

For the 1st Respondent: Mr M. Chitabo of Chitabo Chiinga and Associates

For the 2nd Respondent: Mr M. Mukwasa-State Advocate

Cases referred to:

1. Michael Mabenga Vs Sikota Wina and others [2003] Z.R. 110
2. Mazoka and others Vs Mwanawasa and others [2004] Z.R. 138
3. Lewanika and others Vs Chiluba [1998] Z.R. 79

Legislation referred to:

Constitution of Zambia, Cap 1 - Art. 129

Electoral Act No. 12 of 2006 - SS. 82(1) and 93(2)(a)

Electoral (code of conduct) Regulations (S.1.90 of 2006 - Regs. 4, 6, 7 and 10

JUDGEMENT

Mushabati, JS., delivered the judgment of the Court.

This is an appeal against the High Court Judgment of 17th July, 2007 in an election petition in which the 1st Respondent was declared as the duly elected Member of Parliament for the Mwansabombwe Parliamentary Constituency in the Parliamentary General Elections held on 28th September, 2006.

In this judgment, we shall continue to refer to the appellant as the petitioner, the first respondent and second respondent as the 1st Respondent and second Respondent, respectively, the designations they held in the court below.

The undisputed facts of this case are that both the petitioner and the 1st Respondent were candidates for the Mwansabombwe Parliamentary Constituency Elections which were held on 28th September, 2006. The petitioner contested under the ticket of the Movement for Multiparty Democracy Party

(MMD) and the 1st Respondent was candidate for the Patriotic Front (PF). There were other candidates who contested the Mwansabombwe seat but did not petition the result.

The 1st Respondent was declared the winner of the Mwansabombwe Parliamentary Constituency seat as he polled more votes than any other of the contesting candidates.

The petitioner in this case pleaded a number of malpractices in the said elections which were mainly attributed to Mwata Kazembe, and these were verified by an affidavit. The allegations against Mwata Kazembe were that he actively took part in politics, indirectly or directly, as 1st Respondent's agent. He campaigned for the 1st Respondent by telling the MMD party officials not to campaign and vote for the MMD in general and the petitioner in particular. He used intimidation against the petitioner's supporters and some were physically assaulted by him in the presence of the 1st Respondent. Other allegations against the Mwata were that he threatened to remove any Headman who did not support his preferred candidate, namely the 1st Respondent. Some teachers were threatened with transfers from his kingdom if the Patriotic Front lost. As for the MMD supporters they were threatened with expulsion from the Mwata's Kingdom. The 1st Respondent and his agents were also accused of engaging themselves, during the campaign trails, in acts of intimidation, violence and bribery.

The verification affidavit showed that the 1st Respondent and his part the Patriotic Front, through their agent, His Royal Highness Mwata Kazembe, were engaged in bribery, giving gifts, intimidation, threats and violence against the petitioner and his MMD supporters as proved by exhibits which were collectively marked as "MM1". The second Respondent failed to curb the illegal and immoral campaign tactics used by the 1st Respondent and his supporters.

The petitioner's case rested on the evidence of six witnesses, including himself. Their evidence can be summarized as follows, PW1 Maybin Kabamba Mubanga, the petitioner, told the court that he was one of the five candidates who took part in the Mwansabombwe Constituency Parliamentary Elections on the ticket of MMD. The other four candidates were sponsored by United Democratic Alliance, Heritage Party, Patriotic Front and National Democratic Front. The fifth was an Independent candidate. During the campaign period his opponents, the Patriotic Front, did not adhere to the Rules and Regulations made by the Electoral Commission of Zambia. The malpractices in which the Patriotic Front Party was involved were intimidation and violence on his party organizers. The Mwata, who wielded great influence in the area, acted as an agent of the 1st Respondent and actively campaigned for the 1st Respondent. The Mwata even refused to meet the Petitioner when he wanted to pay a courtesy call on him. He was quoted in the Post Newspaper of 5th August, 2006 as having declared openly his support

for the Patriotic Front Party and that he did not want the Petitioner to stand in Mwansabombwe Constituency.

P.W.1 received numerous reports against the Mwata from his supporters, among them were Webby Mwansa, a constituency Youth Secretary for MMD and Headman Chishishila also known as Kabotolo. Both were told that the Mwata did not want the MMD and the petitioner in his Chiefdom. Headman Chishishila was further told to inform his subjects in the village to vote for a change as the Mwata did not want President Mwanawasa and the Petitioner. P.W.1 paid the fines for his supporters, who, after being assaulted by the Mwata, were detained by the Police and ordered to pay K30,000 admission of guilt fines. P.W.1 lodged a complaint, both to the Police and District Secretary, of the assaults on his supporters.

P.W.2 Cynthia Kasanda, told the court that on 10th September, 2006, whilst campaigning with others for the Petitioner, met Mr George Chilumanda at the market. He told them that if they wanted to see him they could find him at a Guest House called Dikurusi. When they went to the said Guest Hose, they were met by a Mr Mutiti who offered to take them where Mr Chilumanda was. They were instead taken where the Mwata was. The Mwata told them that he did not want any people who mentioned the MMD, the petitioner and Mr Mwanawasa.

