

HIGH COURT

BEFORE THE HON. MADAM JUSTICE P.M. NYAMBE, SC OPEN COURT AT LUSAKA

2006/HP/EP/007

Flynote

Elections campaigns-effects of adverse publicity against a candidate, allegations bordering on character and health status of a candidate.

Headnote

Election agent-whether an election agent can be appointed by virtue of doctrine of estoppel.

Electoral campaigns-the effects of a chief campaigning for a preferred candidate.

The petitioner outlined the Kapoche constituency parliamentary elections during the 2006 tripartite elections and lost to the Respondent. The petitioner alleged that the Respondent anchored his campaign on falsely assassinating the character and person of the petitioner. The Respondent was heavily assisted in campaign by a prominent local chief who threatened voters on a community radio station evictions to Mozambique should they vote against his preferred candidate.

Held:

1. a person shall be deemed to be an apparent election agent if the person conducts himself or herself as an election agent though not specifically appointed as such.
2. it is inappropriate for a chief who wields power and influence in the community to campaign for or against a candidate for the reason that it advantages the candidates he does not favor.

IN THE MATTER OF: The Electoral Act (Act 12 of 2006).

IN THE MATTER OF: An Election Petition.

For the Petitioner:

Mr. C. Banda, SC of Chifumu Banda & Co.

For the Respondent:

Mr. C.L. Mundia, SC of C.L. Mundia and Company.

Cases referred to:

1. Michael Mabenga Vs Sikota Wina & Others, SCZ No.15/2003.
2. Akashambatwa Lewanika and Others Vs Fredrick Jacob Titus Chiluba, SCZ No. 14/1998.
3. Mlewa Vs Wingtman [1995-97] ZR171.

Legislation referred to:

Electoral Act No. 12 of 2006

Electoral (Code of Conduct) Regulations 2006

Other references:

1. Black's Law Dictionary, Seventh Edition.
2. Sheshire and Fifoot Law of Contract Seventh edition.
3. Hulbury's Laws of England, 4th Edition

## JUDGMENT

This is the Election Petition of one Charles Banda (hereinafter, Petitioner) who was a Parliamentary candidate under the United Democratic Allowance (UDA) in the September 2006 Parliamentary Elections for the Kapoche Constituency in the Petauke District. The Petitioner is brought under Section 93 (1) (2) (a) (c) of the Electoral Act No. 12 of 2006 [hereafter, the Act] which reads:-

§93 (1) No election of a candidate as a member of the National Assembly shall be questioned except by an Election Petition presented under the Act.

(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 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 a candidate in that constituency whom they preferred.

(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 that candidate's election agent or polling agent.

Other candidate who contested the Kapoche Constituency were: Mr. Nicholas Banda (hereinafter Respondent), for the Movement for Multi-Party Democracy (MMD) Mr. Lawrence Mwale for Heritage Party (HP), and Ms. Elina Tembo for Patriotic Front (PF).

The Petitioner seeks the following relief viz:

- (i) That it be declared that the said election was void;
- (ii) That it be determined that the said Nicholas Banda was not duly elected;
- (iii) That it be ordered that a recount and scrutiny be carried out.

In support of his petition, the Petitioner gave oral evidence and called three (3) witnesses.

In his evidence, the Petitioner stated that he was the Member of Parliament for Kapoche Constituency from 2001 to 26th July 2006 when Parliament was dissolved to pave way for the General Elections which were held on 28th September 2006. He re-contested the Kapoche Constituency on UDA Ticket but lost to the Respondent. He decided to petition because he was disadvantaged in the election through adverse publicity. The adverse publicity was aired through a Community Radio Station called PASME based in Petauke District. The adverse publicity was aired on 26 September 2006.

The Petitioner stated that on 26th September 2006 at about 19:45 hours, Radio PASME aired a programme featuring Mr. Simeon Banda the MMD Chairman for Petauke District. The host of the programme was Mathews Banda, an employee of Radio PASME. The radio station covered the entire Petauke District, which includes Nyanje and Mwanjabantu Chiefdoms. The programme was in the Nsenga Language, which he understands very well.

On this programme, he heard Mr. Simeon Banda urge the people of Mwanjabantu Chiefdom specifically not to vote for him for the following reasons:

1. That he was a thief who has stolen relief food meant for the people of Mwanjabantu Chiefdom;
2. That he had stolen Constituency Development Fund (CDF) meant for development of Mwanjabantu Chiefdom.

3. That he was a sick man who had contracted HIV/AIDS. And if voted into office, there was going to be a by-election within a short period.

4. That he was a foreigner who hailed from Chadiza, and that it would be in the interest of the voters to vote for the Respondent who hails from Mwanjabantu and that he would be the only one who would bring development to the Kapoche Constituency.

There was another radio broadcast on Radio PASME on 27th September 2006 aired between 19:45 to 20:00 hours, on the eve of the election. It was again in Nsenga presented by Mathews Banda and the guest was one Yorsam Banda. On this radio broadcast, Yorsam Banda presented himself as Chief Mwanjabantu, and spoke as Chief Mwanjabantu. He was reminding the people of Mwanjabantu of the election the following day. He reminded his subjects about the message they were given during the campaign not to vote for him because he was a foreigner from Chadiza, who had stolen CDF and relief food meant for the people of Mwanjabantu, and had HIV/AIDS and that if voted for there would be a by-election soon after the election because he would die.

