

IN THE SUPREME COURT OF ZAMBIA

APPEAL NO. 175 OF 2012

HOLDEN AT LUSAKA

(Civil Jurisdiction)

IN THE MATTER OF: ARTICLE 72(1) (A) OF THE CONSTITUTION OF
THE REPUBLIC OF ZAMBIA

AND

IN THE MATTER OF: SECTIONS 93(1), OF THE ELECTORAL ACT
NO. 12 OF 2006

AND

IN THE MATTER OF: MAFINGA PARLIAMENTARY CONSTITUENCY
ELECTIONS HELD ON 20TH SEPTEMBER, 2011

B E T W E E N:

BRELSFORD JAMES GONDWE

APPELLANT

AND

CATHERINE NAMUGALA

RESPONDENT

CORAM: **MWANAMWAMBWA, CHIBOMBA, PHIRI, WANKI, JJS AND
LISIMBA, AG, JJS**

On 24th September, 2013 and 10th January, 2014

For the Appellant: Mr. I. Mulenga of Messrs. Iven Mulenga and
Company

For the Respondent: Mr. R.K. Malipenga of Messrs. Robson Malipenga
and Company and Mr. S. Bota of Messrs. William
Nyirenda and Company

J U D G M E N T

WANKI, JS delivered the Judgment of the Court.

CASES REFERRED TO:-

- 1. Akashambatwa Mbikusita Lewanika, Everisto Hicuunga Kambaila, Dean Namulya Mung'omba, Sebastian Saizi Zulu and Jennifer Mwaba Phiri -Vs- Jacob Titus Chiluba (1998) ZR 79.**
- 2. Anderson Mazoka -Vs- Levy Patrick Mwanawasa (2005) ZR 138.**
- 3. Michael Mabenga -Vs- Sikota Wina, Mafo Wallace Mafuyo and George Samulela (2003) ZR110.**
- 4. Machobane -Vs- The People (1972) ZR 101 CA.**

OTHER MATERIAL REFERRED TO:-

- 5. The Electoral Act No. 12 of 2006.**

This is an appeal against the High Court judgment delivered at Lusaka on the 28th day of March, 2012 dismissing the appellant's petition against the election of the respondent as a Member of Parliament for Mafinga Parliamentary Constituency during the Presidential and Parliamentary General Elections held on 20th September, 2011 seeking to nullify the respondent's election on a number of malpractices as pleaded

in the petition. The respondent denied pleaded malpractices in her answer filed in response to the petition.

The facts not in dispute are that both the appellant and the respondent contested the Parliamentary General Elections held on 20th September, 2011 in the Mafinga Constituency. The appellant stood on the Patriotic Front (PF) ticket, while the respondent stood on the Movement for Multiparty Democracy (MMD) ticket. The respondent was declared duly elected.

Before the High Court the appellant gave evidence in support and called fifteen other witnesses, while the respondent gave evidence in rebuttal and called eleven other witnesses. The trial Judge after considering the evidence before her found that the appellant had failed to prove all the allegations on the standard required and consequently dismissed the petition with costs.

The appellant in the Memorandum of Appeal advanced seven grounds of appeal as follows:-

- 1. The learned Judge erred in law when she held that the appellant was validly elected as Member of Parliament for Mafinga Constituency when there was overwhelming evidence that the respondent was involved in corrupt practices and that she had failed to**

show to the Court that the same were not committed by her or her election agents.

- 2. The learned Judge erred in law when she held that even if there was evidence that the respondent had made donations at different churches during the campaign period the donations were justified because “the petitioner’s allegations that this was done to induce voters could have been substantiated if the petitioner and his witnesses had endeavoured to show how many people were at these church gatherings and who could have been influenced to vote for the respondent because she gave offering at their churches.”**
- 3. The learned trial Judge erred in law when she held that the evidence of PW1 and PW14 that the respondent delivered the hammer mill on 20th August 2011 could not be true because she had the opportunity to observe the demeanour of the witnesses without putting on record and giving the reasons how their demeanour affected their testimony.**
- 4. The learned trial Judge erred in law when she rejected most of the petitioner’s evidence only because those witnesses belonged to the Patriotic Front, a political party the appellant stood on as a candidate for September 2011 elections, without giving reasons as to why such witnesses’ credibility was affected.**
- 5. The learned trial Judge erred in law when she held that the petitioner should have first pleaded the name of the erring agent of the respondent before finally coming up with the name during the hearing, and thereby rejecting the evidence that specifically referred to the respondent’s election agents has been involved in corrupt practices.**
- 6. The learned trial Judge erred in law when she held that corrupt practices and illegal acts committed by the MMD officials could not count towards nullification of the election of the respondent without adducing evidence in rebuttal.**
- 7. The learned trial Judge erred in law when she held that the petitioner had failed to prove its case to a convincing degree of clarity without stating whether or**

not the respondent had rebutted the evidence adduced by the petitioner to a convincing degree of clarity.

