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IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
LUSAKA

2002/HP/EP.0034

(CONSTITUTIONAL JURISDICTION)

IN THE MATTER OF: THE ELECTORAL ACT, CAP 13 OF THE
LAWS OF ZAMBIA

AND

IN THE MATTER OF: AN ELECTION PETITION FOR LUKULU
WEST PARLIAMENTARY CONSTITUENCY

BETWEEN: VICTOR CHIBVUMBU KACHAKA - PETITIONER
AND
SIMASIKU NAMAKANDO - 1ST RESPONDENT
ELECTORAL COMMISSION
OF ZAMBIA - 2ND RESPONDENT

Before Honourable Mr. Justice S.S.K. Munthali in open court at Kabwe on
7th June 2002

For the Petitioner: Mr. K. Shepande of Messrs. Shepande &
Company and the Petitioner - in person
For the 1st Respondent: Mr. P. Mainza of Messrs. Mainza & Company 5
assisted by Mr. M.H. Chintu of Messrs. Chintu &
Company

For the 2nd Respondent: Mr. M. Haimbe, Senior State Advocate, Attorney-General's Chambers

LEGISLATION, AUTHORITIES AND CASES REFERRED TO:

1. ELECTORAL ACT CAP. 13 SS. 6(2), 18(2)(4).
2. ELECTORAL (GENERAL) REGULATIONS 4(1)(a), 23(1),
26(1)(3)©, 28(1), 29(1)(2), 32(1), 38(2), 40, 52, 54, 56, 62(1)©(e)(f)(g) and 68. 5
3. THE ELECTORAL (GENERAL)(AMENDMENT) REGULATIONS, 2001 s.1 No. 85 of 2001.
4. HALSBURY'S LAWS OF ENGLAND, 4TH EDITION.
5. LUSAKA V. CHEELO (1979) ZLR 99. 10
6. AKASHAMBATWA MBIKUSITA LEWANIKA AND OTHERS V. FREDRICK JACOB TITUS CHILUBA SCZ JUDGMENT NO. 14 OF 1998.

JUDGMENT

The petitioner was a parliamentary candidate in the election for Lukulu West Constituency held on 27th December 2001. On 31st December 2001 the Returning Officer declared the 1st Respondent to have been duly elected. 15

The petition is based on the provisions of Section 18(2)(a), (b) and (c) of the Electoral Act, Cap 13, (hereinafter called the Act). It reads as follows:

“(2) The election of a candidate as a member of the National Assembly shall be void on any of the following grounds which is proved to the satisfaction of the High Court upon the trial of an 5 election petition, that is to say-

- (a) that by reason of any corrupt practice or illegal practice committed in connection with the election or by reason of other misconduct, the majority of voters in a constituency were or may have been prevented from electing the candidate 10 in that constituency whom they preferred; or*
- (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 15 principles laid down in such provisions and that such non-compliance affected the result of the election;*
- (c) that any corrupt practice or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or of his election agent 20 or of his polling agents;”*

Subsection (4) amplifies on Subsection (2)(b) as follows:

“(4) No election shall be declared void by reason of any act or omission by an election officer in breach of his official duty in connection with an election if it appears to the High Court that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such act or omission did not 5 affect the result of that election.”

These grounds are based on four allegations. The first allegation is that there was an illegal practice of **PUBLISHING A FALSE STATEMENT**. The second allegation is that there was a corrupt practice of **PERSONATION**. The third allegation is that there was a corrupt practice 10 of **UNDUE INFLUENCE**. The fourth allegation is that there was **NON-COMPLIANCE WITH THE PROVISIONS OF THE ELECTORAL ACT**.

Both the 1st Respondent and the 2nd Respondent filed an answer rebutting the allegations. I will deal with each allegation in the order tabulated above. 15

1. **PUBLISHING FALSE STATEMENT (FACT (1))**

The evidence on this issue came from PW1, PW4, PW5 and PW6.