He warned them that if they were not careful some of them were going to die. The Mwata then closed the door and began to physically assault P.W.2 and her friends. The Mwata was joined, in beating them, by Mr Mutiti and Mwape Kabungo. They only managed to escape or run away after the door was opened by the Guest House workers who realized that some property was being damaged. P.W.2 and her friends, except for Kapensi, who was apprehended when the rest ran away, were summoned back to the Guest house by one Kapanshya, the Mwata's messenger. On arrival at the Guest House, they still found the Mwata and was then in company of Mutiti, Pepe, Kapondo, Superior and the 1st Respondent. The Mwata addressed them against campaigning for the petitioner and the President. He then urged them to vote for the boat. He warned them that if they were not careful their houses were going to be demolished. He thereafter told them to go away but said he would meet them at the Police Station. The following morning, P.W.2 and her friends were taken to the Police Station where they were put in cells on instructions of Mwata Kazembe. They were accused of following Mwata Kazembe to the Guest House. As a result of the treatment P.W.2 and her friends received at the hands of Mwata Kazembe, they stopped campaigning for the Petitioner.

P.W.3, Chishala Joseph Kabotolo, a dethroned Village Headman, told the court that he was summoned by Mwata Kazembe to his palace through his Messenger Kapanshya. As P.W.3 had just arrived from

where he had gone and felt tired, he went to the Palace late. He was asked why he had gone there late. He explained why he was late after which he was told why he had been summoned to the Palace. He was instructed that he and his fellow Headmen were to tell their subjects that they should vote for the 1st Respondent and Mr Sata. Anyone who was to act contrary to the instructions, he/she was to be chased away. P.W.3 told the Mwata that he (P.W.3) had no power to stop his subjects from doing what they wanted just in the same way he could not tell them to leave their respective Churches to join him in the Catholic Church. This annoyed Mwata Kazembe, who retorted by asking P.W.3 who between the two of them was a slave. When P.W.3 answered that he did not know, the Mwata said 'Don't you know that the life of chicken is in the hands of its keeper and I am the one who keeps you and your well being is in my hands. So I have the right and power to do anything to you. As God is the Creator and I am the one who destroys. Since you have disobeyed me I will sent you to my court so that they can order you to pay two goats and four chickens and remove you from being Headman". Indeed, P.W.3 was later summoned to the Chief's Traditional Court where he never went. He was instead followed to his house where he was informed of his removal from his post as Headman for disobeying the Chief. He was further told that after the elections, he would be chased away from his village so that he could go where the petitioner and President Mwanawasa would be. He denied the allegation that he was removed from his post because he had disobeyed the rule of keeping cleanliness in the village.

P.W.4, Mwila Paul Mukeya, told the lower court that when he went to see his mother, who lived 5 kilometres away, he found her away. He followed her to Kasese Community School where she had gone for a Patriotic Front Party meeting under the chairmanship of the 1st Respondent. Whilst at Kasese Basic School, he was called by Beatrice Daka, who, apart from being the Headmistress of the School, was the Presiding Officer for Kasese Polling Station. Beatrice Daka enquired about the health of the people at Kasengu Village after which he was asked as to which party he supported. P.W.3 told Beatrice Daka that he supported MMD. On hearing this, Beatrice Daka asked him whether he had not heard of the Mwata's instructions that he (the Mwata) did not want anybody to vote for the Petitioner and President Mwanawasa. The Mwata wanted the people to vote for Patriotic Front Party candidates; namely, the 1st Respondent and Mr Sata. He was told to relay this information to the people of the village of which he did. On 27th September, 2006, P.W.4 was given a letter in which the Mwata instructed him to inform the voters to vote early. Eventually, P.W.4 was scared of continuing with his campaigns for MMD. P.W.4 was further told that anybody who was to be summoned to the palace was going to be banished from Mwata Kazembe's land.

P.W.5 Webby Mwansa, said he was involved in campaign for President Mwanawasa when on 29th August, 2006 he was summoned to the Mwata's palace. Whilst in the palace, P.W.5 was questioned by the Mwata himself why he was campaigning for President Mwanawasa, the petitioner and the MMD Ward Councillor whom the Mwata did not want. He was ordered to stop his campaigns for the three people or else he would be made to run mad. This frightened P.W.5 and as a result he handed the Mega-phone, he was using for campaigning, to the Mwata.

P.W.6, Gardner Ketty Kabobwa, the last petitioner's witnesses and the MMD vice-Chairman for Mwansabombwe Ward, received a report that some MMD cadres were in Police Custody at Mwansabombwe Police Station. On going to the Police Post, P.W.6 found eight women and one male in Police Custody. He was informed of how they were beaten and later handed over to the Police. The Police Officers confirmed to him that his cadres were taken there by the Mwata, the 1st Respondent and their people. In all ten of them were detained out of which only one had paid a fine of K30,000. The rest were also expected to pay the same amount. P.W.6 sympathized with some of the women who had children and he paid the fines for them to be released. P.W.6 then made a formal report to the Police about the assault on the detained cadres by the Mwata. The Police declined to take any action because the Mwata was involved.

