

IN THE LOCAL GOVERNMENT ELECTIONS TRIBUNAL
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

2021/P/LGET/007

IN THE MATTER OF: THE LOCAL GOVERNMENT TO RAHAEL CHOTA WARD 25
OF MANDEVU CONSTITUENCY HELD ON THE 12TH DAY
OF AUGUST 2021

IN THE MATTER OF: THE ELECTORAL PROCESS ACT NO 35 OF 2016

IN THE MATTER OF: THE LOCAL GOVERNMENT ELECTIONS TRIBUNALS RULES,
2016

BETWEEN:

DAVIE SAKALA

PETITIONER

AND

BORNFACE BWALYA S

RESPONDENT

Before the Honourables F Hamaundu (Chairperson), H Mdala (Member) and K Banda (Member)- Delivered on 24 September 2021

For the Petitioner: Mr Mumbwa and Ms Mushipe of Mushipe and Advocates

For the Respondent: T Gausi and M Phiri of Messrs Sukwana Mweemba & Partners

JUDGMENT

Honourable H Mdala delivered the Judgment of the Tribunal

Cases referred to

1. Austin Liato v. Sitwala, Selected Judgment No. 23 of 2018
2. Akashambatwa Mbikusita Lewanika, Hicuunga Evaristo Kambaila, Dean Namulya Mungomba, Sebastian Saizi Zulu, Jennifer Mwaba V Frederick Jacob Titus Chiluba (1998) ZR 79
3. Anderson Kambela Mazoka v Levy Patrick Mwanawasa(2005) ZR 138

Legislation referred to

1. Electoral Process Act No 35 of 2016
2. The Local Government Elections Tribunals Rules, Statutory Instrument No 60 of 2016
3. Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No 2 of 2016

On 12 August 2021, the people of Raphael Ward 25 of Mandevu Constituency in the Lusaka District of the Lusaka Province went to the polls to elect a councillor. The Petitioner and the Respondent were amongst the candidates who stood for election as councillor on 12 August 2021. The former on the United Party for National Development (“UPND”) ticket, and the latter on the Patriotic Front (“PF”) ticket. The other candidates were David Phiri of the Democratic Party, Richie Makasa an independent candidate and Lyson Banda of the Socialist Party. On 16 August 2021, the Electoral Commission of Zambia (“ECZ”) through its returning

officer, Clifford Chirwa declared the Respondent as winner of the councillor elections in Raphael Chota Ward 25.

The Petitioner now challenges the election of the Respondent under the Electoral Process Act.

In his Petition and Affidavit Verifying facts filed into this Tribunal on 26 August 2021, the Petitioner alleges that the Respondent was not a duly elected candidate as there was noncompliance with the Constitution of Zambia and the Electoral Process Act. The Petitioner contended that:

1. Despite the suspension of all manner of political campaigns by the ECZ between 15 June 2021 to 28 June 2021, the Respondent continued to undertake campaign activities and that the said campaign activities disadvantaged the Petitioner.
2. On 20 July 2021, a member of the UPND by the name of Joram Leta was murdered by the Respondent's party members hence scaring many voters as well as the Petitioner's campaign team who could not campaign freely after the murder.
3. During the gazetted campaign period, the Respondent and his party cadres destroyed all campaign materials belonging to the Petitioner and his party thereby causing the voters to view the Petitioner as an unserious candidate.
4. The register of voters relating to Chipata LCC Polling Station moved to Kalanga Polling Station and as a result, the Respondent ferried voters from Chipata

Polling Station to Kalanga Polling Station thereby prejudicing the Petitioner who had no financial capacity to ferry his supporters.

5. The Respondent engaged in acts of bribery through the distribution of mealie meal and money to would be voters during the campaign period.
6. On 12 August 2021, the Respondent and his party were seen changing figures at totalling centres for Mandevu Constituency together with ECZ officials.

As a result of the aforesaid, it is the Petitioner's case that the Respondent was not duly elected in terms of the Constitution of Zambia and the Electoral Process Act.

During the Scheduling Conference of the matter, this Tribunal ordered the parties to adduce all evidence of their witnesses by way of Affidavit in accordance with rule 20 (3) of the Local Government Election Tribunal Rules which rules allow the Tribunal, at any stage of the proceedings, to make an order requiring evidence to be adduced by way of affidavit.