The petitioner complained of the article in the Zambia Daily Mail dated 9th November, 2001 entitled *MPONGIWE, LUKULU REJECT 20 CANDIDATE*”. He was particularly livid with the following passage:

“In Lukulu West, Constituency Committee Chairperson Mary Lubinda, said in a joint statement signed by constituency officials that Mr. Kachaka’s adoption was

not welcome. She said members of the constituency committee felt betrayed and insulted and condemned the move by the NMC. Ms. Lubinda said the Constituency would choose its own candidate and de-campaign Mr. Kachaka. She said that some Party members had since resigned protesting Mr. Kachaka's adoption."

PW4, a Zambia Daily Mail journalist admitted being the author of the exhibited story complained of and that it was based on a press release. PW6 Clara Ilitongo who is a Lukulu West UPND Constituency Chairlady denied signing a document rejecting the candidature of the petitioner. She did not know MARY LUBINDA.

From the evidence of these witnesses I find as a fact that the Zambia Daily Mail Limited published the statement on Friday 9th November 2001. The question is whether the authors of the statement committed an illegal practice under Regulation 56(1) and (2) of the Electoral (General) Regulations (hereinafter called the Regulations).

Regulation 56(1) and (2) reads as follows:

"56(1). Any person who, before or during an election, publishes a false statement of the illness, death or withdrawal from election of a candidate at that election for the purpose of promoting or procuring the election of another candidate, knowing that statement to be false or not believing it to be true, shall be guilty of an illegal practice."

(2) Any person who, before or during an election, publishes any false statement of fact in relation to the personal character or conduct of a candidate in that election, shall be guilty of an illegal practice, unless he can show that he had reasonable grounds for believing, and did believe, the statement to be true."

The statement complained of does not say that the petitioner had withdrawn from election. If anything the statement confirms the fact that the petitioner was very much in the hustings when it reveals the intention to de-campaign him. One does not de-campaign a candidate who has allegedly withdrawn from an election.

PW5 did not say that the petitioner had withdrawn from election. He clearly relished capitalising on what was perceived as internal wrangles within UPND. No attempt was made by PW6 or any of the constituency officials to deny the statement. The falsehood which has been established is that relating to MARY LUBINDA as being the Chairperson of UPND in Lukulu West Constituency when in fact not.

I find as a fact that the statement did not allege that the petitioner had withdrawn from election. Even assuming it did so, no evidence has been canvassed to the effect that the statement was made for the purpose of promoting or procuring the election of another candidate. The 1st Respondent has not been identified with the statement for one to say it could have been made for the purpose of promoting or procuring his election at the expense of the petitioner.

On the evidence before me no illegal practice has been committed under Regulation 56(1).

As to the personal character and conduct of the petitioner I see nothing in the statement which impugns the personal character and conduct of the petitioner. No reasons are given for the purported S rejection of the petitioner. All one can see through the article is that the Constituency Committee of UPND did not want a candidate imposed by NMC. The Committee may have wanted one in their ranks to be a candidate, that's why they felt "*betrayed and insulted*" by NMC's selection. 10

I do not see any ILLEGAL PRACTICE committed under Regulation 56(2) either. On the evidence before me the allegation of publishing false statement in respect of candidates under Regulation 56 has not been proved.

2. CORRUPT PRACTICE OF PERSONATION (FACT IV) / S

The evidence on this allegation is that of PW1, PW5 and RW13. The evidence of PW1 and PW5 on what happened at MBANGWETA Polling Station is hearsay as both of them were not there on 27th December 2001. PW5 proudly told the court that he was at Mbao Polling Station the whole day of 27th December 2001 "body and QD soul". However, what comes out clear from RW13's evidence and I accept it as a fact is that there were Isoka ballot papers for Local

Government elections. These were discovered after 8 voters had cast their votes and the 9th one was about to cast his.

The petitioner has alleged that at Mbangweta Polling Station the people who voted using Isoka ballot papers and voted a second time using the Lukulu West ballot papers committed the offence of **PERSONATION** contrary to Regulation 52(b). Regulation 52(b) reads as follows:

“52. Any person who-

- (a) At any election, applies for a ballot paper in the name of some other person, living or dead, or of a fictitious person; or*
- (b) having voted once at any election, applies again at the same election for a ballot paper; or*
- (c) votes at any election knowing that he is not entitled to vote at that election or induces or produces any person to vote at any election knowing that that person is not entitled to vote at that election;*

shall be guilty of an offence of personation.”

