidavits, Mr. Nxumalo states that he is 'an adult Swazi male of Thembelihle area, in Mbabane within the District of Shiselweni.' (Mbabane is of course in the District of Hhohho).

[3] The answering or opposing affidavit by the First Respondent has been filed by Mr. Phiwayinkhosi Mabuza, who is the Minister responsible for Housing and Urban Development. A supporting or confirmatory affidavit has also been filed by Chief Gija Dlamini, the Chairman of Third Respondent.

[4] It is common cause that in or about May this year, the First Respondent dissolved all Local Government Councils in the country and ad hoc or interim councillors were appointed to hold the fort pending the elections of new councillors. The date or dates for such elections, has or have not been publicly announced or declared.

[5] The Applicant avers that the elections aforesaid shall be conducted and managed or run by the First Respondent contrary to the dictates of the Elections and Boundaries Commission Act of 2013. He states further that in terms of the said Act, the election ought to be conducted or

overseen by the Third Respondent. It is thus the Applicant's assertion that what the First Respondent wants to do, i.e. holding elections in terms of the Urban Government Act of 1969 is unconstitutional and invalid. Applicant points out that:

> 'The Local Government Elections under the Urban Government Act are undemocratic and stand at odds with Section 79 as read together with Section 78 (4) of the Constitution, in that:
>
> Regulation 17 of the Urban Government Elections Regulations of 1969 is at odds with the Constitution and The Elections Act of 2013'

The Applicant avers further that in terms of the said regulation, any eligible voter is entitled to nominate himself or herself to be a councillor and he or she may become such a councillor if he manages to secure a minimum of ten (10) votes or nominees. It is the Applicant's contention that self-nomination 'is inconsistent with the practices of democracy', and by extension, to the dictates of the Constitution. Lastly, I think, the Applicant states that this application; is in defence of the very Constitution which is the Supreme Law of Land. In support of this assertion, Applicant cites the provisions of Section 2 (2) of the Constitution and says the Applicant, like any other person or entity to whom the Constitution applies, has 'the right and duty to defend and uphold [the] Constitution.'

[6] Although the First Respondent, supported by the Third Respondent initially raised about 2 objections or points in *limine*, these points were not persisted in during arguments or submissions before us. The first point was that the matter was not urgent or that the Applicant has waited for too long since the dissolution of the Local Government in May before filing this application in June, as stated in paragraph 1 above. The second point of objection was that Mr. Nxumalo has filed no document to support his assertion to depose to the papers herein, or to file this application. He was, so it was alleged, 'on a frolic of his own.' The third point in *limine* was that of non-joinder. The Respondent averred that Parliament was a necessary party in these proceedings inasmuch as Sections 218 (1) and 226 of the Constitution, enjoined Parliament to enact laws or make provision for the Constitution, powers, election, membership, vacation, qualification and regulations, accountability, auditing, control and supervision of Local Government Authorities'.

[7] I observe that whilst the provisions of Sections 218 and 226 of the Constitution are obviously relevant in this application, the non-joinder of Parliament is plainly mistaken and was eventually not seriously pursued by Counsel for the Respondents. There is, therefore no need for me to examine this point further.

[8] First Respondent states that Local Government Elections as conducted in terms of The Urban Government Act 8 of 1969 are not inconsistent with the relevant provisions of the Constitution or the Elections Act of 2013. He states that the Elections and Boundaries Act and Elections Act of 2013 govern general elections and not Local Government Elections. The First Respondent states further, and is supported by the Third Respondent in this regard, that 'the current Local Urban Government Elections have been commissioned under the authority of the [Third Respondent] and are so supervised by the [Third Respondent].' Annexure HUDI, which is a letter by the Chairman of the Third Respondent authorising the First Respondent to conduct the 2017 Urban Government Elections; with the Third Respondent playing or performing a supervisory role in the whole exercise, has been filed. This letter or communique is dated 03 January 2017.

[9] The respondents deny that the elections conducted under the provisions of the Urban Government Act are undemocratic or unconstitutional, or that the applicable provisions of the said Act are inconsistent or at odds with any provision of the Constitution. It is the respondents' assertion further that until and unless Parliament enacts laws as enjoined by Sections 218 and 226 of the Constitution, the Urban Government Act 8 of 1969 is the

applicable law to govern or regulate Local or Urban Government Elections. Finally, the respondents state that:

> 'While [We] agree – that there should be compliance with the Constitution, where there is noncompliance with certain provisions of the Constitution, especially where Parliament is concerned, it is incumbent upon every aggrieved party with such noncompliance to seek an order compelling Parliament to comply with the Constitution, as in this case.'