The 1st Respondent called five witnesses, including himself. The 1st Respondent was the first defence witness. The 1st Respondent told the court that he was a candidate for the Mwansabombwe Parliamentary Constituency on the PF ticket. The seat was contested by three other Political Parties, namely, MMD, UDA and NDF and the fourth candidate stood as an independent. The candidate for the NDF Party was Prince Diuru, the Mwata's own brother. He further testified that he was well versed with the code of conduct for people and parties taking part in an election. They were not allowed to give any gifts during the campaigns. Campaigns were expected to close at 18:00 hours. He denied the allegations made against him by the petitioner that he was always found in the company of the Mwata. On the evidence of P.W.2, Cynthia Kasanda, the Respondent denied being with the Mwata when she and others were summoned by the Mwata and that in fact the Mwata was not his agent. His campaigns were peaceful, devoid of any intimidations and violence. He only learned of the alleged assault on P.W.2 through a Press Article in the Post Newspaper which he saw after the elections. He was the winner of the seat with 6,818 votes as against 2,400 for his nearest rival. He denied any involvement in the assault on the MMD cadres by the Mwata and also in the removal of P.W.3, Headman Kabotolo, from his post as village Headman. Neither did the 1st Respondent prevent or stop P.W.6 from carrying out campaigns for his chosen candidate. As for the letter MM1 dated 29th September, 2006 (27th September, 2006) from Mrs Beatrice Daka to P.W.4 the 1st Respondent said he had nothing to do with it as his name was not mentioned therein and had no bearing on the elections.

D.W.2 Muyembe Chipota told the court that he was appointed as the Convener/Chairman of the traditional Indunas Court by the Mwata with powers to chair meetings for village headmen. Villages were expected to be cleaned just before the Mutomboko Ceremony and in this regard there existed a Cleaning Committee composed of village Headmen. D.W.2 supervised the cleaning of Kasao Village for which he was even commended by Joseph Kabotolo, the Headman of Chishishila Village. Joseph Kabotolo was advised what to do in order to maintain cleanliness in his village. Kabotolo's village was later visited for inspection but Headman Kabotolo was not found at home. His village was found to be

dirty and so the villagers were fined a chicken each. When time to collect the chickens came, D.W.2 and his group went to Kabotolo's village. On arrival, they found the villagers waiting for them but they were ordered to disperse by Headman Kabotolo Chishishila. A court sitting to which Kabotolo was summoned, was convened but it was adjourned because of Kabotolo's behaviour. When the court sat for the second time, Headman Kabotolo, also referred to as Chishishila, failed to attend court. His case was decided in his absence and was subsequently removed from his post as village Headman because of his insulting and insubordinate behaviour towards his fellow Headmen and the Lunda Royal Establishment. D.W.2 said at no time did the Mwata instructed the Headmen to vote for the 1st Respondent and Mr Sata. Neither did he tell them to vote for his own brother Prince Diuru.

D.W.3, Prince Diuru Kabeya, one of the losing candidates for the Mwansabombwe Parliamentary Constituency in the elections under review and a Senior Induna of the Mwata, told the court that Headman Chishishila, otherwise also known as Joseph Kabotolo, was removed from his post for insubordination. This was after Headman Chipota (DW.2), Ntumbila and Nfwalo made a complaint against him. When he was removed from his post his subjects were happy. The Mwata had nothing to do with Kabotolo's removal. D.W.3 further said he was not aware of any call made to Headmen by the Mwata on 28th August, 2006.

D.W.4 (R.W.4), was Carol Kasanda, one of the women in the group that went to Dikurushi Guest House where they wanted to meet George Chilumanda. As they were going to Guest House, they were singing praise songs about the petitioner. On arrival at the Guest House, Mr Mutiti came to ask them what they wanted. They told him that they were looking for Mr George Chilumanda. When Mr Mutiti told them that George Chilumanda was not there they insisted on seeing him. They were then ushered in and found the Mwata inside. The Mwata ordered the door to be closed so that he could beat them. They, however, managed to escape without any of them being beaten. They were later summoned back to Dikurushi Guest House where they still found the Mwata in Company of two young men and one lady. The 1st Respondent was not there. P.W.2 was also missing as she did not go back with the others when they were summoned by the Mwata. They were summoned to the Palace on 11th September, 2006. Whilst at the Palace they were informed, by the messengers, to go to the Police. They told the Police why they had gone there. The Police eventually fined them K30,000 each for making noise for he Chief. D.W.4 said they admitted to pay the fines because they had provoked the Mwata.

D.W.5 (R.W.5), John Mutiti, said he was on 10th September, 2006 at Dikurushi Guest House with the Mwata at 21.00 hours when some people came singing to the Guest House. The Mwata ordered him to find out what those people wanted. They were looking for Mr George Chilumanda, their campaign Manager. He told them that he was not there but they did not believe him. They continued singing MMD songs as they entered into the Guest House. On reaching where the Mwata was, he ordered the door to be closed so that they could be apprehended and taken to the Police Station. Those people

scampered around and managed to escape except for one man. The apprehended man was taken to the Police Station.

The following morning when he (D.W.5) went back to the Police Station, he found that some ladies had been apprehended and charged with conduct likely to cause breach of peace, for which they were fined.

These are the summaries of the evidence presented before the trial court.

The learned trial judge made the following findings of fact in this case. That both the petitioner and the 1st Respondent contested the Mwansabombwe Parliamentary Constituency Seat on MMD and PF tickets, respectively.

That the Mwansabombwe Parliamentary Constituency was within Mwata Kazembe Royal Establishment.