It is unfortunate that the petitioner has not named the eight people who he claims voted twice. I am saying this because if I were to find these people guilty of personation there are penal sanctions to be visited on them. See Regulation 55. RW13 however confirms that

eight un-named people voted for Local Government candidates using the Isoka ballot papers.

According to the unchallenged evidence of RW13 which I accept after the eight voters had left, election monitors, agents and polling assistants agreed with him to recall the voters. The voters were asked ⁵ to vote again using the Lukulu West ballot papers in the Local Government elections.

Mens rea is an essential ingredient of the offence of PERSONATION. Personation entails that a voter has assumed the identity of another or pretends that one has not voted. There is no evidence that the eight ¹⁰ voters assumed the identity of other voters or pretended that they had not voted. These voters voted in their own names after being asked to do so. There is no evidence of fraud. The essential ingredient of mens rea has not been proved. Proof of actus reas alone is not sufficient. ¹⁵

I find and hold that the eight unnamed voters did not commit the offence of PERSONATION.

The petitioner has also claimed that the eight unnamed voters voted twice contrary to Section 6(2) of the Act and Regulation 26(3)(d).

The Section and the Regulations refer to a "legal vote". This is a ²⁰ vote, in my view, which is cast in accordance with instructions provided to all registered voters in the Constituency and which expresses the will of the voter. The voters in Lukulu West did not

have any intention of voting for Councillors in Isoka whose names were on the ballot papers. Their votes were not legal votes.

However, I agree with the petitioner that it was a non-compliance of Regulation 29(1)(2) for the Presiding Officer to remove the Isoka Papers from the sealed ballot boxes. The Isoka ballot papers should have been added to the list of 2 other rejected ballot papers for Mbangweta Polling Station. Notwithstanding what happened I have taken note that the petitioner got 107 votes compared to the 1st respondent's 34 votes. I find that the petitioner was not in any way disadvantaged by the use of Isoka ballot papers as these ballot papers were for Local Government Elections. 10

3. CORRUPT PRACTICE OF UNDUE INFLUENCE (FACT XI)

The petitioner has alleged that one MUKAMBWA MUKATA (RW2) threatened violence to the electorate contrary to Regulation 54. The evidence on this issue is that of PW1, PW7, PW8, PW9, RW2, RW3, RW4, RW5, RW6, RW7 and RW8. The evidence of these witnesses relates to what happened at SITWALA Polling Station. 15

PW1's evidence is based on what he was told. PW7 RICHARD NABITA said that MUKATA came to the Polling Station on 27th December 2001 with a shotgun. Polling agents and monitors were present. Voters were afraid of the shotgun and some of them left the queue. He himself voted. 20

PW8 KWASHIMBISA MUMBELA a polling agent for a party called ZRP said MUKATA and CHINYAMA went to Sitwala polling station on 27th December, 2001 and he was holding a gun in his hands. PW9 KAMENE MUNALULA a UPND candidate in Local Government Election testified that he saw MUKATA on 27th December 2001 at 5 Sitwala polling station with a gun in his hands. People went to their homes because of the gun they saw.

The 1st Respondent (RW1) told the court that he was not aware that MUKATA went to Sitwala polling station with a gun. RW2 MUKAMBWA MUKATA denied going to Sitwala polling station on 10 27th December 2001 but admitted having a reed stick on 28th December 2001. RW3 CHRISTOPHER SITUMBEKO the presiding officer said he did not receive any disturbing reports from outside. Monitors from FODEP and Coalition 2001 were present.