In compliance with the Orders of the Tribunal the Petitioner filed 10 affidavits in relation to the Petition on 14 September 2021. PW1 was the Petitioner, PW2 was Mirriam Chibesa Leta, PW3 was Gift Phiri, PW4 was Mary Mwanza, PW5 was Vincent Chongo, PW6 was Kondwani Ngon'a, PW7 was Elesi Phiri, PW8 was Muliwana Muhau, PW9 was Natasha Chimese. The Petitioner also submitted the named witnesses for cross examination.

The Respondent also filed an Answer and an Affidavit in Support of the Answer on 10 September 2021.

At the close of the Respondent's case, we requested the parties to file their written submissions. At the time of writing our judgement, we had only received submissions from the Respondent.

We will now review the evidence brought before this Tribunal in respect of the Petition.

Campaigns during the ban

The Petitioner in his Affidavit alleges that the Respondent disadvantaged the Petitioner by campaigning during the ban which was between 15 June 2021 and 28 June 2021. During cross examination, PW1 informed the Tribunal that he had seen the Respondent campaigning on 15th 16th and 26th June 2021 which period was during the ban and further that he as the Petitioner did not campaign during the election ban. The Petitioner did not call any other evidence or adduce any documentation that supported this allegation that the Respondent campaigned during the dates highlighted to the Tribunal.

The Respondent in his Affidavit in Support of Answer denied ever campaigning during the ban and informed the Tribunal that no campaign activity during the ban can be attributed to himself or his agents. During cross examination, the Respondent informed the Tribunal that he campaigned with PF and the aspiring Mandevu Member of Parliament ("MP"), Christopher Shakafuswa when road shows were held. When asked by Counsel for the Petitioner during cross examination whether the Respondent was present during a rally on 28 June 2021 at which Mr Shakafuswa was present, the Respondent said he did campaign during the campaign period together with Mr Shakafuswa and the then President, Edgar Chagwa Lungu, but that he was not present at the rally held on 28 June 2021.

Further, the Respondent stated that during most campaigns by senior members of a party in a particular ward, the aspiring councillor candidates in a ward would accompany the aspiring MP.

The death of Joram Leta scared voters in the ward

The Petitioner alleges that on 20 July 2021 during campaigns and the erection of billboards, a member of the UPND by the name of Joram Leta was murdered by known PF cadres in the neighbouring Justin Kabwe Ward 24. In support of this allegation, the Petitioner directed the Tribunal to the exhibits marked DS4 to 6 which were copies of the Notice of Death, Coroner's Authority of Burial Permit and the Burial Permit.

The Petitioner informed the Tribunal that the said murder instilled fear in his campaign team as well as his supporters and as a result, prejudiced his ability to campaign to the electorate. In cross examination, the Petitioner informed the Tribunal that the Petition was in relation to Raphael Kabwe Ward and not Justin Chota Ward where the death happened. The Petitioner stated that he did not mention that he saw the Respondent under paragraphs 14 15 and 16 which paragraphs relate to the death of Joram Leta. The Petitioner confirmed that following the death of Joram Leta, no other person was allegedly murdered.

The Petitioner called PW2 and PW3 in support of this allegation. PW2 was the widow of the deceased Joram Leta and PWS3 was the deceased's brother. Both witnesses testified that the deceased was attacked by PF cadres whilst they were erecting billboards in Mandevu at the old Ngoma market. PW3 stated that during the said incident, other people at the market were watching and crying saying "I

will not risk my life to go and vote". PW2 and PW3 both stated that the incident scared the voters in Mandevu from voting.

During cross examination, PW2 informed the Tribunal that she was not present during the incident that led to the deceased's death while PW3 stated that he was initially with the deceased during the erection of the billboard but was separated from him during the attack by PF. He further stated that the attackers could not be identified as they were wearing masks. During re-examination, PW3 informed the Tribunal that he did see a mob of PF cadres but he could not specify who was present at the incident that resulted in the death of Joram Leta.

In response to the allegations by the Petitioner, the Respondent in his Affidavit said that neither he nor his duly appointed agents participated in nor sanctioned any of the acts that led to the demise of the deceased. He further stated that he was not present at Justin Kabwe Ward 24 during the incident.

During cross examination, the Respondent confirmed that he had heard about the death of Joram Leta but said he could not confirm whether other people had heard about his death. The Respondent further stated that he could not state whether the death frightened people nor instilled fear in them.