And on the issue of lack of alternative remedy, they state: [We are] advised and verily believe that Applicant has an alternative remedy available to it in the sense that rather than seeking an interdict stopping the Urban Government Elections, it can seek an order compelling Parliament to comply with Section 218 (1) of the Constitution.

[10] On the issue that the First Respondent has been mandated or authorised by the Third Respondent to conduct the Local Urban Government Elections, it is argued by the Applicant that such authorisation or delegation of authority is unlawful and is of no force and effect. The Applicant argues that a person to whom powers have been delegated cannot delegate them to another person (Delegatus non potest delegare).

[11] From the above, it is clear to me that the Respondents agree with the Applicant's assertion that it is the duty and the responsibility of the Third Respondent to conduct the Local Government Elections. It was with this realisation or acknowledgement by the respondents that an agreement was reached whereby the Third Respondent authorised or appointed the First Respondent to conduct the said elections. The Third Respondent, however, retained the power and or authority to supervise and oversee the said exercise. (See annexures HUDI and EBC1 at pages 56 and 58 of the Book of Pleadings, respectively). In fact this document records that the First Respondent is "appointed to run the elections on behalf of the Third Respondent. This, in my judgment, is not a delegation properly so-called. It is nothing more than an authorisation to perform a certain task on the strict orders and supervision of the appointing authority. OSBORN's **Concise Law Dictionary** (6th Ed) (Sweet & Maxwell) by John Burke states:

> 'A person vested with authority is usually termed an agent, and the person for whom he acts, the principal. A bare authority is an authority which exists only for the benefit of the principal, which the agent must execute in accordance with his directions.'

[12] To delegate is to assign responsibility or authority to another person normally by a supervisor to a subordinate. In the present case, I hold that the Third Respondent by retaining oversight or supervisory powers did

not delegate its functions or powers to the First Respondent. That being the case, the axiom or adage quoted above finds no application in this case. (See *Tradax Export SA v Volkswagen Werk A.G., [1970] 1ALL E.R. 420 C.A. at 424).*

[13] The court notes though that, contrary to the First Respondent's answering affidavit, which constitutes the case for the respondents, Counsel for the respondents submitted before us and in his heads of argument that:

> '10. The only responsibility the [Third Respondent] has in Local Government is laid down in 219 of the Constitution. In terms of this section the [Third Respondent] only recommends Local Government areas'.

Heads of argument, however, do not constitute pleadings. The affidavits do so.

[14] Again, whilst it is agreed that it is the responsibility of the Third Respondent to conduct the Local Government Elections, the parties are not agreed as to which law ought to be used in conducting the said elections. In support of its case, the Applicant places reliance on the provisions of Section 90 of the Constitution which basically establishes the Third Respondent and spells out its functions. The Applicant placed

heavy reliance on Section 90 (7) of the Constitution, which provides that the Commission shall:-

‘(a) oversee and supervise the registration of voters and ensure fair and free elections at primary, secondary or other level;

(b) facilitate civic or voter education as may be necessary in between elections.

(c) review and determine the boundaries of Tinkhundla areas for purposes of elections;

(d) perform such other functions in connection with elections or boundaries as may be prescribed;

(e) produce periodic reports in respect of work done.’

[15] Counsel for the Applicant relied on the words or phrase ‘or other level’ as appear in Section 90 (7) (a) quoted above. He submitted that these 3 words included or encompass Local or Urban Government Elections. This submission, is in my judgment seriously flawed and lacking in reasoning. The starting point, I think, is to understand or appreciate the nature of the elections envisaged by the Constitution and in particular Section 90 (7) (a). That section refers or governs parliamentary or general elections at various levels or stages namely, Primary or Secondary ‘or other level’. It does not refer to types or systems of elections but levels, stages or hierarchy of elections.