RW4 MALUME SIYUMBANYA a security officer at Sitwala polling 15 station denied seeing MUKATA with a gun at Sitwala polling station on 27th December 2001. RW5 MOSES CHINYAMA the campaign manager for the 1st respondent denied seeing MUKATA with a gun or stick. They were together all the time. He told the court that on 26th December 2001 he had agreed with MUKATA to collect results. 20

RW6 BAGLEY SAKUYA the polling agent for the 1st respondent told the court that he did not see MUKATA and CHINYAMA both on 27th December 2001 and 28th December 2001 at Sitwala polling

station. Most of the time he was inside the polling station and one could not see what was going on outside. RW7 SAXCN KASHUMBA a polling assistant at Muyondoti polling station testified that MUKATA was a registered voter at Muyondoti polling station.

RW8 MATILDA NGENDA was a presiding officer at Muyondoti S polling station and told the court that MUKATA was at Muyondoti polling station on 27th December 2001.

I have heard the evidence of the petitioner and his witnesses and that of the respondents on the issue of UNDUE INFLUENCE.

The issue I am called upon to resolve is whether RW2 MUKAMBWA | 0 MUKATA went to Sitwala polling station with a gun and threatened the voters with violence as alleged in Fact xi of the petition.

On the evidence before me I find it as a fact that the election at Sitwala polling station took place on 27th and 28th December 2001.

This means that on both dates there were voters at that polling station. | S

I also find it as a fact that there were election monitors from FODEP and Coalition 2001. It is common cause that one MUKAMBWA MUKATA was an election agent of the 1st respondent.

PW7, PW8 and PW9 say that MUKATA went to Sitwala polling station with a gun on 27th December, 2001. The evidence of PW8 a 20 polling agent for ZRP and PW9 a UPND candidate for Local Government election should be taken with caution as coming from

witnesses with a possible bias. PW7's evidence has been attacked on the grounds of his admitted mental illness. To me he appeared perfectly normal. There was no sign of any mental instability. His claim that he was a registered voter has not been disputed. Under Section 4(1)(b) of the Act he would have been disqualified to register S as a voter if he was of unsound mind.

RW2 has denied being at Sitwala polling station on 27th December 2001 with a gun. He has been supported by the Sitwala polling station presiding officer (RW3), a makeshift security officer (RW4), the Campaign Manager (RW5), the Polling Agent for 1st respondent 10 (RW6), Polling assistant and Presiding Officer (RW7 and RW8) of Muyondoti Polling Station respectively. I discount the evidence of RW5 and RW6 as coming from witnesses with possible bias.

On the evidence before me I find as a fact that RW2 MUKAMBWA MUKATA went to Sitwala Polling Station on 27th December 2001. 1 S This is the date which RW2 and RW5 had agreed upon to collect the results on 26th December 2001. They were not aware that voting would go on to 28th December 2001 for them to make arrangements to collect results on 28th December 2001.

The evidence of RW8 that MUKATA was voting at MUYONDOTI 20 that day does not mean that MUKATA could not have gone to Sitwala polling station. Voting at Sitwala polling station started at around 17.00 hours. RW5 was lying through his teeth when he said he never saw MUKATA with a stick or a gun. MUKATA himself said he had

a reed stick. At first MUKATA denied holding anything in his hands. Yet it was being put in cross-examination by Counsel for the 1st respondent that MUKATA had a stick in his hands as opposed to a gun. RW2 and RW5 were very evasive and uncomfortable in cross-examination. 5

I find it as a fact that MUKAMBWA MUKATA was in the vicinity (some 100 metres away) of Sitwala polling station on 27th December 2001 holding a wooden stick. It was big enough for it to be likened to a shotgun by some witnesses who had the fancy to exaggerate their evidence. 10

According to fact (xi) the petitioner avers and I quote: *"It is contrary to Regulation 54 which does not allow making use of or threatening to make use of any force, violence or restraint upon any other person."*

Clearly the petitioner had Regulation 54(1)(a) in mind. For 15 completeness I will quote the relevant portions of the Regulation:

"54(1) Any person who directly or indirectly himself or by any other person –

(a) makes use of or threatens to make use of any force, violence or restraint upon any other person; or 20

(b) (NOT APPLICABLE)