The register of voters relating to Chipata LCC Polling Station moved to Kalanga Polling Station

The Petitioner in paragraph 17 of his Affidavit alleged that upon queuing up on polling day, it was discovered that the Register for most of the voters who had

registered and verified their details at Chipata LCC Polling District was missing. To that effect, ECZ advised that the affected voters be transferred to from Chipata LCC Polling District to Kalanga Polling Station where the register was. As a result, the Respondent ferried voters from the said Chipata Polling Station to Kalanga Polling Station of Ngwerere. This prejudiced the Petitioner as he had no financial ability to ferry his supporters.

In cross examination, the Petitioner informed the Tribunal that he did not bring any action against ECZ relating to the missing register. He further stated that he could not confirm that all voters in the claimed register that was missing would have voted for him and further that it could not be determined who they voted for. The Petitioner stated that he had seen the Respondent at the polling station in question but he was not the person driving the buses that ferried the voters.

The Petitioner adduced the Affidavits of PW7 and PW9 in support of this allegation. PW7 testified that she was a polling agent at LCC Chipata. She stated in paragraph 4 of her Affidavit that she came across people who were supposed to be voting from Chipata LCC and needed to be moved to Kalanga Polling Station instead. She stated that the Respondent and Mr Shakafuswa had provided buses for people who would be going to vote at Kalanga Polling Station. She testified that when she went outside, she found Mr Shakafuswa informing people entering the buses to vote Pamaka, the PF symbol.

PW9's Affidavit evidence is similar to that of PW7. PW7 noted that she was ferried by a Rosa bus to Ngwerere where she voted. She stated that her and many other

electorates were convinced to vote for PF candidates for their gesture of transport. She stated that she was with PF cadres and they told her to vote for PF as they provided buses. She added that there were 12 buses in total.

During cross examination, PW7 stated that she was a member of UPND. She stated that she had seen the Respondent at the Polling station and saw him standing near the buses.

PW9 said that she changed her mind about the candidate she would vote for because of the transportation provided. She testified that she did not know who else voted for the Respondent because of the transportation provided as voting is a secret process.

The Respondent in his Affidavit denied the allegations in paragraph 17 and 18 of the Petition and deposed that the confusion was not brought about by any actions attributable to himself or his agent. He noted that he was equally affected by the said confusion. He stated that the confusion happened at 1 out of 31 polling stations within the ward contested.

In cross examination, the Respondent stated that he had voted from LCC Chipata and that he found confusion at the said LCC polling station. He confirmed calling the area MP regarding the said confusion but denied ferrying people on a bus to Ngwerere Polling station. He further stated that he could not ascertain how many people were stranded and could not vote.

In re-examination, the Respondent stated that he did not know anything about voters being ferried .

Party cadres destroyed all campaign materials belonging to the Petitioner and engaged in acts of bribery

The Petitioner stated in paragraphs 20 and 21 of his Affidavit that during the gazetted period, the Respondent and his party cadres or agents without lawful authority destroyed, mutilated, defaced or removed all campaign placards, posters and billboards for the UPND party. The Petitioner stated that the destruction and removal of his campaign material was calculated to misrepresent the facts and to induce in the minds of the voters that the Petitioner was not a serious candidate.

Further, in paragraphs 22 of the Petition, the Petitioner stated that the Respondent was seen bribing voters through the distribution of mealie meal and by giving voters money on voting day in exchange for votes.

During cross examination, the Petitioner stated that he did not see the Respondent or the Respondent's agents remove any of the Petitioner's campaign material. He did not call any witnesses or provide any evidence to support this allegation.

As regards the allegation of bribery, the Petitioner in cross examination stated that he did not see the Respondent or any of his agents distribute money or mealie meal to the voters but heard this from various people.

The Petitioner called PW4, PW6 and PW8. PW4 in her Affidavit stated that on 9 August 2021 at 19 hours, she received 2 bags of mealie meal, 5 litres of cooking oil and 1 chicken from known PF party officials, namely Joe in exchange for her vote for PF. She further received the same food items again on 12 August 2021. She stated that she voted for PF due to the food items she received.

PW6 stated that on 11 August 2021, the former President, Edgar Chagwa Lungu and his entourage were throwing party regalia and stated that there was a meeting at the house of the former councillor for PF namely; Mr. Tamba and they were distributing money. PW6 stated that they attended a meeting where they found a lot of people and were all given K170 cash and as such were influenced to vote for PF. In re-examination, PW6 said he could not state how many people were at the said meeting.