In support of the grounds of the appeal, the appellant filed heads of argument on which Mr. Mulenga relied at the hearing of the appeal.

In the heads of argument the appellant argued grounds one, four, five, six and seven together. Grounds two and three were argued separately.

In support of grounds one, four, five, six and seven of the appeal the appellant contended in brief that the appellant proved his case to the required standard in election petitions. According to the appellant his appeal in the above stated grounds is based on **Subsection 2(a) and (c) of Section 93 of the Electoral Act No.12 of 2006**. It was argued that the learned trial Judge fell into error when she failed to apply the provisions of **Subsection 3 of Section 93 of the Electoral Act** in the face of unchallenged evidence that the appellant tendered before the trial Court. The appellant submitted that the learned trial Judge misdirected herself when she rejected the evidence of PW3 and PW14 and that the trial Court's reason

for rejecting the evidence that Charity Kaonga the election agent was the one involved in maize distribution was far-fetched and not supported by evidence and law. Mr. Mulenga argued for the appellant that there was biasness on the part of the trial Judge in the way she dealt with the parties' witnesses and that pleadings in the appellant's petition gave sufficient and fair notice to the respondent by the mention of the respondent and her agents. It was further argued that the respondent failed to prove that she and her election agents took all reasonable steps to prevent the commission of the corrupt practices on any of the grounds in **Subsection 3 of Section 93.**

In response to grounds one, four, five, six and seven it was submitted on behalf of the respondent that **Subsection (3) of Section 93 of the Electoral Act** is not applicable in the current situation since the High Court did not make any of the following findings:-

- (i) **That there were some corrupt practices or illegal practice committed by or with knowledge and consent or approval of any agent of the respondent as is required by the law in Subsection 3.**

- (ii) **That the commission of any alleged wrongs were done with the knowledge and consent or approval of the Respondent's agents.**

It was argued that the persons who were alleged to have committed the wrongs were not agents of the respondent and the respondent cannot be held accountable. Counsel for the respondent relied on the decision in **AKASHAMBATWA MBIKUSITA LEWANIKA AND OTHERS -VS- FREDRICK TITUS JACOB CHILUBA** ⁽¹⁾. It was contended that that since the persons alleged to have committed wrongs were not the respondent's agents and neither did they do what they are alleged to have done with the consent of the respondent, **Subsection 2 (b) of the Section 93 of the Electoral Act** is not applicable. It was submitted that **Subsection 2(a)** is only applicable, where the petitioner proves to the required standard that corrupt practices or illegal practices were committed in connection with the election and that such acts did prevent or may have prevented the majority of voters in the Constituency from electing the candidate of their choice.

The summary of the arguments in support of ground two is that the trial Judge misdirected herself when she refused to

nullify the election of the respondent on the basis of this ground as it was not in dispute that the respondent made donations to the various churches during the campaign period and that there was no requirement for knowledge of numbers of people present at churches where donations were made.

The summary response to ground two is that in order for a Petitioner who relies on this ground to succeed the majority of voters in the Constituency should have been prevented from electing the candidate of their choice. If the numbers who are likely to be prevented from voting for the candidate of their choice is not known there is no way of knowing whether those likely to be or actually prevented constitute the majority as required by the law under **Subsection 2(a) of Section 93 of the Electoral Act**. It was argued that what the Petitioner gave out to the churches are offerings, which were not capable of influencing anybody as the same were not disclosed.

In respect of ground three of the appeal the summary of the arguments submitted in support thereof is that the trial Court erred in law when she held that the evidence of PW1 and PW14 relating to the delivery of the hummer mill was not true

because she observed their demeanor without putting on record and giving the reasons how their demeanour affected their testimony. Mr. Mulenga argued on behalf of the appellant that demeanour is an item of evidence which must be included in the record or at least the judgment of the trial Court and absence of any evidence to support an adverse finding on demeanour in the record or judgment is a serious irregularity relying on the decision in ***MACHOBANE -VS- THE PEOPLE.*** ⁽⁴⁾

The response to ground three in brief is that the appellant's argument is not substantiated because it is not supported by evidence. It was submitted that the demeanour of witnesses came into question on account that that the trial Court found the witnesses in question to have told lies.