(c) (NOT APPLICABLE)

in order to induce or compel that person-

- (i) (NOT APPLICABLE)
- (ii) to vote or refrain from voting;
- (iii) (NOT APPLICABLE)
- (iv) (NOT APPLICABLE)

Shall be guilty of the offence of undue influence." 5

Even assuming the stick which MUKATA was carrying turned out to be a shotgun as alleged, is there evidence from PW7, PW8 and PW9 to show that MUKATA made use of or threatened to make use of any force, violence or restraint upon any other person in order to induce or compel that person to VOTE OR REFRAIN from VOTING? 10

PW7 was asked a direct question as to whether any force, violence or restraint was used or threatened against any voter. He never gave a straight answer. PW8 said Rw2 was just holding the gun. He was not pointing at any one. PW9 said some people on the queue went home because of the gun they saw. But PW7 told the Court that people 15 started going home because they were hungry and it was late in the afternoon. There is no evidence to show that MUKATA had a history of violence to make voters ran away at his sight. As I have already found MUKATA was no where near the queue.

Learned authors of HALSBURY'S LAWS OF ENGLAND 4TH 20
Edition Vol. 15 at paragraph 699 have this to say under the rubric –
USE OR THREATENED USE OF FORCE, VIOLENCE OR
RESTRAINT.

“It is the undue influence on individual voters and not general rioting or violence which constitutes the corrupt practice. In order to constitute undue influence a threat must be serious and intended to influence the voter.”

All the three witnesses who gave evidence on behalf of the petitioner⁵ on this issue have not mentioned any voter, including themselves as having been threatened with the use of force, violence or restraint by RW2. What RW2 did may be said to constitute misconduct but his behaviour does not fall within the compass of Regulation 54. See the case of LUSAKA V. CHEELO (1979) ZLR 99. 10

On the evidence before me I find and hold that the corrupt practice of **UNDUE INFLUENCE** has not been proved against RW2.

4. NON-COMPLIANCE WITH THE ELECTORAL ACT

The non-compliance with the Electoral Act was canvassed in relation to specific polling stations. I will deal with the issues raised polling¹⁵ station by polling station.

(a) MUKUMA Polling Station (FACT ii)

The petitioner has complained that some voters at the station voted without producing National Registration Cards to identify themselves. He mentioned only one voter. It turned out²⁰ through the 1st respondent's exhibits and the evidence of RW11 that in fact three voters were allowed to vote without producing their national registration cards.

Both RW11 and RW12 testified that the three voters NAMUNJI SEFU, CHRISPINE SIMENDA and DAVID NAMALOYA voted because they were well known to the polling assistants, polling agents and the presiding officer.

Regulation 26(1)© (3)© is emphatic on the necessity to produce ⁵ a national registration card. There is no substitute for a national registration card. There is a substitute for a voter's registration card.

Under Regulation 26A as amended by Statutory Instrument No. 85 of 2001 a voter whose voters registration card is lost ₁₀ destroyed or defaced is required to deliver the duplicate copy of form RV1 at the time the voter applies for a ballot paper. ⁰

I have referred to the new Regulation 26A to show that the voter's registration card has had substitutes. At first it was a certificate given four days before election. Now it is the Form ¹⁵ RV1. The Legislature has not found an alternative to the National Registration Card.

I find and hold that the requirement for a voter to identify oneself by producing a national registration card is mandatory. The importance of a national registration card in the electoral ²⁰ process cannot be over-emphasised. Fraud in the electoral process has to be avoided at all costs. When a voter applies to

be registered, the details which are put on form RV1 are extracted from the National Registration Card. Without the National Registration Card it is difficult to verify the information in the Register of Voters.

I find and hold that there was a non-compliance with 5 Regulation 26.

(b) MBANGWETA POLLING STATION (FACT V AND VI)

I have already dealt with Fact iii) and (iv) when I was discussing PERSONATION. Under Fact (v) the petitioner is complaining that the ballot papers from Isoka were not 10 authorised to be put in the ballot box in terms of Regulation 62(1)©. The 2nd Respondent has admitted in the Answer and has averred that the misdistribution of ballot papers was an inadvertent error.

