

LOONGO V SHEPANDE

In a proper case, we would not be surprised if in future, the courts objected, on principle, to entertaining litigation between two wrong-doers, each seeking judicial support in these sort of circumstances.

It follows from what we have been saying that this appeal must fail with costs to be taxed in default of agreement.

Appeal dismissed

IN THE MATTER OF ELECTORAL ACT, CAP. 19 AND
IN THE MATTER OF THE PARLIAMENTARY GENERAL
ELECTION FOR THE MUMBWA EAST CONSTITUENCY
HELD ON THE 27TH DAY OF OCTOBER, 1983

and

IN THE MATTER BETWEEN:

SETH SHIBULO LOONGO—Petitioner

and

KENNEDY MPOLOBE SHEPANDE—Respondent

HIGH COURT

E. L. SAKALA, J.

24TH MAY, 1984

(H.C. Judgment No. 1983/HP/EP/25)

*Elections – Recount of votes – Application for – Procedure to be followed –
Whether recount and scrutiny mean the same thing.*

The petitioner polled 2 099 votes and the respondent 2 340. The petitioner alleged that during the counting of ballot papers in respondent's tray, a certain bunch of ballot papers had been counted twice. When the alleged double counting was queried, the Returning Officer is alleged to have ignored the query and declared the respondent duly elected.

The petitioner moved the High Court seeking an order for scrutiny to be carried out to determine the number of valid votes cast for both the respondent and himself.

Held:

- (i) A scrutiny is not the same thing as a recount of the votes cast.
- (ii) An application for a recount should not be made by petition, but by interlocutory summons supported by an affidavit.
- (iii) An Order for the recount of votes is not a relief; it merely helps the court in arriving at its decision as to which candidate should have been declared duly elected.

Case referred to:

(1) *Phiri v Phiri* (1979) Z.R. 126.

Legislation referred to:

Electoral Act, Cap. 19, ss. 17 (2) (b) and 28.

Other Works referred to:

Halsbury's Laws of England, Vol. 15, 4th Edn., para. 940.

N. Kavanambulu, of Shamuana and Company for the petitioner.

S. S. Zulu, of Zulu and Company, for the respondent.

5 E. L. Sakala, J. This is a petition by Seth Shibulo Loongo, who together with the respondent Mr Kennedy Mpolobe Shepande, and five others were candidates in an election held on 27th October, 1983, in the Mumbwa East Constituency. The Returning Officer in that Constituency declared and returned Mr Kennedy Shepande as duly elected. The
10 petitioner prays that it may be determined that the said Kennedy Shepande was not duly elected and that he ought to have been returned and declared duly elected himself. The petitioner also prays further and in addition, for a scrutiny to be carried out to determine the number of valid votes cast for both the respondent and himself.

15 The petition is based on the ground of non-compliance with the provisions of the Electoral Act relating to the conduct of the elections and the counting of votes.

This ground is based on the provisions of Section 17 (2) (b) which reads:

20 "17. (2) The election of a candidate as a member shall be void on any of the following grounds which is proved to the satisfaction of the High Court upon the trial of an election petition, that is to say:

25 (b) subject to the provisions of subsection (4), that there has been a non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the
30 result of the election;"

Counsel for the petitioner in his opening address told the court that the petition arises from issues related to the counting of votes and does not question the validity of the whole election. In the written submissions counsel for the petitioner set out the issues raised in the petition as follows:

- 35 (a) Whether on the facts of the case there has been non-compliance of the provisions of the Electoral Act and if so whether the said non-compliance affected the result of the election.
- 40 (b) If the non-compliance affected the result of the election, whether the court should order a recount of the votes cast and declare the result or whether under the circumstances of the case it is impossible to ascertain the correct state of the ballot and accordingly the court to declare the result null and void.

The declaration of result of poll, exhibit 'P2', discloses that the respondent polled 2 340 votes while the petitioner polled 2 099. The evidence of the petitioner's election agent, PW3, who was present at the counting is that during the counting of ballot papers in the respondent's tray, he observed a bunch of ballot papers which was counted twice. When he queried, the Returning officer ignored him. The Returning officer admitted in court the discrepancies in the counting. He attributed this to human error. A scrutiny of exhibit 'D1' a Record of Proceedings at the count, prepared at the time of counting the votes shows a lot of cancellations, alterations and crossing of figures. Exhibit 'P2' prepared at the verification from exhibit 'P1' also shows some alterations of figures.

On account of the foregoing evidence the petitioner prays that the election of the respondent be nullified and a recount of the votes taken. I have very carefully perused the Electoral Act and the Regulations. I have been unable to find the remedy or relief or recount of votes by way of an election petition. An order for recount is by way of interlocutory proceedings in an election petition so long there is evidence justifying the making of such an order (*Phiri v Phiri*/1979/ZR 126). An order for the recount of votes is not a relief; but helps to clarify unclear situations as is the case here and enables a court in making a determination under Section 28 of the Act.

The Returning Officer in the Constituency, DW2, admits of errors in the counting. Exhibits 'D2' and 'P1' reveal a number of erasures in the entries of the proceedings at the count.

The petitioner's prayer is for a scrutiny. Suffice is to mention that scrutiny is not recounting, and a request for recounting is not by petition but by interlocutory summons supported by an affidavit (*see Halsburys Laws of England, Volume 15, 4th Edition paragraph 940*). On the evidence as a whole I am satisfied that a case for a recount has been made out. I am further satisfied that I can at this stage make an interlocutory order for a recount without making a determination in accordance with the prayer to the petition. The outcome of the recount will in my view greatly assist the court in determining the issue raised in the petition. In the circumstances I order that there shall be a recount. For this purpose the order of the court is that there be a recount of the votes in favour of the petitioner and the respondent only. The recount to be conducted by the Registrar of the High Court with the assistance of the counting assistants to be named by the Director of Elections in the presence of counsel for both the petitioner and the respondent as well as their clients if they do so desire. The recount to be done within fourteen days from the date hereof and the Registrar thereafter to submit a report of the result of the recount to the court. The court will thereafter set a date for judgment which date will be communicated to the parties.

Recount of votes cast, ordered