[16] As pointed out by Counsel for the Respondents the phrase 'or other level' as appears in the subsection quoted above, is commonly referred to as an *ejusdem generis* ('of the same kind'). **Cross, Statutory Interpretation (2nd ed) (Butterworths)** *by Dr. John Bell & Sir George Engle, at 132-134* says of the rule of interpretation:

> 'Something must now be said about the rule of *ejusdem generis* ('of the same kind'), the *maxim noscitur a sociis* ('a thing is known by its associates'), the rule of rank and the *maxim expressio unius exclusio alterius* ('The mention of one thing is the exclusion of another'). *Noscitur a sociis* and the rule of rank can, roughly speaking, be respectively regarded as extended and attenuated versions of the *ejusdem generis* rule. These rules or maxims have attracted an unduly large quantity of case law because they are neither legal principles nor legal rules. It is hardly correct to speak of them as rules of language, for they simply refer to the way in which people speak in certain contexts. They are no more than rough guides to the intention of the speaker or writer. To quote from an article by *E. A. Driedger*: 'Ordinarily a husband who authorised his wife to purchase a hat, coat, shoes and "anything else you need" would not expect her to buy anything but clothes'. To exemplify the *expressio unius maxim* by the words of an even

more generous hypothetical speaker, if someone were to say 'I am going to give you my houses in London and York and the fixtures in my London house', the prospective donee could hardly hope for the fixtures in the York house.' Again E.A Driedger gives a full formulation of the rule as follows:

'Where general words are found, following an enumeration of persons of things all susceptible of being regarded as specimens of a single genus or category, but not exhaustive thereof, their construction should be restricted to things of that class or category, unless it is reasonably clear from the context or the general scope and purview of the Act that Parliament intended that they should be given a broader signification'.

[17] In *Quazi v Quazi [1980] AC 744 at 807-808*, Lord Diplock explained the rule in the following way:

'The presumption then is that the draftsman's mind was directed only to [the genus indicated by the specific words] and that he did not, by his addition of the word "other" to the list, intend to stray beyond its boundaries, but merely to bring within the ambit of the enacting words those species which complete the genus but have

> been omitted from the preceding list either inadvertently or in the interest of brevity'.

Whilst it is true that the *ejusdem generis* rule should not be narrowly interpreted, I do not think that it should be liberally interpreted or stretched either, for doing so may easily corrupt the draftsman's intention. Where the words bear a clear meaning, then the court is enjoined to go no further than that meaning or intent. In the present application, Parliament refers to 'or other level' of elections, and this can only be a reference to Parliamentary elections.

[18] One also notes that the relevant section appears under Part 1(c) of Chapter VII of the Constitution. This part deals with the legislature. It refers amongst other things, to the nomination and election of Indvuna yeNkhundla, members of Parliament and Bucopho Committees. There is no reference to Local Government Elections.

[19] Chapter XIII of the Constitution deals with Local Government issues or matters. The first section under that Chapter is Section 218 and this provides as follows:

> '218 (1) Parliament shall within five years of the commencement of this Constitution provide for the establishment of a single country-wide system of Local Government which is based on the

Tinkhundla System of Government, hierarchically organised according to the volume or complexity of service rendered and integrated so as to avoid the urban/rural dichotomy.

---

(3) Local Government shall be organised and administered, as far as practicable, through democratically established regional and sub-regional councils or committees'

The Third Respondent is mandated by Section 219 to recommend to Parliament for the division of the country into as many local government areas as may be necessary. Section 220 provides for the election or appointment of local government Councils or Committees. Again, Parliament is tasked with the duty to prescribe for such matters. The term of office of such Councils or Committees shall be similar to that of members of Parliament. Perhaps, most importantly, Section 226 enjoins Parliament to "make provision for the Constitution, powers, election, membership, vacation, qualification and regulations, accountability, auditing, control and supervision of local government authorities." (The underlining is mine). The Constitution came into force more than ten (10) years ago. Parliament has to-date, not complied with either Section 218 or 226. This is common cause.

[20] Since Parliament has not complied with its constitutional mandate to enact a law to regulate and or govern Local Government Elections and other related affairs pertaining to Local Government Councils or Committees, the old order obtains. In short, the Urban Government Act 8 of 1969 still operates and governs the situation. The court has no mandate or jurisdiction under the circumstances to declare that Act as having been abrogated; simply because the period within which Parliament had to enact new legislation to regulate the situation has come and gone or passed. The duty or mandate still resides with Parliament. This court, like any other person to whom the Constitution applies, has a duty and responsibility to uphold and defend this Constitution. Reminding or alerting Parliament of its Constitutional duties is, I venture to suggest, part of this right and duty to uphold and defend the Constitution. I respectfully exercise that right herein.

[21] I have referred above to subsection 3 of Section 218 of the Constitution which stipulates in mandatory terms that Local Government shall be organised and administered through democratically established Councils and Committees. This is a stand-alone provision and is not dependant on whether Parliament has enacted the appropriate legislation or not. The Applicant complains or alleges that Regulation 17 of the Urban Government (Elections) Regulation, 1969 'is at odds with the

Constitution and the Elections Act of 2013.' The Applicant argues that this regulation allows an individual or prospective councillor to nominate himself or herself. The Applicant says that:

> "This practice is inconsistent with the practices of democracy. Aspiring councillors should be nominated and seconded by the people on the ground instead of self-nomination."