As for Fact (vi) RW13 the presiding officer for MUKUMA 15 polling station has admitted that ballot boxes were opened to allow for the removal of Isoka ballot papers. As I have already found elsewhere this was non-compliance of the electoral regulations.

(c) KAKUNJU POLLING STATION (FACT vii) 20

The petitioner has complained in his petition that three MMD agents were allowed at the polling station contrary to Regulation 68. The Respondents have admitted that there were

three MMD agents at this polling station. Under this Regulation a candidate or his election agent is entitled to appoint a person to be the polling agent of such candidate. The December 2001 elections were tripartite i.e. Local Government (Councillors), Parliamentary and Presidential. I find and hold ^S that the presence of the three MMD polling agents was in line with the Regulations.

(d) WASHISHI POLLING STATION (FACT viii)

The petitioner has complained that the voters in Washishi Village were disenfranchised and were denied their right to ¹⁰ vote, contrary to Section 6(1) of the Act.

I have heard a number of witnesses on the situation at Washishi Village which borders Angola. The petitioner himself told the Court that when he went to Washishi Village on his campaign trail in December 2001 people complained to him about the ¹⁵ security situation. He said Angolan soldiers would every now and then enter Zambia and get their food.

PW3 the returning officer told the court that the electoral officer decided to cancel the elections in Washishi on security grounds. The 1st respondent testified that the situation at Washishi was ²⁰ volatile. When he went to Washishi to campaign he met two Zambian soldiers who ran away from the area. He was asked to mobilise reinforcements on their behalf. Most of the villagers went to Lukulu Boma and others to Kalabo to seek refuge.

RW10 a presiding officer at Kakwacha polling station which is next to Washishi in the interior, told the court that out of the 90 voters only 18 people voted. RW17 the Assistant Returning Officer told the court that he did not deliver election materials to Washishi because the polling station was vandalised by S Angolan soldiers. Some residents of Washishi are camped at Lukulu Boma and others went to different places in Western Province.

On the evidence before me I am satisfied that the situation envisaged under Regulation 23(1) did obtain at Washishi 10 polling station to warrant a postponement/adjournment of elections.

The question of using an alternative polling station as canvassed by the petitioner does not arise as the voters had fled the village to different parts of Western Province. The low 15 turn-out at Kakwacha polling station attests to this.

(e) MATABA POLLING STATION (FACT ix and x)

The petitioner's complaint is that the ballot box for Mataba polling station was brought unsealed to the Returning Officer. RW9 the Polling Assistant at Mataba polling station denied that 20 the box was not sealed. She said after the votes were counted and results were announced all papers were put in one box and taken to MATETE for verification. This evidence has not been

contradicted by any eyewitness. Regulation 38 referred to in the petition comes into play only when the counting is done at a central place in the presence of the Returning Officer.

Fact (x) has been taken together with fact (iv) as both deal with the issue of ballot boxes. Regulation 40 just like Regulations S 38 and 41 covers a situation where the votes are centrally counted. It does not apply to a situation where votes are counted at each polling station. This complaint has no merits.

5. DOUBLE VOTING AND OTHER ALLEGATIONS OF NON-COMPLIANCE (FACTS xii, xiii and Fact xiv in the Addendum to petition) 10

Under this heading there are three allegations. The petitioner firstly alleges that contrary to Regulation 8 the polling stations listed in the petition, namely LUPUI, KAKUNJU, MUYONDOTI, SITWALA, MBANGWETA AND 15 KAKWACHA voted on days and times that were not appointed, gazetted or supported by Statutory Order and there was double voting.

The second allegation is that at SIKUNDUKO polling station ballot boxes remained at the polling station for three nights and 20 two days without a security officer.

The third allegation is that contrary to Regulation 4(1)(a) and Regulation 6 one Eugene Akamandisa who was Returning Officer for Lukulu West Constituency was not gazetted.