It was also found as a fact that Mwata Kazembe wielded great powers and influence among the people in his Chiefdom.

The court made a further finding of fact that the Post Newspapers published some articles in which the Mwata declared that MMD would be leaving his Chiefdom that year and that the Petitioner would also go whether he liked it or not. The articles in question were contained in the issues of the Post Newspapers dated 1st September, 2006 and 5th October, 2006. It was also an established fact, as per article of 1st September, 2006, that the Mwata had in fact appointed a six man team for under ground campaign for the Patriotic Front Party of Mr Michael Sata.

In the latter article of 5th October, 2006 the Mwata "observed that it is not only Members of Parliament from the ruling party who could develop their Constituencies. It was good that there was a strong opposition in parliament. It is healthy for the nation."

The lower court further found as a fact that the Mwata had whipped MMD cadres who chanted slogans in support of President Mwanawasa and the MMD Parliamentary Candidate, Maybin Mubanga. This was contained in the Post Newspaper Issue of 13th September, 2006. It was further established fact, in the

same article that the Mwata, himself, took some of the cadres to the Police Station where he found a Police Officer on duty asleep and the Mwata blasted that officer for sleeping on duty.

In the same article the Mwata was quoted as having said that the appellant has failed to perform as a Member of Parliament for the said area and asked why he should be given another mandate.

The court still found as a fact that the MMD cadres or supporters who had gone to Dikurushi Guest House on 10th September, 2006 found the Mwata there and that the Mwata was in fact the proprietor of the said Guest House.

Finally, the court stated that it was a fact Headman Chishishila was removed from his post during the campaign trails.

The court then analyzed the evidence on record and made some findings of fact. One of such facts was that she did not believe D.W.4's testimony that the cadres were not beaten. On the contrary, she was satisfied that they were beaten or whipped because they showed disrespect to the Mwata and not on political grounds.

The court also found that the Headman Kabotolo/Chishishila was removed from his post on the ground that he refused to attend court sitting and not because he disobeyed the Mwata.

All in all, the court below dismissed the petition because the Mwata did not say he supported Mr Chitonge, the Patriotic Front Party candidate. In all that he said he was merely expressing his personal political opinion about the MMD and its policies. In so doing he was exercising his rights pursuant to Regulation 6(1)(a) and (b) of the Electoral (Code of Conduct) Regulations.

In summary the court was saying the Mwata never influenced his subjects into voting for Mr Chitonge of the Patriotic Front.

The appellant was dissatisfied with the lower court's decision: hence this appeal. He filed five grounds of appeal. These are:

1. The learned trial judge erred in law and in fact and misdirected herself in finding that "The Chief has great powers and influence upon the people in his chiefdom" and yet did not arrive at the conclusion of declaring the election of the Respondent null and void.
2. The learned trial judge erred in law and fact and misdirected herself by finding that "That Chief confirmed his dislike of Mubanga in the Post Newspaper Article; and yet failed to declare that the election of the Respondent was null and void.
3. The learned trial judge erred in law and fact and misdirected herself in establishing that "supporters of MMD went to Nakabanda (D. Kurushi) Guest House and found the Chief, later the supporters were detained and fined" when there is no law which prevents supporters to campaign at night.
4. The learned trial judge erred in law and fact and misdirected herself in holding that "the Chief whipped them (the MMD supporters) not for political reasons but because they did not respect him "when in the same judgment the learned trial judge said" I therefore find that the Chief did say what has been published" in the Post Newspapers that the people of Mwanabombwe should not vote for the appellant.
5. The learned trial judge erred in law and fact in finding that "the Chief wanted change" and yet concluded in the judgment that "I am satisfied that the chief's utterance published in the Newspaper about MMD and the Petitioner did not adversely affect the parliamentary elections in Mwanabombwe Constituency" the judgment of the Hon. Trial Judge is full of contradictions.

These grounds were buttressed with written heads of argument and oral submissions. Grounds one and two were argued as one. The gist of the arguments was that the court below misdirected itself when it failed to appreciate the special position enjoyed by the Chiefs and Headmen in the rural areas in general and in their Chiefdoms and villages in particular. Article 129 of the Constitution of Zambia forbids Chiefs from engaging themselves in partisan politics. Though accepting this provision of the law; the court below found otherwise when it ruled that Mwata Kazembe had not breached this Article despite accepting that he had said what was attributed to him by Post Newspaper articles. The court below found as a fact at page J50 or page 66 of the record of appeal when it said "when I analyse the extract from the Newspaper on page 1 of the petitioners bundle of documents, it is clear that the Chief spoke strongly against the MMD and the Petitioner in particular". The court's decision was therefore against the weight of evidence on record. The counsel urged this court to determine the fact whether the Mwata did not contravene Article 129 of the Constitution because he did not only engage himself in partisan politics; but he abused his authority by exerting undue influence on his subjects during the rural up to 2006 general elections.

Grounds 3, 4 and 5 were also argued as one. It was argued that the court's findings as outlined in the three grounds of appeal were shocking and against the spirit of democratic election. The finding that the MMD supporters ought not to have campaigned after 18.00 hours was not supported by any evidence or law. The court below, however, disbelieved D.W.4 (R.W.4) when she said the MMD cadres were not whipped. She made a specific finding that the MMD supporters were whipped for showing disrespect to the Mwata and not for political reasons.