PW8 also testified to being given K170 at a meeting and further that former President Lungu visited the ward on 11 August 2021. PW8 stated that they were told to vote for the PF President, MP and Mayor at the meeting where they received the K170.

The Respondent in his affidavit denied all allegations in so far as they relate to acts of bribery corruption and destruction of property.

Respondent and his party were seen changing figures at totalling centres for Mandevu Constituency

The Petitioner stated that on 12 August 2021, the Respondent and his agent were seen at the totalling centres (OlympiaAfricaSports Centre) for Mandevu changing figures together with ECZ. This brought about a fracas amongst voters. The ECZ and the Respondent agents were thus left alone at the said totalling centre and thereafter the wrong results were announced. The Petitioner exhibited "DS/7" a copy of a CD containing the video of the fracas.

The Tribunal was unable to see the contents of the video during the hearings as the video evidence appeared to be an audio instead.

During cross examination, the Petitioner told the Tribunal that while at the polling station, there was a long queue of people who wanted to vote and that he had managed to vote. He stated that there was a huge turnout of voters.

PW5 provided an Affidavit in support of the allegation of the fracas in Mandevu. PW5 stated that he was a local monitor for the UPND. He stated that he noticed a difference in the Gen 20 being announced and exhibited "VC1-2" copies of the said documents. PW5 stated that the same observation was made in Roma Ward 20. However, the returning officer did not stop the announcement.

In cross examination, PW5 stated that the documents stated in the Affidavit were not exhibited and thus not before the Tribunal. The Petitioner stated that he did not know the Respondent and did not see the Respondent during the events highlighted in paragraph 6 and 7 of his Affidavit.

The Respondent denied the allegations that there were changes in the votes at the totalling centres. The Respondent further denied being aware of the fracas in Mandevu.

After the re-examination of the Respondent, the Respondent closed his case.

After examining the facts and evidence in support of the Petition as well as the evidence in answer to the Petition by the Respondent, we will now examine the law governing the nullification of election results.

The law on nullification of election results

In terms of the Electoral Process Act, the only avenue for nullification of a local government election is stipulated in section 97 (2) of the Electoral Process Act which states as follows:

“97. (2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that—

(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election—

(i) by a candidate; or

(ii) with the knowledge and consent or approval of a candidate or of that candidate’s election agent or polling agent; and the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;

(b) subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it

appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election; or

(c) the candidate was at the time of the election a person not qualified or a person disqualified for election."

The allegations put forward by the Petitioner are thus presented by the Petitioner as illegal practices, corrupt practices or other malpractice sufficient for this Tribunal to set aside the election.

● Under section 2 of the Electoral Process Act, "*corrupt practice*" means any conduct which is declared to be a corrupt practice in accordance with section 81 of the Election Process Act. An "*illegal practice*" means an offence which is declared under the Electoral Process Act to be an illegal practice.

We will now turn to look at the burden and standard of proof in election petitions relating to a councillor. In the case of *Austin Liato v. Sitwala Sitwala (1)*, the Constitutional Court cited with approval the sentiments of the Supreme Court in the case of *Lewanika and Others v Chiluba (2)* wherein the Court asserted that it could not be seriously disputed that parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probabilities and that it followed that the issues raised were required to be established to a fairly high degree of convincing clarity.

Having warned ourselves of the burden and standard of proof in election petitions, this Tribunal will now examine whether the evidence provided by the Petitioner is sufficient to prove to the required standard that:

1. That the 1st Respondent (or an agent of the 1st Respondent with the consent or knowledge of the 1st Respondent) committed a corrupt practice, illegal practice or other misconduct ; and
2. As a result of such corrupt practice, illegal practice or other misconduct, the majority of voters in Raphael Chota Ward were or may have been prevented from electing the candidate whom they preferred.

In relation to whether the Petitioner proved, as matter of fact that the Respondent or his agent campaigned during the election ban by ECZ, this Tribunal finds that the Petitioner did not adduce enough to find as a fact that the Respondent campaigned during the ban. In fact, no witness was called to prove this ground. The only evidence provided was the testimony of PW1 himself which would not link the Respondent to any campaigns during the campaign ban.