Coming to the issue of double voting, I will again deal with the evidence polling station by polling station. 5

a) LUPUI POLLING STATION

The evidence of the petitioner and that of PW5 is hearsay. Both witnesses gave evidence as if they had been to these polling stations and witnessed the events when in fact not. 10

The evidence of RW16 the Presiding Officer for LUPUI polling station is to the effect that voting started late on 27th December 2001. They started voting at 16.00 hours and went up to 03.00 hours. He adjourned because there were no lights. Voting started again at 06.00 hours to 12.00 hours on 28th December 2001. RW17 the Assistant

Returning Officer testified that ballot papers were received late and were delivered late to LUPUI,

KAKUNJU, SIKUNDUKO, MBANGWETA and

NAMAKANDO. I find it as a fact that the poll at LUPUI 20

Polling Station was adjourned on account of darkness.

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b) KAKUNJU POLLING STATION

There is no evidence to support the allegation of adjournments at Kakunju polling station as I have already discounted the evidence of PW1 and PW5.

c) MUYONDOTI POLLING STATION 5

PW6 testified that at MUYONDOTI polling station, they voted on 28th December 2001. Voting started on 27th December 2001 in the afternoon. RW7 has confirmed the evidence of PW6 that voting started on 27th December 2001 at 16.00 hours up to 19.10 hours and 10 adjourned to the following day at 06.00 hours. The light was not sufficient. RW8 the presiding officer for Muyondoti testified that voting started on 27th December 2001 at 16.00 hours up to 19.10 hours then adjourned to the next day from 06.00 hours to 17.00 hours. The 1S petitioner had an election agent. He adjourned because candles ran out and it was dark.

I accept the evidence of PW6, RW7 and RW8 as to the dates and times of voting. I find as a fact that the voting was adjourned on account of darkness after candles ran 20 out.

d) SITWALA POLLING STATION

PW9 gave evidence to the effect that voting started at 17.00 hours on 27th December 2001 until night. The

votes were counted. The following day at 14.00 hours when he went back to the polling station he found people still voting. RW3 the Presiding Officer told the court that voting started on 27th December 2001 at 17.30 hours because ballot papers came late. He denied that after 5 voting the votes were counted. The voting was adjourned to the next day from 06.00 hours up to 17.00 hours.

I accept the evidence of PW5 and RW3 in relation to the dates and timing of voting. But I do not believe the 10 evidence of PW9 when he says after the voting was adjourned votes were counted there and then and there was a second round of voting.

e) MBANGWETA POLLING STATION

RW13 the Presiding Officer for Mbangweta polling 15 station testified that ballot papers were delivered late and voting started on 28th December 2001 at 16.00 hours and went up to 29th December 2001 at 12.45 hours. The petitioner got 107 votes and the respondent got 34 votes.

I accept the evidence of RW13 as to the dates and time of 20 voting at Mbangweta polling station. I find as a fact that the voting was adjourned on account of darkness.

f) KAKWACHA POLLING STATION

RW10 the Presiding Officer testified that the voting at Kakwacha started on 27th December 2001 at 14.06 hours and ended at 21.06 hours. They started late because ballot papers came late. Voting resumed on 28th 5 December 2001 at 06.00 hours and closed at 13.00 hours. 18 people out of 90 registered voters voted on 27th December 2001. None voted on 28th December 2001 because most of the people ran away from the area. The petitioner got 6 votes and the 1st respondent got 1 vote. 10 The other candidates shared the other votes.

I accept the evidence of RW10 on the dates and times of voting and that voting was adjourned on account of darkness.

On the evidence before me I find and hold that there was no 15 double voting as claimed by the petitioner in all polling stations mentioned. Not a single voter has been cited as having double voted. Apart from WASHISHI Polling Station, I find that the adjournments in other Polling Stations were not made on the grounds stipulated in Regulation 23(1). 20

The second allegation under this heading is that the ballot boxes remained at the polling station without proper security. RW14 and RW15 have given evidence to the effect that there was a security officer at the station and who accompanied the ballot box to MATETE for 25 verification. No one prevented the petitioner's agents to

be at the polling station and the verification centre. I accept the evidence of these two witnesses. I find no merit in this allegation.