The Petitioner stated that Yorsam Banda warned the people of Mwanjabantu that if he won the elections, he as Chief Mwanjabantu was going to evict and chase them to Mozambique, emphasizing that he was going to give them 48 hours to leave his chieftom if the Petitioner won. He would evict them according to the polling stations where the Petitioner would win and that he had data through the voters' register and knew every voter, polling station by polling station.

The Petitioner denied that he has stolen any CDF or relief food meant for Mwanjabantu, and that it was not true that he was sick with HIV/AIDS nor that he came from Chadiza. The allegations were false, and those that uttered them knew them to be false. He contended that the allegations caused him a lot of damage during the campaign because they were told repeatedly to the people at all public meetings, which the Respondent and Yorsam Banda held in Kapoche Constituency. The Respondent never disassociated himself from the allegations. According to the Petitioner, Yorsam Banda was the Chief Speaker at all political rallies held by the Respondent and was presented as the incoming Member of Parliament, anointed by him as Chief Mwanjabantu. Yorsam Banda was the one who presented the Respondent at every public meeting, always spoke first and the Respondent only came to agree with him in begging for votes.

Under cross-examination, he admitted that the Respondent himself never featured on the broadcasts of 26 and 27 September 2006. He clarified that in his Petition, he referred to Yorsam Banda as Respondent's agent, though not registered as such with the Election Commission of Zambia (ECZ), since

he spoke on behalf of the Respondent; and that he understood an agent in main forms, including an emissary, one sent to do something for another.

He stated that Yorsam Banda is a member of the Mwanjabantu Royal Establishment, and that in the Rural set up, a member of the Royal Establishment is looked at and listened to as a Chief. Even when they know there is a Chief, a Member of the Royal Family is listened to. He explained that the substantive Chief is abroad, and it is normal when the Chief is away that there is someone who acts and speaks on his behalf, and it follows, Yorsam Banda was speaking as Chief Mwanjabantu in the absence of the substantive Chief who is away in the United States of America. He stated that he believed when he said he would chase those who would vote for him.

Still under cross-examination, he stated that Yorsam Banda was present at the meeting on 17 June 2006 at Mwanjabantu Kalu Stadium, 9 September 2006 at Zumaile Village in the school grounds, on 22 September 2006 at Nyanje Headquarters and the same day at Chimpundu School. He admitted that he did not attend all the meetings but his agents attended some on his behalf. He had requested for the tapes of the radio broadcasts but was never given. The relationship between the Respondent and Yorsam Banda disadvantaged him and as Chief, Yorsam Banda should not have campaigned in that manner because he had influenced as Chief in Petauke.

Under re-examination, he stated that Yorsam Banda conducted himself as a Chief Mwanjabantu during campaign, and that he was deeply involved in the 2006 elections. He was the main campaigner and chief speaker for the Respondent at all meetings.

PW2 was Nicholas Mozowe Daka of Kwenje Village, Chief Mwanjabantu, Petauke District. He is also Headman Kwenje. In his evidence in Chief, he recalled the General Elections held on 28 September 2006. He attended some campaign meetings. He attended first the meeting held on 17 June 2006 at Mwanjabantu. The first person to address the meeting was Yorsam Banda. He told them not to vote for the Petitioner because he was a foreigner from Chadiza, he had stolen relief food and CDF, which was meant for the people of Mwanjabantu, he was sick with HIV/AIDS and if voted for there would be a by-election because he was going to die. He was using Nsenga language. Among the people who attended the meeting on 17 June 2006 were the Respondent, Moses Mteteka, Mwakakalombe and Someone from MTN.

He also attended rallies at Zumaile and Kamwala Kanjoma addressed by Yorsam Banda and the Respondent. Again, Yorsam Banda started the meeting and the Respondent finished. Yorsam Banda and

Respondent were together at Zumaile and Kanjoma and repeated the same allegations against the Petitioner. He stated that the one who was leading the campaign for the Respondent was Yorsam Banda and not Mr. Samuel Kanyama.

He also recalled that Yorsam Banda was on Radio PASME on 27 September 2006. On the programme, he reminded the people about what he had told them during campaigns. He told them to vote for Respondent for the same reasons he had given during the campaign, and he repeated the allegations against the Petitioner. The broadcast was in Nsenga and it was between 19:30 and 20:30 hours. Later the same evening, he saw Yorsam Banda and the Respondent campaigning using a car with a loud speaker. He stated that he believed the allegations were true because they were told on the radio.

Under cross-examination, he stated he believed the Petitioner was a thief because the words were said on the radio and the radio does not tell a lie. He stated that about ten (10) people had gone to Mozambique as a result of the allegations.

PW3 was Banison Mwanza of Chief Mwanjabantu, Petauke District. He confirmed attending a meeting at Mwanjabantu organized by Yorsam Banda; and all the people in Mwanjabantu came to attend the meeting. Present at the meeting were Moses Mteteka, Mwakalombe, and a Mr. Mokoena representing MTN. Others were Dora Siliya aspiring MMD candidate for Petauke Central Constituency, Respondent, MMD aspiring candidate for Kapoche Constituency, and Yorsam Banda who introduced the guests. He introduced himself as Chief Mwanjabantu. He first thanked the people that they came in large numbers. He reminded the people that it was the election year and the person they were supposed to vote for was the Respondent and not the Petitioner. He repeated the allegations against the Petitioner. Next, Mr. Mteteka spoke followed by Mr. Mokoena who promised to put an aerial if the Respondent won. He donated footballs and jerseys. The respondent also spoke and concurred with Yorsam Banda saying that in Mwanjabantu, they have never voted for a person from their area, and this was the time to vote for someone from Mwanjabantu.