The learned counsel for the Petitioner wondered how the court below knew everything that the Mwata was thinking even if there was no such evidence on record. He posed two questions on why the evidence by the Petitioner's witness on the Mwata's violent conduct was avoided and why the court below concluded that the Chief's utterances, as published in the Post Newspaper about the MMD and the petitioner, did not adversely affect the parliamentary elections in the Mwansabombwe Constituency. Mr Bwalya argued that the Mwata was not an ordinary Chief but a Senior Chief of the Lunda people with sub-Chiefs under him as evidenced by the testimony of D.W.3 Prince Diuru Kabeya. The argument that the Chief was entitled to his opinion as per Regulation 6(1) of the Electoral (code of conduct) Regulations was a wrong interpretation because this pre-supposed that Article 129 of the Constitution, which forbids Chiefs from joining active partisan politics, was subordinate to the said Regulation 6. He urged this court to find that Mwata Kazembe acted and spoke politics when he condemned and whipped the MMD cadres. The Mwata's conduct must render the elections in Mwansabombwe Constituency as not being free and fair and so the respondent's election must be declared void. He, therefore, urged this court to up-hold the appeal.

In his oral submission Mr Bwalya repeated more or less what is already contained in his written heads of argument. He addressed the court on the content of Regulations 4(1) and (2) and 7(1)(a)(e) and (i) of the Electoral (Code of Conduct) Regulation. He said Regulation 4 imposed a duty on every citizen to be responsible and maintain peace during the election campaign period so as to render the elections free and fair. On Regulation 7, he argued that the Electoral Commission and the Police had a duty to see to it that the Electoral (Code of Conduct) Regulations were observed.

The involvement of the Mwata in elections under review gave undue advantage to the 1st Respondent. He uttered disparaging remarks against the appellant. The declarations made by the Chief during the elections were acknowledged by the court. The court below found as a fact that the Chief's voice was supreme in his Chiefdom, it ought to have considered the effect of his influence had on the elections.

He cited the case of Mabenga Vs Sikota Wina(1) in support of his argument relating to the Chief's influence.

The petitioner was refused access to the Mwata for him to pay homage. The Police failed to act on the MMD cadres' complaint against the Mwata. The Police, being the agents of the 2nd Respondent who had failed to maintain law and order, rendered the 1st Respondent's election, as Member of Parliament, a nullity. The rest of the submissions were a repetition of the written heads of argument.

In response to the petitioner's written heads and oral submissions Mr Chitabo filed in written heads and made a brief oral submission.

The grounds of appeal were globally argued. Mr Chitabo argued that the burden and standard of proof required in cases of this nature was high as laid down by this court in the case of Mazoka and others Vs Mwanawasa and others(2). He urged us to consider the question whether voters in Mwanabombwe were or may have been prevented from electing the candidate of their choice. He said there was no such evidence.

On the participation of the Chief and Headmen in the campaign, Mr Chitabo submitted that it was not the duty of the 1st Respondent but that of the 2nd Respondent to see that they did not get involved in the electoral process.

In his oral submissions Mr Chitabo said reference by Mr Bwalya to Regulation 4 and 7 was wrong because these were not alluded to in the memorandum of appeal.

On the removal of Headman Kabotolo from his position, he argued that the court correctly directed itself when it held that he was dismissed or removed by the Chief's Council for indiscipline. He then attacked the petitioner's failure to lodge his complaint to the District Conflict Management Committee.

He argued that the Police's failure to take action on the complaint by MMD cadres ought to have been reported to the Police Public Complaints Authority. In any case, he submitted, the 1st Respondent could not be punished for the Mwata's wrongs. There was no evidence on record to suggest that the voters in Mwanabombwe Constituency were prevented from electing a candidate of their choice as required by Section 93(2) of the Electoral Act.

The learned counsel for the 2nd Respondent did not file any written heads of argument but made a brief oral submission that though the Mwata misconducted himself, no complaint was reported against him to the District Conflict Management Committee. On the report to the Police by the MMD cadres, Mr Mukwasa submitted that the court had disbelieved the Petitioner's witness. On the contrary there was evidence on record that the Mwata had gone to the Police to report the MMD cadres for the offence of conduct likely to cause a breach of peace. In view of all that transpired, the 2nd Respondent could not be blamed for failing to action against the Chief.

In reply to the Respondent's submissions, Mr Bwalya said the essence of his submission in relation to Section 93(2) of the Electoral Act was on the general atmosphere prevailing during the campaigns. It was not conducive to fair and free elections.

He reiterated that there was no dispute that the Mwata had given interview to the Post Newspapers in which he said he did not want the MMD in his Chieftdom and that he did not want both the Petitioner and his Presidential candidate. The Chief further confirmed that he had whipped the MMD cadres. As it will be noted, the Chief picked on the MMD alone, out of all the contesting parties, for his attacks. Though the 1st Respondent had indicated in his pleadings that he would call the Mwata as a witness, he did not do so and such failure was self destruction of his defence.

On the 2nd Respondent, Mr Bwalya argued that it could not plead ignorance of what was obtaining on the ground during the campaigns. It ought to have been pro-active rather than to being re-active.

These are the summaries of the submissions by all learned counsel.

We have considered the submissions by all learned counsel and the judgment appealed against in the light of the evidence on record.