We must hasten to state that we are indebted to Counsel on both sides for their submissions. Counsel for the respondent was gracious enough to avail us with copies of the authorities relied on. We shall consider the grounds of appeal in the order they were argued by the appellant. Before we consider the grounds we wish to make the following observations.

Election petitions are governed by **Section 93 of the**

Electoral Act. The said Section provides:

- (1) No Election of a candidate as a Member of the National Assembly shall be questioned except by an election petition presented under this Part.**
- (2) The election of a candidate as a Member of 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 the candidate in that Constituency whom they preferred;**
 - (b) Subject to the provisions of Subsection (4), that there has been a non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election;**
 - (c) That any corrupt practice or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or of that candidate's election agent or polling agent; or**
 - (d) That the candidate was at the time of the election a person not qualified or a person disqualified for election.**
- (3) Notwithstanding the provisions of Subsection (2), where, upon the trial of an election petition, the High Court finds that any corrupt practice or illegal practice has been committed by, or with**

the knowledge and consent or approval of, any agent of the candidate whose election is the subject of such election petition, and the High Court further finds that such candidate has proved that-

- (a) No corrupt practice or illegal practice was committed by the candidate personally or by that candidate's election agent, or with the knowledge and consent or approval of such candidate or that candidate's election agent;**
- (b) Such candidate and that candidate's election agent took all reasonable means to prevent the commission of a corrupt practice or illegal practice at the election; and**
- (c) In all other respects the election was free from any corrupt practice or illegal practice on the part of the candidate or that candidate's election agent's;**

The High Court shall not, by reason only of such corrupt practice or illegal practice, declare that election of the candidate void...

From this provision it is our view that the election of a candidate as a Member of National Assembly will be rendered void if any one of the grounds set out in **Subsection 2(a)-(d)** is established. To this extent, in the case of **MICHAEL MABENGA -VS- SIKOTA WINA AND OTHERS** ⁽³⁾ the Court held that:-

“Satisfactory proof of any one corrupt or illegal or misconduct in an election is sufficient to nullify an election.”

The burden of establishing any one of the grounds lies on the person making the allegation and in election petitions, it is

the petitioner in keeping with the well settled principle of law in civil matters that he who alleges must prove. The ground(s) must be established to the required standard in election petitions namely a fairly high degree of convincing clarity. We call in aid on this point, our decision in **ANDERSON MAZOKA - VS- LEVY PATRICK MWANAWASA** ⁽²⁾ case where we held that:-

“The evidence adduced must establish the issues raised to a fairly high degree of convincing clarity.”

It is our understanding that **Subsection 3** will only come into question after any one of the grounds set out in **Subsection 2** has been established. It is not mandatory that in every election petition the High Court must call upon the person whose election is being challenged to establish that no corrupt practice or illegal practice was committed by him or her personally or by that person’s election agent, or with the knowledge and consent or approval of such person or that person’s election agent; or that such person and that person’s election agent took all reasonable means to prevent the commission of a corrupt practice or illegal practice at the

election. It is our considered view that the High Court will only be duty bound to do so in the event that the petitioner establishes any one of the grounds aforementioned to the requisite standard in election petitions.

We have carefully examined the grounds of this appeal; the judgment of the trial Court; the detailed evidence on record as presented by the parties at trial (suffice to state here that we find no need of reproducing the said evidence herein); and the arguments presented before us by the parties in this appeal.

In ground one of the appeal, the appellant invited this Court to fault the judgment of the trial Court on the basis that there was overwhelming evidence before her to the effect that the respondent was involved in corrupt practices and that the respondent did not show that the same were not committed by her or her election agents. We found this argument to be over ambitious as the evidence before the trial Court did not establish alleged grounds to the required standard and did not connect the respondent to the allegations. As was rightly submitted on behalf of the respondent **Subsection 3 of**

Section 93 of the Electoral Act is not applicable in this case.

We find no merit in this ground.

In ground four of the appeal, the appellant argued that the trial Court rejected his evidence because his witnesses belonged to the Patriotic Front, a party on whose ticket he stood without giving reasons. We have anxiously considered the judgment of the trial Court and found that the trial Judge gave reasons for attaching little weight to the petitioner's evidence. We agree with the respondent's argument in response to this ground that the trial Court considered the petitioner's evidence and gave reasons for rejecting the petitioner's evidence. This ground lacks merit.