He recalled listening to a radio programme on 27 September 2006, aired on Radio PASME; around 19:45 hours. Mathews Banda was the interviewer and it was featuring Yorsam Banda. Yorsam Banda warned all Kapoche villagers especially from Mwanjabantu to vote for the Respondent and he repeated the allegations against the Petitioner.

Later the same night, he heard announcements on a Public Address System and Yorsam Banda with the Respondent were asking people whether they had heard him on the radio. At the same time, the Respondent knelt down, clapped his hands supporting what Yorsam Banda had said, pleading for votes.

Under cross-examination he was asked:

Q: Was he (Yorsam Banda) not urging you to go and vote for the candidates of your choice?

A: We were told a person whom we should vote for.

Q: Yes, who did he tell you to vote?

A: He said we should vote for Nicholas Banda (Respondent) because he belongs to our Chiefdom.

Q: And did you vote for Nicholas Banda?

A: Yes, my Lady.

Asked whether he believed the allegations, the answer was:-

A: I believed my Lady because having the freedom to tell the people in Kapoche, he must have evidence according to the accusations.

Still under cross-examination, he stated that on 17 June 2006 at Mwanjabantu, they were told that Yorsam Banda was the Chief and they should listen to whatever he says. At the meeting of 17 June 2006, the Respondent concurred with what Yorsam Banda said.

He stated that the MTN brought Jerseys and footballs. According to him in Mwanjabantu Chiefdom, there is no one who doesn't know that the Petitioner is a thief because the Chief said so, and that these were the reasons for voting for the Respondent.

"From that time when the Chief said this, we said this is the truth. This is the reason why we did not vote for Charles Banda."

PW4 was Tennis Lungu of Nyansimbo Village, Chief Mwanjabantu, Petauke District. He recalled that on 26 September 2006, he listened to Radio PASME around 19:45 hours to 20:30 hours. The programme was featuring Mr. Simeon Banda, the MMD Chairman for Petauke District and Mr. James Lungu, being interviewed by Mathews Banda. He also listened to another programme on 27 September 2006, this time featuring Yorsam Banda. His evidence on what was said on both these broadcasts corroborated the evidence of PW1, PW2 and PW3 as regards the allegations against by the Petitioner. At the time he was telling the people that he was the Chief. After the radio programme, he went around the Constituency with a vehicle, which had a Public Address mounted, telling people to vote for the Respondent and not the Petitioner the following day. Yorsam Banda was driving and he was with the Respondent. According to him, elections were not conducted well in Mwanjabantu because of the allegations but in Nyanje, people voted well because there were no threats and people voted for any of the four candidates.

Under cross-examination, he confirmed that he listened to the radio broadcast on 27 September 2006 between 19:45 and 20:30 hours and that he knows Yorsam Banda as Chief Mwanjabantu.

Q: Were you comfortable when you heard that Charles Banda lost the election?

A: I was comfortable because I knew that the people from Mwanjabantu wouldn't be chased to Mozambique according to what he (Yorsam Banda) was saying that they would be chased.

Q: According to your knowledge, has there been any people chased to Mozambique since the election?

A: Other people ran away just when they got the message from the radio; they were thinking things could happen.

According to the witness, they were chased due to the threats, which they got, from the radio. He believed the Petitioner was from Chadiza because it was said on the radio, and because there are no lies on the radio.

Q: You are saying there are no lies on the radio; anything said on the radio is gospel truth that is your statement?

A: According to us villagers.



The Petitioner closed his case.

The Respondent called ten (10) witnesses including himself.

DW1 was Mathews Banda of House No. 197, Petauke District. He explained that PASME stands for:-  
Petauke Association of Small and Medium Entrepreneurship.

He has been working for Radio PASME since 2003. The radio is for information dissemination. As a Community Radio Station, they provided coverage to all candidates who participated in the elections.

He recalled recording a programme on 26 September 2006 featuring Mr. Simeon Banda, the MMD District Chairman for Petauke District and Mr. James Lungu, then aspiring Councillor for Nyakawise Ward in Msanzala Constituency. He denied that any reference was made during the broadcast to the allegation by the Petitioner.

He also recalled recording a number of programmes on 27 September 2006 among them one featuring Yorsam Banda, which was recorded at 06:00 hours and aired the same day at 11:00 hours. It was not a political programme and Yorsam Banda spoke as a Petauke resident and the Director of an NGO called Rural Youth Initiative (RYI). The first question he asked was on the future of elections and the second one, on whether the youths should go and cast their vote. According to the witness, Yorsam Banda praised the police and ECZ for conducting the elections in a very good atmosphere and urged the youths to go and vote.

He denied that Yorsam Banda ever made the allegations against the Petitioner; or that the programme was covered between 19:45 and 20:30 hours.

Under cross-examination, he stated that he had trained at Zamcom as a Journalist although he admitted he had no certificate. He stated that the programmes were recorded for purpose of keeping a record. Both programmes of 26 and 27 September 2006 were recorded for 35 minutes and were in the Nsenga language. He denied that relief food was talked about. When asked if he had a record of the programmes, he said he did not.

Q: What did you do to them?

A: They were erased, my Lady.

Q: When did you erase them?

A: We erased them on 5th October.

Q: Who directed the person who erased them?

A: I directed him.