On the ground that the voters of Raphael Chota Ward were deterred from voting due to the death of Joram Leta, this Tribunal finds that the Petitioner, PW2 and PW3 failed to provide sufficient evidence linking the Respondent or his agent to the death of Joram Leta. Further, the Petitioner failed to provide evidence showing that a majority of voters were unable to vote for the Petitioner or any other candidate due to the fear caused by the said death. This is especially so because none of the witnesses were able to confirm that they saw the Respondent at the incident that resulted in the death of Joram Leta.

As regards the allegations that the Respondent ferried voters from LCC Chipata Polling Station to Kalanga Polling Station and thus prejudiced the Petitioner who did not have the capacity to ferry the voters himself. This Tribunal finds as follows:

1. That it cannot find as a fact that such confusion did in fact prevail at the said LCC Chipata Polling Station because the ECZ was not joined as a party to these proceedings and as such, there was no testimony from ECZ, or even any other evidence that showed that the register was moved except the testimonies of PW7 and PW9. In fact, PW7 was a member of UPND as such, cannot be said to be an independent witness to the event.
2. The Petitioner failed to show that the Respondent himself, or his agent were the persons who ferried the voters to Kalanga Polling Station. What was established by the Petitioner through the evidence of PW7 and PW9 was merely that the Respondent was present at the polling station at which the alleged confusion occurred.

As regards the ground that the Respondent committed acts of destruction against the Petitioner's campaign material and thus inhibiting his ability to campaign, this Tribunal finds that no evidence was adduced to prove that any campaign material was destroyed or that the Petitioner was ever unable to campaign due to such destructive acts. No evidence other than the testimony of PW1 was adduced to support this ground. Even if the Petitioner's material was destroyed as alleged, the Petitioner himself testified that he did not see the Respondent or his agent removing the said materials but merely saw unnamed PF cadres.

As regards the allegations of bribery, this Tribunal notes that PW4, PW6 and PW8 could not testify to being given the said materials by the Respondent or his agents. Further, none of the witnesses were able to provide evidence to show that other persons were influenced into voting for PF as a result of the alleged gifts of cash, food and regalia. Therefore, this Tribunal cannot find as a fact that the Respondent or his agent committed the said acts of bribery and that such bribery affected the decision by the electorate.

Finally, on the allegation that the ECZ and the Respondent changed the results of the elections by tampering with the Gen 20, it is our finding that the Petitioner has failed to prove this allegation to the required standard as he did not exhibit the documents he claimed to have been tempered with and PW5's Affidavit did not contain any exhibits to this effect. Further, the Petitioner did not call ECZ as a witness or bring any action against ECZ regarding these acts. The Tribunal cannot therefore find as a fact that the alleged changes to the results did in fact occur.

In conclusion, this Tribunal finds that the Petitioner has failed to prove to the required standard that the Respondent was not a duly elected Councillor of Raphael Chota Ward as he has failed to provide evidence that the Respondent or his agent (with the knowledge and consent of the Respondent);

1. Committed a corrupt practice, illegal practice or other misconduct and as a result of which the majority of voters of Raphael Chota Ward were or may have been prevented from electing the candidate they preferred; and
2. That there was any non-compliance with the provisions of the Electoral Process Act relating to the conduct of elections..

We therefore find that the Respondent was duly elected to the office of councillor for Raphael Chota Ward.

On the issue of costs, we are guided by the case of *Anderson Kambela Mazoka v Levy Patrick Mwanawasa (3)* in which the Supreme Court said the following:

“As we have always said on costs in matters of this nature, it is in the interest of the proper functioning of our democracy that challenges to the election of the President, which are permitted by the Constitution and which are not frivolous should not be inhibited by unwarranted condemnation in costs. In the event, it is only fair that each of the parties should bear their own costs.”

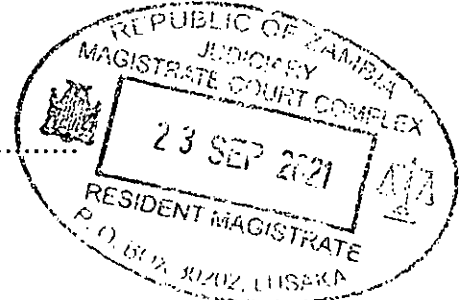
We adopt the reasoning as our own and order that each party bears their own costs.

Petition dismissed.

We direct the parties’ attention to rule 24 of the Tribunal Rules allowing an appeal to the Constitutional Court within 14 days of this decision.

Dated the day of September 2021.

Hon. F Hamaundu
Chairperson



Hon K Banda
Honourable Member

Hon H Mdala
Honourable Member