We have no doubt that the appeal hinges on the alleged conduct of Mwata Kazembe during the run up period to the General Parliamentary and Presidential Elections held on 28th September, 2006 as they related to the Mwanabombwe Parliamentary Constituency.

It is clear to us that the success or failure of this appeal will depend on the view that we hold as regards the alleged conduct of Mwata Kazembe.

On the totality of evidence and submissions, we find that the following facts were of common cause to both parties.

That Mwata Kazembe, as the most Senior Chief of the Lunda people of Luapula Province, wields a lot of powers and influence among his subjects.

We are also satisfied that ten or so MMD cadres were subjected to physical assault by Mwata Kazembe after which they were reported to the police where they paid admission of guilt fines of K30,000 each. It is also not in dispute that during the run up to the said elections, Headman Kabotolo alias Headman Chishishila of Chishishila village of Mwata Kazembe's Chiefdom, was relieved of his post as Headman just before the elections. As to the reasons why he was removed, we shall allude to them in the course of our judgment.

The court below found as a fact and which fact was accepted by both parties that Mwata Kazembe did express what was termed as his personal opinion for his support for a particular candidate and a Political Party.

The main issues to be resolved are:

- (i) Were the Chief's conduct and utterances purely personal and a mere expression of his democratic right as a citizen?
- (ii) Could the Chief's involvement in the campaigns have influenced the out come of the parliamentary results in Mwansabombwe Constituency? and if so did his conduct have any influence on the election of the 1st Respondent as a Member of Parliament for the Mwansabombwe Parliamentary Constituency?
- (iii) Was the assault on the cadres politically motivated in that the victims held different views from those of the Mwata?
- (iv) Was Headman Chishishila's removal from his position politically motivated in that he held a contra view to that of the Mwata?

First and foremost we wish to comment on Mr Chitabo's argument that the memorandum of appeal did not allude to Regulations 4 and 7 of the Electoral (Code of Conduct) Regulations as argued by Mr

Bwalya. Our reaction to this is that points of law are not included in the memorandum of appeal. These are matters for submissions. Mr Chitabo's argument has therefore not basis.

In dealing with appeal, we shall globally consider all the grounds together because they are interrelated.

We shall first consider the Mwata's conduct and utterances. Did he act within his democratic rights? This was argued under the combined first ground and second ground of appeal. Mr Bwalya said the Mwata's conduct and utterances were partisan and for that reason he was precluded by Article 129 of the Constitution of Zambia from conducting himself in that manner. He was further under Regulation 10(i) of Electoral (Code of Conduct) Regulations expected as a traditional leader not to exert any undue or excessive influence on his subjects to support a particular political party or a candidate.

For ease of reference, we reproduce Article 129 of the Constitution of Zambia and Regulation 10(i) of the Electoral (Code of Conduct) Regulations (S.I.No. 90 of 2006). Article 129 reads: A person shall not, while remaining a Chief, join or participate in partisan politics.

Regulation 10(1)(i) of the Electoral (Code of Conduct) Regulations reads: The commission shall where reasonable and practicable to do so: Ensure that traditional leaders, such as Chiefs and Headmen, do not exert undue influence on their subjects to support a particular political party or candidate.

It was argued on behalf of the 1st Respondent and found by the court below that the Mwata was only exercising this democratic right in whatever he was doing during the run up period to the elections.

We have to consider the above argument in the light of the law cited above. Mwata Kazembe was, throughout the proceedings in the court below referred to as the "Mwata". He was not referred to by his personal name. The Supreme Law of the Country, the Constitution of Zambia, clearly forbids Chiefs from acting in a partisan way.

Regulation 10(1)(i) of the Electoral (Code of Conduct) places an obligation on the Electoral Commission of Zambia, where possible, to ensure that tradition leaders, Chiefs and Headmen, do not exert undue influence on their subjects to support any particular political party or candidate. This directive under the said Regulation implies that Chiefs and Headmen are not expected to use their positions to exert their

political views on their subjects. This is in fact also enshrined in Section 82(1) of the Electoral Act No. 12 of 2006. This section reads: (1) No person shall directly or indirectly, by oneself or by any other person.

- (a) make of or threaten to make use of any force, violence or restraint upon any other person;
- (b) inflict or threaten to inflict by oneself or by any other person, or by any supernatural or non-natural means, any physical, psychological, mental or spiritual injury, damage, harm or loss upon or against any person; and
- (c) do or threaten to do anything to the advantage of any person; In order to induce or compel any person
 - (i) to register or not to register as a voter;
 - (ii) to vote or not to vote;
 - (iii) to vote or not to vote for any registered party or candidate;
 - (iv) to support or not to support any registered party or candidate; or
 - (v) to attend and participate in, or not to attend and participate in, any political meeting, march, demonstration or other events;
- (d) interfere with the independence or impartiality of the commission, any member, employee or officer of the commission;
- (e) prejudice any person because of any past, present or anticipated performance or a function under this Act;
- (f) advantage, or promise to advantage, a person in exchange for that person not performing a function under this Act; or
- (g) unlawfully preventing the holding of any political meeting, march, demonstration or other political event.