He confirmed that Radio PASME covers a wide area. He denied that Yorsam Banda presented himself as Chief Mwanjabantu during the programme. He denied that he deleted the programmes to protect anyone or that he deleted it without the knowledge of people of PASME.

He was then shown a note written by Mr. Kennedy Mwansa on 8 October 2006; in which he was requesting the Programmes Officer to allow the bearer of the note to review the tapes.

Q: Now the Programmes Officer that was away was yourself.

A: Yes my Lady.

Q: When did you specifically delete the programmes, 27 September 2006 and 26 September 2006?

A: My Lady, they were deleted on 5th October 2006.

Q: Did you have instructions to delete the programmes?

A: Yes my Lady.

Q: I am saying, the letter (is) written the way it was because your boss was not aware that it had been removed from the computer or that you had removed it?

A: Yes my lady, that's what the letter says.

Q: And it goes without saying that had he known, he wouldn't have bothered to write requesting to allow this person to review this programme, had he known, he wouldn't have bothered as a prudent officer, is that not so, is your boss a reasonable boss?

A: Yes my Lady.

When it was put to him that he was not a journalist, he replied he was and that it does not mean when one has no certificate, he is not a journalist. He insisted he was a journalist through experience and had attended a course for six months.

DW2 was Mr. Simeon Banda, the District Chairman for Petauke. He recalled appearing to Radio PASME on 26 September 2006 with James Lungu, the Councillor for Nyakawise Ward, Msanzala Constituency, and the interviewer was DW1. His evidence was that they were interviewed about how the campaign was going on, and how they were doing in the election.

He denied talking about CDF, stealing of relief food, AIDS or that the Petitioner was a foreigner.

Under cross-examination, he denied that any radio programme was aired on 27 September 2006 featuring Yorsam Banda.

He denied again talking about CDF, or relief food. He admitted that he knew Yorsam Banda but he did not campaign with him.

DW3 was James Lung of Kanjola Compound, Petauke District. He is the Councillor for Nyakawise Ward, Msanzala Constituency and participated in the elections but did not take part in the Kapoche Constituency campaigns.

He recalled appearing on Radio PASME on 26 September 2006 around 08:00 hours but was not aware when it was broadcast, as he was busy campaigning. He was interviewed with DW2. On the programme, they told the people what good things MMD had done, including bringing relief food. He did not listen to the radio on 27 September 2006.

Under cross-examination, he stated that DW1 interviewed him together with DW2. He agreed that they spoke about relief food between himself and DW2 but denied saying anything about CDF.

DW4 was Gibson Asam Banda of A485 Mandevu Compound, Lusaka. He testified that he was the election agent for the Respondent and not Yorsam Banda. He went to Kapoche Constituency at the end of August and from the beginning, Yorsam Banda was not in the campaign team of the Respondent. He never had any occasion to listen to Radio PASME but he attended some of the Respondent's meetings including the one at Zumaile. The speakers were Kanyama, Makalamu and the Respondent. Yorsam Banda was also there. He never heard Yorsam Banda talk about the allegations against the Petitioner.

He stated further that he was at the Mwanjabantu meeting of 17 June 2006 and that it was a meeting about HIV/AIDS. Among the speakers was Yorsam Banda, the Director of RYI. He is the one who called his friends for this meeting. At the meeting, Yorsam Banda was told the People that as he was coming from the Royal Establishment, he was telling them how bad HIV was.

Under cross-examination, he stated that the meeting of 17 June 2006 was at Zumaile in Mwanjabantu. When pressed further about the venue of the meeting of 17 June 2006, he stated that he was not sure. Asked who was present at the meeting; he replied that it was Mr. Kanyama. When asked which meetings he attended and which ones Respondent attended, he replied, "The one at Zumaile for MTN, even at Mwanjabantu I was there."

Q: You had guests travelling from as far as Lusaka in attendance to that meeting?

A: Yes my Lord, the people from MTN my Lady came at the meeting for Honourable Nicholas Banda.

Still under cross-examination, he stated that Yorsam Banda was the first to speak and he spoke for some time. He spoke a long time. About 45 minutes, one hour, two hours. He stated that the Respondent attended the meeting and he was invited by Yorsam Banda.

Q: You were not aware when Nicholas Banda spoke?

A: He was not one of the people who talked at the meeting.

Q: Do you know when he was called and introduced?

A: All of us were called and introduced by Mr. Mbewe, the Master of Ceremony.

Q: He was introduced as what?

A: As an aspiring candidate.

Still under cross-examination, he was asked about what goods were dished out by Mr. Mokoena. He replied that he did not see anything being dished out.

Q: You don't recall Mokoena give footballs and football jerseys to Mr. Yorsam Banda.

A: At that meeting, there were no jerseys and balls given. I don't recall any meeting at which jerseys and football attires were given my Lady.

He stated that the Zumaile meeting was an MMD campaign meeting, Yorsam Banda attended and spoke.

Still under cross-examination, he conceded that he did not remember the dates of the Zumaile and Mwanjabantu meetings.

DWS was Makalamú Phiri, of Mushala Village, Chief Kalindawalo and the MMD Vice District Chairman for Petauke District. He did not recall the date but he attended the meeting at Zumaile. The speakers were Headman Zumaile, Kanyama Zulu as the campaign manager and Gibson Banda as the election agent. Yorsam Banda joined the meeting after it had started. He spoke at the meeting. He spoke to the youths about AIDS. The Respondent did not speak, he was just introduced as the aspiring candidate for Kapoche Constituency. He denied that Yorsam Banda made the allegations against the Petitioner; neither did the Respondent.