The thrust of the appellant's argument in ground five of the appeal, is that it was wrong for the trial Court to hold that the appellant should have first named the respondent's erring agents in the pleadings and not only mention them at the hearing and rejected the appellant's evidence which referred to the respondents agents. We are at pains to appreciate this argument. In election petitions the pleadings must give sufficient notice of the wrongs complained of, specific persons

(by means of names and peculiar features of identity) who perpetrated the wrongs and specific places where the wrongs were committed. In **ANDERSON MAZOKA -VS- LEVY PATRICK MWANAWASA** ⁽²⁾ we had this to say on pleadings:-

“The function of pleadings, is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have been closed, the parties are bound by their pleadings and the Court has to take them as such.”

The appellant herein did not give fair notice of the case and did not know the names of persons he alleged were election agents of the respondent. The appellant never saw the respondent and or her election agents engaging in the alleged wrong practices. In the premises we cannot fault the trial Court and we accordingly find no merit in this ground.

In ground six the appellant challenged the trial Court’s judgment arguing that this Court should find that that trial Court was in error when she endorsed and upheld the election of the respondent without requiring the respondent to rebut the evidence of corrupt practices by MMD officials. We are not prepared to fortify this argument as doing so will amount to

making election candidates answerable even for the wrongs not within their contemplation at the material time. In **AKASHAMBATWA MBIKUSITA LEWANIKA AND OTHER -VS- FREDRICK TITUS JACOB CHILUBA** ⁽¹⁾ we held that:

“We are mindful of the provisions of the Electoral Act as that a candidate is only answerable for those things which he had done or which are done by his election agent or with his Consent. In this regard, we note that not everyone in one’s political party is one’s election agent. An election agent has to be specifically so appointed”

It is our considered view that the submissions of Counsel for the respondent on this point were apt. There is no merit in ground six.

Ground seven of the appeal, seems to place a duty on the trial Court to state whether or not the respondent had rebutted the evidence adduced by the petitioner to a convincing degree of clarity, when she held that the appellant failed to prove his case. There was no such duty on the trial Court and this Court cannot create such duty on trial Courts in election petitions as do so defies not only logic but common sense as well. It was the duty of the appellant to prove his case to the required standards. The respondent would only be called upon to adduce

evidence in rebuttal upon the appellant establishing a case against her. The appellant failed to prove his case and therefore his petition did not succeed. In the case of **ANDERSON KEMBELA MAZOKA -VS- LEVY PATRICK MWANAWASA AND ANOTHER** ⁽²⁾ we held that:-

“For the petitioner to succeed in the present Petition, he must adduce evidence establishing the issues raised to a convincing degree of clarity in that proven defects and flaws were such that the majority of Voters were prevented from electing the candidate who they preferred or that the election was so flawed that the defects seriously affected the result which can no longer be said to represent the true and free choice of the majority of voters.”

The appellant having failed to prove his case no reasonable Court would call upon the respondent to adduce evidence in rebuttal. In any event there was nothing to be rebutted and only Courts where injustice is practiced, would brave calling the respondent to adduce evidence in rebuttal in these circumstances. We hasten to state here that injustice is not practiced in this Court. The appellant’s arguments were misconceived and consequently ground seven lacks merit.

It was contended by the appellant in ground two of the appeal that, the trial Court fell in error when she refused to

nullify the election of the respondent in light of the donations she made at various churches in Mafinga Constituency. The trial Court found that the respondent made offering at the various churches in question and not donations as alleged. This was a sound finding of fact which we are not prepared to tamper with it as we did not have the opportunity the trial Court had in this case. Further, the appellant did not show that the offerings influenced the majority of the voters in Mafinga Constituency. In the circumstances this ground fails.

In ground three of the appeal, the appellant argued that the trial Court fell in error when she held that the evidence of PW1 and PW14 could not be true as she had the opportunity to observe their demeanour without putting on record and giving reasons how their demeanour affected their testimony. It is our view that the spirited arguments made in support of this ground were misplaced. We cannot fault the judgment of the trial Court on the basis of this ground. As opposed to the appellant's arguments the trial Court found the witnesses in question untruthful having had an opportunity to observe them in Court. This ground is without basis and it equally fails.

Our upshot is that this appeal fails. We find no merit in all the grounds advanced by the appellant and we accordingly dismiss it. Each party will bear its own costs.

.....
M.S. Mwanamwambwa,
SUPREME COURT JUDGE

.....
H. Chibomba,
SUPREME COURT JUDGE

.....
G. S. Phiri,
SUPREME COURT JUDGE

.....
M. E. Wanki,
SUPREME COURT JUDGE

.....
M. Lisimba,
SUPREME COURT JUDGE