The Mwata, according to the evidence on record, said he did not want the petitioner and the MMD in his area. This was not disputed. There is evidence showing that P.W.2 and others were physically abused as they campaigned for the petitioner and which fact was acknowledged by the court below when it said at 141, (page 57 of the record): The testimony of the 1st Respondent to the effect that one of the campaign rules was that people were supposed to stop campaigning by 18.00 hours every day and resume in the morning was not challenged ... I therefore credit that part of testimony and find that it was unreasonable and unacceptable for anybody to be campaigning in the manner that the MMD supporters did at night when some people were supposed to be sleeping and others just relaxing or enjoying peace. It was wrongful to campaign after 18.00 hours.

It is clear from the above that the court below was justifying the Mwata's action against the MMD's cadres. Both the Electoral Act No. 12 of 2006 and the Electoral (Code of Conduct) Regulations S.I. 90 of 2006 do not have a prohibitive or restrictive provision on time for campaigns. We do not, therefore, understand where the learned trial judge derived the above conclusion.

p.W.3, Headman Chishishila, told the lower court that when he was summoned by the Mwata he was instructed to go and inform his subject in the village to vote for the 1st Respondent and Mr Sata and was warned that those that would resist this directive were to be banished from the area or village. When p.W.3 refused to comply, he was told that "the life of a chicken was in the hands of its keeper and p.W.3's life and well being were in the Mwata's hands."

It did not take long before this witness was dethroned from his post as a Headman. Given the above incidents, we do not believe that these were mere coincidences of victimization of the people who supported the MMD in general and the petitioner in particular. We perceive the Mwata's conduct as being partisan and in his stance, he did not like the MMD and the Petitioner. His conduct went beyond the exercise of his democratic rights as a Chief. By his conduct, he breached Article 129 of the Constitution of Zambia and Regulation 10(1)(i) of the Electoral (Code of Conduct) Regulations.

We wish briefly to look at the assault on the MMD cadres and removal of Headman Chishishila from his post as Headman. We have already said above that it was not a mere coincidence that both the assaulted cadres and the dethroned village Headman belonged to the Petitioner's camp, so to say. They were punished because of the political view they held which were in conflict with those of the Mwata.

~~Mr Bwalya submitted that this was done in order to tilt the political atmosphere in the favour of the 1st Respondent. On the other hand, it was argued on behalf of the respondent that the cadres' whipping was a mere disciplinary action taken against them for showing disrespect to the Mwata. This was evidenced by the fact that they paid admission of guilt fines and failed to lodge their complaints to the District Conflict Management Committee.~~

As for P.W.3, the argument was that he had disobeyed the summons for his appearance before the Indunas Traditional Court. As we said above that the whipping of the cadres was not in contention but the reason giving rise to the punishment meted out.

At the time the cadres were punished, the Mwata was not alone. So was it really necessary for him to physically go to the Police to report the incident after the cadres had been beaten? Obviously, his intention was to draw away the attention of the Police from his wrong doing by prevailing over the Police to have the MMD cadres charged with the offence of conduct likely to cause a breach of peace. Both the petitioner and P.W.6 made attempts to formally report the assault by the Mwata but the Police took no action.

The Petitioner and P.W.6 may not have reported the matter to the District Conflict Management Committee but we believe that a formal report was made to the Police. We find that Mwata Kazembe's conduct was not of a Senior Chief but that of a politician despite the provisions of Article 129 of the Constitution of Zambia which forbid Chiefs from taking part in partisan politics.

What we have said above still brings us to the conclusion we made elsewhere above that the Mwata's conduct was politically motivated.

We now come to the last issue. This is whether the Mwata's conduct influenced the voters in Mwanabombwe Parliamentary Constituency to vote in a particular way.

The court below found as fact that the Mwata had used very strong language against the MMD and the petitioner. The court, in so finding observed as follows: I must say that the Chief used very strong language when he said "you will prove me right or Mr Mubanga right. Whether he likes it or not he is going". The court below however, viewed such evidence as not being enough for a reasonable mind to accept it as being adequate to support the petitioner's contention.

We must say on the outset that what the Chief is quoted to have said here cannot be looked at in isolation from the rest of the evidence on record.

The Mwata's conduct was not without support for a particular candidate. All the witnesses who came into conflict with him were told that he favoured the 1st Respondent and urged them to vote for him and Mr Sata, all of Patriotic Front. These were P.W.2 Cynthia Kasanda, P.W.3, Chisala Joseph Kabotolo and Mr Sata, also known as Headman Chishishila) and P.W.5, Webby Mwansa. P.W.4, Mwila Paul Mukeya, was written a letter in which he was urged to vote for the 1st Respondent.

We have no doubt that the Mwata's conduct and utterances lead us to one irresistible inference that he was partisan and supported the 1st Respondent and Mr Sata. His actions went beyond the realm of merely exercising his democratic rights which in a matter like this ought to be restricted to registering himself as a voter and casting a vote on the polling day, for a candidate of his choice, but not to campaign for or openly support one particular candidate.

Mr Bwalya argued that the findings of the trial judge were against the weight of her finding on what the Mwata was quoted to have said in the Newspaper. This is what the court below said; when I analyse the extract from the Newspaper on page 1 of the petitioner's bundle of documents, it is clear that the Chief spoke strongly against the MMD and the Petitioner in particular.