Under cross-examination, he conceded that he spent most of the time in Petauke Central Constituency where he is Councillor, campaigning for himself and the Member of Parliament there. He attended only

the Zumaile meeting, which was an MMD campaign meeting. He denied that Yorsam Banda made the allegations against the Petitioner.

DW6, Samuel Kanyama Zulu of Chongololo Village, Chief Kalindawalo, Petauke District and MMD's Vice Information and Publicity Secretary for Petauke. He was the campaign manager for the Respondent. He attended some meetings including the Zuamile meeting at which they were introducing the MMD Parliamentary candidate and Councillor.

Under cross-examination, he stated that he was removed as campaign manager two weeks before the elections.

Q: And to cut a long story short one of the speakers there was Yorsam Banda?

A: No, Mr. Yorsam Banda was not there.

Q: So if a witness came to this Court and told the Court that Yorsam Banda came and he actually addressed the meeting, would he be lying?

A: He was not on the list of speakers.

Prodded further, he admitted Yorsam Banda spoke for a short time. He had no knowledge of the radio broadcasts of 26 and 27 September 2006 on Radio PASME.

DW7 was Jabulani Mokoena, Chief Marketing Officer for MTN. He recalled attending a function in Petauke on 17 June 2006 at the invitation of Chief Mwanjabantu. The invitation was by letter, Exhibit "FM1". At the meeting, he gave out some footballs and soccer outfits. He denied that he promised to put an aerial in Mwanjabantu if they voted for the Respondent. He never heard any allegations made against the Petitioner by Yorsam Banda.

Under cross-examination, he stated that he was invited by Chief Mwanjabantu and he would be surprised if he was told that the Chief was a woman. He donated about 100 balls, some handsets, and gave one handset personally to Chief Mwanjabantu. He spoke in English but the rest of the speeches were in the local language, so he did not follow what was said.

Under re-examination, he stated Chief Mwanjabantu spoke first.

DW8 was Yorsam Mwanjabantu Banda of Mwanjabanthu Own Palace, Chief Mwanjabantu, Petauke, and Director of RYI. In June 2006, he invited MTN to sponsor a tournament and the response was favourable.

The function was attended by inter alia Mr. Mokoena and Mr. Mteteka. The function was at Mwanjabantu—Kalu Stadium. It was a multitude and people were there in their thousands. He denied that he made the allegations against the Petitioner. He said MTN did not promise an aerial but he made an appeal to MTN for network and a dish.

He was at the meeting at Zumaile and was given five minutes to speak. The Respondent was there. He denied uttering the allegations against the Petitioner or that he was chief campaigner for the Respondent.

On 27 September 2006, he was requested to feature on Radio PASME. It was recorded at 06:00 hours and broadcast at 11:00 hours the same day. It was recorded in a mixture of Nyanja and English; and the interviewer was Mathews Banda. He denied uttering the allegations in the petition. He denied campaigning with the Respondent between 19:45-20:00 hours on 27 September 2006.

Under cross-examination, the witness was shown Exhibit "FM1". He conceded that when he read the letter first, he omitted the paragraph relating to the First Lady, and the fact that he signed the letter as Chief Mwanjabantu. He stated that he was Chief Mwanjabantu, and not his brother Lenard Banda. He does not recognize his brother as Chief Mwanjabantu although he is the one gazetted as such by the Government. Neither does he recognize his mother as Regent.

Still under cross-examination, he stated that he had invited the First Lady as Guest of Honour but when she did not respond, Mr. Mteteka was invited instead. The Petitioner was not invited because he does not deal with politicians, but the Respondent just attended, he was not invited. He clarified that when he said he does not deal with politicians, he meant he did not invite them. He did not know that Mr. Mteteka was aspiring candidate for Chisamba. MTN donated about 20 balls and not 100 balls. According to him the main speakers were Mr. Mokoena and Mr. Mteteka; and the Respondent did not speak. He conceded recording a programme on Radio PASME on 27 September 2006, but only for about 15 minutes including a break. He denied introducing himself as Chief Mwanjabantu. He was interviewed in a mixture of Nyanja and English because he was not very good in Nyanja though he went to school in

Petauke from Grade 1 to 7 where the medium of instruction was Nsenga. He denied that he made the allegations against the Petitioner.

Under re-examination, he reaffirmed that he never said that the Petitioner was a thief of relief food, CDF as NGOs were distributing relief food and not MPs.

DW9 was Mr. Moses Mteteka of House No. 1 Mumbo Road Long Acres, Lusaka. He is the Member of Parliament for Chisamba and Deputy Minister of Lands as he then was.

In his evidence, he confirmed attending the meeting of 17 June 2006. He was invited by the son of Chief Mwanjabantu and MTN were present. DW8 introduced his delegation. The First Lady had been invited but she did not attend. He denied that DW8 had uttered the allegations against the Petitioner.

Under cross-examination, he admitted that he knew the Petitioner as Area Member of Parliament, but he was not present at the meeting. He attended after an invitation from Yorsam Banda, son of Chief Mwanjabantu and Mr. Mwakalombe was part of his delegation. He was aware that Mr. Mwakalombe is a supporter of MMD but he was not aware that he was a Trustee of MMD. He agreed that Mr.