The third allegation under this heading is that one EUGINE AKAMANDISA was not properly appointed as 5 the Returning Officer for Lukulu West Constituency.

The petitioner has exhibited the Government Gazette Notice No. 601 of 2001 showing that one CHIBINDA, P. was the duly gazetted Returning Officer for Lukulu West Constituency. Mr. Akamandisa PW3 claims that he was 10 appointed Returning Officer by the Electoral Officer. He did not produce any letter of appointment. RW15 told the court that Regulations allow for the replacement of a gazetted officer in case of death, sickness or disciplinary reasons. 15

For unexplained reasons PW2 DAN KALALE the Director of Elections was not asked any question on the appointment of AKAMANDISA as a returning officer. I will accept the evidence of the petitioner that AKAMANDISA was not gazetted as a returning officer 20 for Lukulu West Constituency. He did conduct the elections as a returning officer for all intents and purposes.

I agree with the petitioner that it was a non-compliance of Regulation 4(1)(a) for the electoral officer to appoint a Returning Officer instead of the Commission. However, there is no evidence to show that the petitioner was disadvantaged by the defective appointment any more ⁵ than other candidates were.

It is unfortunate that the petitioner did not call any of his polling agents, election agent or independent monitors to support his allegations. The lacuna has, however, been filled by the respondents' witnesses. 10

CONCLUSION

The non-compliance with the Electoral Regulations which the petitioner has established, has to be put on the door steps of the 2nd respondent.

The adjournments which were made in six polling stations were made ¹⁵ because of the failure by the Electoral Commission to prepare adequately for the tripartite elections. It is unacceptable for the Electoral Commission to deliver election materials on the day of election itself.

It is equally unacceptable for candles to be used for lighting during ²⁰ counting of votes. There are more reliable lighting gadgets which the Commission could have mobilised. It is clear that the Electoral



Commission was not ready to conduct the tripartite elections of 2001. This is partly on account that the election date is not determined in advance.

It is high time the Constitution was amended to provide for definite dates for the holding of presidential and General Elections. Once this is done all the stakeholders in the electoral process will be able to prepare adequately. The election date should not be left to the whims and caprices of a president in office. S

The words of the Supreme Court of Zambia in the case of AKASHAMBATWA MBIKUSITA LEWANIKA AND OTHERS V. FREDRICK JACOB TITUS CHILUBA – judgment No. 14 of 1998 – still ring true today. These words are found on page 85 of the judgment, and I quote:- 10

“The flaws of all types which we have said were established, of course did not reflect well on those managing the electoral process. Many of them can and should be addressed in order to enhance our democratic profile and in order to engender greater confidence in the electoral process” S

I echo these sentiments. It does not engender confidence in the electoral process to deliver election materials late. It does not engender confidence in the electoral process for ballot papers from one polling district to be sent to a different polling district. It does not 20

engender confidence in the electoral process to allow counting of votes to be done in conditions of poor visibility.

The petitioner's complaint of non-compliance centred around six polling stations. The petitioner got the highest votes in two of these polling stations. At MBANGWETA polling station he got 107 votes S and the 1st respondent got 34 votes. At KAKWACHA polling station the petitioner got 6 votes and the 1st respondent got 1 vote.

Lukulu West Constituency held elections in 31 out of the 32 polling stations.

Notwithstanding the non-compliance with the provisions of the Act, I 10 find and hold that the election was so conducted as to be substantially in accordance with the provisions of the Act, and that such act or omission did not affect the result of the election in Lukulu West Constituency.

Accordingly, I determine that the 1st respondent was **DULY IS ELECTED** as Member of Parliament for Lukulu West Constituency in the election held on 27th December 2001.

The petition is unsuccessful and it is dismissed. The challenge to the election of the 1st respondent was not frivolous. The petitioner raised

important issues in connection with the electoral process. It is only fair that each of the parties bear their own costs.

Delivered this 7th day of June 2002 at Kabwe.



S.S.K. MUNTHALI

JUDGE S-