I hereby reproduce this regulation in full.

> '17. (1) The nomination of a candidate for election shall be made on the approved form M.E. 3 to contain the provision of section 10 of the Urban Government Act which must be duly completed and signed by –
>
> (a) not less than ten supporters who shall be voters of the ward for which he is a candidate; and
>
> (b) the candidate, as accepting the nomination.
>
> (Amended L.N. 90/2001.)
>
> (2) No candidate may be nominated for more than one ward, nor may a husband and wife be nominated as candidates at the same election.
>
> (3) Each candidate shall deliver his nomination paper, duly completed and signed as provided in subregulation (1), to the Returning Officer on the day fixed and at the place specified in the notice referred

to in regulation 15 (3) between the hours of nine o'clock in the morning and noon. (Amended L.N. 90/2001)

(4) The Returning Officer shall reject –

(a) the nomination of a person proved , to his satisfaction, not to be eligible in terms of regulation 16;

(b) a nomination which does not substantially comply with the requirements of subregulations (1) and (3); and

(c) the nomination of a person who, in terms of regulation 22 (2), has withdrawn his candidature.'

With due respect to the Applicant, I do not understand or read anything in this regulation that permits a prospective councillor to nominate himself or herself. (1) (b) of the regulation specifically requires the candidate to complete and sign the nomination form "as accepting the nomination". Grammatically, that presupposes that someone, other than the candidate himself or herself has made the nomination. There is, in my judgment, no merit in this objection by the Applicant. I see nothing undemocratic in these provisions. The fact that the nomination form is delivered to the Returning Officer by the candidate in question does not detract from the

central fact that the candidate has been nominated by not less than ten voters. The complaint by the Applicant that there is no provision for a Returning Officer is also baseless. (See reg. 14, 17 (3) and 18. The Town Clerk is the Returning Officer).

[22] The Applicant also states that the provisions of Sections 7 and 8 of the Urban Government Act 8 of 1969 are inconsistent with Sections 79 and 87 (4) of the Constitution. The argument proffered here is that:

> 'The spirit, tenor and import of Sections 79 and 87 (4) of the Constitution is clear from the Elections Act of 2013, in that nominations are received by the Returning Officer.'

Coincidentally, Section 87 (4), like regulation 17 quoted above, requires that all nominations for the various posts must be supported by at least ten persons who are qualified to vote at that particular Inkhundla or voting centre. Section 79 on the hand decrees that the system of governance for the country 'is a democratic, participatory and Tinkhundla based'. Individual merit is championed as the basis for election or appointment to public office. As already stated in the preceding paragraph, Nomination forms under the Urban Government Act 8 of 1969 are received by the Returning Officer. Regulation 14 empowers the line Minister to appoint the Town Clerk or such other person to be such Returning Officer. This point stands to be rejected as well.

[23] For the above reasons, I would dismiss this application in its entirety. Because this is a constitutional matter, following on the practice and tradition in this court, I would order that each party shall bear its own costs of the proceedings.

[24] One further point deserves mention in this judgment and it is this: Cognisant of the fact that Parliament has failed to carry out its constitutional mandate stated in Section 218 of the Constitution, this court cannot and should not second -guess what law Parliament would eventually enact regarding the conduct of Local Government Elections and other related issues. For example, this court cannot say that Parliament would grant the authority to carry out this exercise to the Third Respondent or some other entity. I say this, notwithstanding the fact that the pending Local Government Elections shall be conducted or run under the auspices of the Third Respondent. This is the case notwithstanding the fact that the powers to conduct and manage such elections are, in terms of the 1969 Act, vested in the line Minister and not the Third Respondent. The court has not been asked to determine or pronounce on the lawfulness or otherwise of this action. That being the case, I shall accordingly refrain from doing so Again, this court has no

power to amend or tinker with this piece of legislation to cater for the wishes or desires of the parties herein.

[25] Mindful of the fact that the country will be going to the polls next year to elect members of Parliament, I beseech Parliament to do the right thing and carry out its Constitutional Mandate as decreed in Section 218 (1) of the Constitution.

MAMBA J

I agree

MABUZA PJ

I also agree

HLOPHE J

FOR THE APPLICANT:	**MR. S.M. NHLABATSI**
FOR THE RESPONDENTS:	**MR. K. NXUMALO**