Mwakalombe is a NEC Member of MMD. He agreed that Hon. Dora Siliya, Hon. Peter Daka and Mr. Mokoena attended the meeting. At the time he had left the Ministry of Community Development and was aspiring candidate for Chisamba, on the MMD ticket. All three adopted candidates for Petauke were present at the meeting. By then, MMD had announced the list of adopted candidates. He said that Yorsam Banda spoke in Nsenga.

Although all three MMD aspiring candidates for Petauke and MMD NEC members were present, this was not an MMD function. It was just unfortunate that the Area Member of Parliament was not present.

He agreed that he was related to the First Family but on that occasion he was not representing the First Lady. He was not aware about allegations made against the Petitioner, and if they were made, it could have been in his absence.

DW10 was Nicholas Kumbukani Banda of Plot No. 4831 Los Angels Road, Long Acres, Lusaka, and is the Member of Parliament for Kapoche Constituency and Deputy Minister for Community Development. He participated in the elections on the MMD ticket.



Although he had not been invited on 17 June 2006, he attended a meeting sponsored by MTN, organized by the NGO RYI. He did not speak at this meeting. He had gone to verify his voter's registration when he heard that MTN and the NGO were having a meeting, so he decided to stay and participate. He confirmed those in attendance but denied that DW8 uttered the allegations against the Petitioner, or that DW7 promised an aerial for Mwanjabantu Chiefdom if he was elected.

He was at Zumaile meeting. Again he did not hear DW8 utter the allegations against the Petitioner. DW8 has never been his agent or Chief Campaigner, and he never spoke at any of his meetings. He did not listen to the radio broadcasts, as he was busy with the campaigns. He never went round campaigning with PW8 or knelt begging for voters from any crowd on 27 September 2006.

But the same evening, he met people coming from a meeting who told him that the people had dispersed so he decided to rest and proceeded to his parent's place. He arrived around 21:00 hours and DW8 came when he was resting.

He stated that the elections were fair; he won fair and prayed that he should not be disturbed in his work for the people who voted him. It would be too expensive to run another election and requested that the Petitioner be dismissed with costs.

Under cross-examination, he stated that he has worked with DW8 on sports programmes for some time; from about 2005 and that DW8 is his friend.

He conceded that DW8 was at the Zumaile meeting and knew the programme of his meetings.

After the Respondent's evidence, both Counsel submitted written submissions. Mr. Chifumu Banda, SC, Counsel for the Petitioner submitted that the Court will have to consider the credibility of the witnesses called by the Petitioner as against those called by the Respondent. He submitted that on the whole, the evidence tendered by the Respondent was unreliable and invited the Court to believe the evidence of the Petitioner's witnesses and find that the words complained of were uttered. He submitted further that the allegations that the Petitioner Charles Banda is suffering from HIV/AIDS contravene S.83 (1) of the Act. Similarly, to allege that a candidate in an election is a thief who had stolen CDF Funds and Relief Food for the people in that Constituency contravenes S.82 (2) of the Act. These two Acts are clearly

illegal practices and the Court should hold that the election of one NICHOLAS BANDA, be declared null and void as the majority of voters in the Constituency were prevented from electing a candidate whom they preferred on account of these illegal practices.

Mr. C.L. Mundia, SC, Counsel for the Respondent submitted that it is petition, not on a preponderance of probabilities but on a standard higher in a civil matter although that standard is less than that required in a criminal case. For the election of the Respondent to be held void, the Petitioner has to prove any of the offences in S 83(1) (2) of the Act to the satisfaction of the Court, and that there was wrong doing of a scale and type which adversely affected the election, and such proof should be a standards set out in the Mabenga Case.

He submitted that all the allegations made by the Petitioner in his petition have not been proved and that the petition is incompetent and must be dismissed as being one without merit with costs to the Respondent. He requested the Court to confirm the Respondent as being the duly elected Member of Parliament for a Kapoche Constituency; that the Court makes further declaration that the election of the Respondent as Member of Parliament for Kapoche Constituency was held freely and fairly.

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From the evidence on record, the following facts are not disputed:-

On 28 September 2006, there were held in Zambia General Elections to elect the Republican President, Members of National Assembly and Councillors. The Petitioner was a candidate under UDA ticket. At the end of the election, the Returning Officer declared the Respondent the winner.

During the elections, a Community Radio Station called Radio PASME provided coverage for the campaign rallies for all political parties participating in the elections and that among such activities, two radio broadcasts aired on 26 and 27 September 2006 and the host was DW1, Mathews Banda. The broadcast on 26 September 2006 featured Mr. Simeon Banda, DW2, and MMD District Chairman for Petauke, Mr. James Lungu, DW3, the MMD Counsellor in Nyakawise, Msanzala Constituency.

The radio broadcast on 27 September 2006 feared DW8, Yorsam Mwanjabantu Banda.

During the campaign, there was a meeting at Mwanjabantu Kalu Stadium on 17 June 2006 which all three MMD aspiring candidates for Petauke District attended. Also present were then MMD aspiring candidate for Chisamba, Mr. Moses Mteteka, a Mr. Mwakalombe, MMD NEC Member; and Mr. Jabulani

Freddie Mokoena, the Chief Sales Marketing Manager for MTN. There were other campaign rallies at Zumaile and Kanjoma.