The court accepted the fact that the Chief spoke strongly against the MMD and the petitioner. It is surprising that the court below, despite making a finding of fact that the Chief spoke strongly against the MMD in general and the petitioner in particular, when he (the Mwata) said he was disappointed that the MMD had failed to develop his Chiefdom, still found that he was not being partisan but merely exercising his democratic right under Rule 6(1) of the Electoral (Code of Conduct) Regulations.

This Regulation states: Every person shall subject to Regulation 7 have the right to:

- (a) express political opinions
- (b) debate the policies and programmes of political parties.

The learned trial judge addressed her mind to the constitutional provision under Article 129 of the Constitution, which Mr Bwalya said was superior to the Regulation 6(1) of the Electoral (Code of Conduct) Regulations. She, however, failed to appreciate its overriding supremacy over any other piece of legislation which is in conflict with it, in its application.

We have no doubt in our minds that the Mwata's behaviour was not an ordinary "bona-fide" critique of the going on in his area but a direct political attack on the MMD and the petitioner. The Mwata, as already pointed out elsewhere above, wielded a lot of powers in the Chiefdom. P.W.2, P.W.3, P.W.4 and P.W.5 stopped campaigning for the MMD and the Petitioner for fear of victimization by the Mwata. P.W.3 and P.W.5 were summoned by the Mwata to his Palace where they were talked to by the Mwata himself against campaigning for the MMD and the petitioner. P.W.5 was warned that if he did not comply with the instructions he would run mad.

In defence, the 1st Respondent merely said he could not speak for the Chief. In fact it was indicated that the defence would call the Mwata as a witness but he was not. The allegations against the Mwata about his political affiliations have not been rebutted. The Electoral Act and the Electoral (Code of Conduct) Regulations do not allow Chiefs and Headmen to exert undue influence on their subjects to vote for a particular political party or candidate.

In the submission regarding the Mwata's influence on his subjects, we were referred to our earlier decision in the case of Mabenga Vs Wina(1). In that case, the appellant had ferried some Indunas for a secret meeting to boost his election campaign. The appellant had, however, disputed this allegation but was disbelieved. We did say "it is clear that the Indunas were collected at his instance, certainly to be partisan. This was a secret meeting organize by the appellant for the purpose of soliciting them and their subjects' support in the election."

In the instant case before us, we are not dealing with an ordinary Induna; but a Senior Chief. If we can hold that mere Indunas are capable of influencing their subjects in one way or the other; what will make the Senior Chief fail to do so?

In this case, we are satisfied that the removal of the Headman Chishishila from his post by the Indunas was influenced by the Mwata, though he, himself, as a Headman should also not have involved himself in partisan politics. We have no doubt that the Mwata's active role in partisan politics in this case disadvantaged the petitioner who was the target of his (Mwata's) vicious campaign against him in particular and MMD in general.

It is also clear in our mind that the Mwata's conduct was such that a good number of voters were prevented from freely and fairly choosing or electing a candidate of their own choice. The Mwata's conduct and utterances amounted to illegal practices within the ambit of Section 93(2)(a) of the Electoral Act No. 12 of 2006 in that the Mwata was a very influential personality in the Chiefdom whose stance against the MMD in general and the petitioner was capable of influencing the way his subjects voted in Mwansabombwe Parliamentary Constituency election.

The Mwata acted in total disregard of the various pieces of legislation; namely: Article 129 of the Constitution of Zambia, Section 82 of Electoral Act No. 12 of 2006 and Regulation 7(1)(a)(c) and (e) of Electoral (Code of Conduct) Regulations S.1. 90 of 2006.

We have no doubt the high standard of proof cast on the petitioner, as per our decisions in Mazoka and Others Vs Mwanawasa and Others(2) and Lewanika and others vs Chiluba(3) to prove his case, has been discharged.

We, therefore, declare that the elections in Mwansabombwe Parliamentary Constituency were not free and fair and we are therefore bound to disturb the lower court's findings of both law and fact. We, therefore, declare the election of the 1st Respondent as Member of Parliament for the Mwansabombwe Constituency as void, though we find no wrongdoing on the part of the 2nd Respondent in the conduct of the elections. The Judgment of the High Court is set aside. The appeal is allowed.

Costs shall follow the event, in default of agreement, they shall be taxed.

.....
E.L. Sakala

CHIEF JUSTICE

.....
D.K. Chirwa

SUPREME COURT JUDGE

.....
F.N.M. Mumba

SUPREME COURT JUDGE

.....
P. Chitengi

SUPREME COURT JUDGE

C.S. Mushabati

MAYBIN MUBANGA Vs SAMUEL CHITONGE AND ELECTORAL COMMISSION OF ZAMBIA

SUPREME COURT

Sakala, CJ., Chirwa, Mumba, Chitengi and Mushabati; JJS.

On 10th July, 2008 and 12th August, 2008

SCZ APPEAL NO. 66 OF 2008

Flynote

Parliamentary election petition-effects of a chief's involvement in active politics, under influence on voters through threats of evictions from the kingdom.

Headnote

The senior chief in the constituency had a preferred candidate and ordered his subjects to vote for that candidate. Voters were threatened with evictions and some were physically assaulted for disobeying the order to vote for the candidate and his political party.

Held.

A chief should not actively participate in partisan politics.

Elections results nullified.

For the Appellants: Mr K.F. Bwalya of KBF and Partners