In reviewing the evidence adduced in this petition, the following are my comments. Firstly, Respondent's Counsel stated in his written submission that the Petitioner was trying to fight his petition contrary to his pleadings by coming out with outrageous and unfounded allegations, which were not pleaded. Here, Counsel was referring to the allegations attributed to DW8. At the campaign meetings held at Zumaile Village and Mwanjabantu. His arguments being that the evidence relating to the meetings at Zumaile and Mwanjabantu were not pleaded in the Petition and were therefore, outside the pleadings and should have been excluded. While it is true that this evidence was tendered in evidence by PW1, and alluded to by all his witnesses, Counsel cross-examined these witnesses at length. He led evidence on these allegations with all of his own witnesses. He never raised any objection during the trial so as to enable the other party to reply to his objection and for the Court to deliberate and rule on the objection. Instead, Counsel chose to raise the objection after the case was closed thereby denying the other party the right to reply and the Court the opportunity to deliberate and rule on the objection. He slept on his rights. He cannot now raise that objection.

Secondly, Counsel submitted that DW8, was not the Chief Campaigner or agent of the Respondent because he was not appointed or accredited as such by the Elections Commission of Zambia (ECZ).

The evidence on record shows that DW8 was at the Zumaile meeting, which was an MMD campaign rally organized to introduce the MMD aspiring candidates for Petauke Constituency. He was present at the Mwanjabantu meeting at which all three MMD aspiring candidates for Petauke District were present. Also present were some MMD big wings from outside Petauke District viz: Mr. Moses Mteteka, MMD aspiring candidate for Chisamba and Mr. Mwakalombe, a Trustee of the MMD and a Member of the NEC.

There is further evidence, which was not challenged in cross-examination, that DW8 and Respondent also attended campaign meetings at Kanjoma, Nyimba, and Champundu. It is clear from the evidence on record that although he may not have been the accredited agent of the Respondent by ECZ, he was deeply involved in the campaign for the Respondent.

CHESHIRE AND FIFOOT on "THE LAW OF CONTRACT" Seventh Edition, at pages 426-427 defines the formation of agency as follows:-

"The relationship of principal and agent may arise in any one of five ways: by express appointment, by virtue of the doctrine of estoppel by the subsequent ratification, by the principal of a contract made on his behalf without any authorization from him, by implication of law in cases where it is urgently necessary that one man should act on behalf of another, and by presumption of the law in cases of cohabitation."

We are concerned here with agency by setoppel. Again, Cheshire and Fifoot introduced the subject by a quotation from LORD CRANWORTH, in the case of Pole V Leask [1863], 33 L.J. Ch. 135 at PP 161-2.

"No one can become an agent of another except by the will of that person. His will may be manifest in writing, or orally or simply by placing another in a situation in which according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him  
.....This proposition .....is not at variance with the doctrine that where one has so acted as from his conduct to lead another to believe that he has appointed someone to act as his agent, and knows that that person is about to act on that belief, then unless he interposes, he will in general be stopped from disputing the agency though in fact no agency really existed.

At page 428—"In all these cases a person who has no authority whatever to represent another is nevertheless regarded as an apparent agent."

And Black's Law Dictionary, Seventh Edition, defines apparent agent as follows:-

"A person who reasonably appears to have authority to act for another regardless of whether actual authority has been conferred."

In view of the above, therefore, although DW8 was not the accredited election agency by the ECZ for the Respondent, by his conduct and utterance, he placed himself in such a situation such that the people who listened to the radio broadcasts and his statements at campaign meetings took him to be the agent and Chief Campaigner for the Respondent. DW8 was therefore by his action and statements the Respondent's apparent agent.

Now I turn to determine whether the words complained of were uttered.

PW2, Nicholas Mozowe Daka in answer to a question from Respondent's Counsel whether or not the allegations were true, he replied:-

"They were because they were said on radio" "For us listening from the radio we thought it was true."

According to PW3, "In Mwanjabantu Chiefdom, there is no one who doesn't know that Charles is a thief because our Chief told us .....these were the reasons for us voting for Nicholas Banda....."

"From that time when the Chief said this, we said this was the truth. This is the reason why we did not vote for Charles Banda."

PW4 in answer to a question from Counsel on whether there are lies on radio, he replied, ".....Me I believe because it was said on radio, saying that he is from Chadiza that is why I believed because there are no lies on the radio."

The evidence adduced on behalf of the petitioner is very clear and cogent and remained unshaken even under cross-examination.

To the contrary, the evidence on behalf of the Respondent was presented as a general denial and fraught with inconsistencies, contradictions and discrepancies.

DW2, Simeon Banda, who was interviewed with DW3, James Lungu, denied ever talked about relief food. Yet, DW3, admitted that they talked about food. DW3 contracted himself further when he was asked about the time the programme of 26 September 2006 was aired. First, he replied that he did not know the time because he was tired and busy. But when it was put to him that it was aired around 19:45 hours, he disputed emphatically. When asked again to state the time when it was aired, he replied that he did not know when it was aired because he was away.

DW1's evidence on the radio broadcast was very unreliable and revealing. He insisted that the programmes were not political even when the speakers were talking about voting, urging people to go

and vote because if they did not vote, there can be no change. When he was asked to produce the tapes of the recordings of the broadcast, he replied that they were erased. Then became evasive about who actually deleted the programmes and whether or not he had authority to erase them. First he told the Court that it was Mabvuto Banda, the Recording Technician who deleted the programmes, only to concede that he directed him to do so. In fact a note from the Acting Station Manager, Mr. Kennedy Mwansa clearly indicates that he had no authority and that he the Programme Officer deleted the programmes and not Mabvuto Banda. Quite incredible that within six (6) days he erased the evidence of one of the most important events in the national calendar, even when in his evidence he stated that the programmes were recorded for purpose of keeping a record. The only inference I can draw from this action is that if the tapes had been produced, they would have been favourable to the Petitioner. As submitted by Petitioner's Counsel, he probably destroyed the tapes to hide the truth from the Court. This action by DW1 contravenes Regulation 14(2) (a), of the Electoral Code of Conduct, which states:

(2) Television and radio stations shall:-

(a) maintain full records of all radio and television bulletins and recordings of all other programmes related to the election, including party political broadcasts and shall institute a close and meticulous system to ensure balance throughout the campaign up to the close of the poll;

The Petitioner also complained that the same words or allegations were repeatedly made against him by DW8, often, if not always in the company of the Respondent at a number of campaign meetings or rallies.

First, there was the meeting, which was held at Mwanjabantu Kalu Stadium on 17 June 2006.

Among those who attended the meeting were PW2 and PW3. At the end of that meeting both were left in no doubt that it was MMD meeting organised by DW8 to drum up support for the Respondent. In answer to a question from Counsel, PW3 replied;

Q: Now you said that you heard that Charles Banda was a thief that he stole CDF then he stole relief maize, and did you believe that he was a foreigner?

A: I believed my lady because having the freedom to tell the people in Kapoche, he must have evidence according to the accusation.

Elsewhere in his evidence, he stated:-

"In Mwanjabantu Chiefdom, there is no one who doesn't know that Charles is a thief because our Chief told us."

The other meetings that DW8 attended were at Zumaile Primary School. This was an MMD meeting organised to introduce the Respondent to the electorate. This was stated by Respondent's own witnesses. According to DW4, he was comfortable that the Petitioner lost the election because then the people of Mwanjabantu wouldn't be chased to Mozambique, and he firmly believed they were chased through the threats on the radio. He believed what DW8 said firstly because he was the Chief and also because he heard it on the radio.

There was also the meeting at Kanjoma at which according to PW3, DW8 uttered the same words as what he said at Zumaile.

Again the evidence on behalf of the Respondent is full of inconsistencies.

To pick a few, DW4 stated that the Respondent spoke at the meeting at Zumaile. But DW5 said Respondent did not speak at the meeting. DW6 even went further and stated that the Respondent was not there at this meeting, though he conceded later in his evidence that he spoke for a short time. This is quite incredible when the other evidence by the Respondent own witness was to the effect that the meeting was organised to introduce the Respondent to the electorate.

DW1 testified that he donated about 100 footballs, some jerseys, some handsets, and gave one handset personally to DW8. DW8 recalls only 20 balls being given out. As for DW4, he did not recall any goods being given out. He did not recall any meeting at which footballs, jerseys or football attires were given out.

In the light of such inconsistencies, contradictions and discrepancies, I find the evidence on behalf of the Respondent unreliable and discredited to be believed. I find that evidence on behalf of the Petitioner believable. I, therefore, find that it is more than probable that the words complained of were uttered.

The allegations against the Petitioner clearly contravene the Provisions of the Act. In particular, the allegations that the Petitioner has HIV/AIDS contravene Section 83 (1), which reads:-

"Any person who, before or during an election publishes a false statement of the illness, death or withdrawal from election of a candidate at the election for 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."

Further, the allegations against the Petitioner that he stole CDF funds and relief food meant for the people of Mwanjabantu Chiefdom contravenes Section 83 (2) or the Act which reads:-

"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 that person can show that that person had reasonable grounds for believing, and did believe, the statement to be true."

The evidence before this Court is to the effect that the Respondent himself never made the said allegations against the Petitioner, but they were made in his presence, with his knowledge and approval. He made no effort to disassociate himself there from the same. According to PW2, "The one I know who was leading this campaign for Mr. Nicholas Banda is Yorsam Banda DW8, my Lady."

The body of evidence before this Court has shown how deeply involved DW8; Yorsam Mwanjabantu Banda was involved in the election. It has brought to the fore how strongly people believe in Chief: A Chief we have seen, wields power and influence in the Community, such that any threat on his part is taken very seriously so as to influence or induce the electorate to do his will. In an election, as we have seen here, it will bring influence to bear upon the voters such that some would refrain from voting for a candidate whom they preferred or go into forced exile for fear of repercussions.

In my view, it is inappropriate for a Chief who wields power and influence in the community to campaign for or against a candidate for the reason that it advantages his preferred candidate and disadvantages the candidates he does not favour.

HULBURY'S LAWS OF ENGLAND, FOURTH EDITION describes undue influence thus:-



"In order to constitute undue influence a threat must be serious and intended to influence the voter. A threat may amount to undue influence even though the person using the threat has no power to carry it out."

In the instant case, as Chief, DW8 contravene Section 82 (1) (c) of Act and Regulation 7 (a) (i) of the Electoral Code of conduct, which reads:-

Regulation 7 (1): A person shall not-

(i) abuse or attempt to abuse a position of power, privilege or influence, including ..... traditional authority, for political purpose....."

For the evidence above, it is quite clear that by reason of the above illegal practice, the majority of voters in the Kapoche Constituency were or may have been prevented from electing the candidate who they preferred.

With the above in view, I make the following Declaration:-

THAT the election of ONE NICHOLAS BANDA is null and void.

THAT the said NICHOLAS BANDA was not duly elected.

Right of appeal granted.

DELIVERED ON THE 29TH DAY OF MARCH 2007.

Prisca M. Nyambe, SC

JUDGE