

IN THE LOCAL GOVERNMENT ELECTIONS TRIBUNAL 2021/EP/LWN/LG/005  
HOLDEN AT LUANGWA  
(Civil Jurisdiction)

IN THE MATTER OF: ARTICLE 47, 153, 159 OF THE CONSTITUTION OF  
THE REPUBLIC OF ZAMBIA (AMENDMENT) NO. 2 OF  
2016

IN THE MATTER OF: SECTION 83 OF THE ELECTORAL PROCESS ACT NO.  
35 OF 2016

IN THE MATTER OF: SECTION 97, 98, AND 99 OF THE ELECTORAL  
PROCESS ACT NO. 35 OF 2016

IN THE MATTER OF: THE LOCAL GOVERNMENT ELECTIONS TRIBUNAL  
RULES, 2016 (STATUTORY INSTRUMENT NO. 60 OF  
2016)

IN THE MATTER OF: THE SCHEDULE TO THE ELECTORAL PROCESS  
ACT NO. 35 OF 2016

IN THE MATTER OF: THE ELECTORAL (CODE OF CONDUCT)  
REGULATIONS 2011 STATUTORY INSTRUMENT NO.  
52 OF 2011

IN THE MATTER OF: THE COUNCILOR ELECTION FOR PHWAZI WARD,  
LUANGWA DISTRICT OF THE LUSAKA PROVINCE

BETWEEN:

FOSTINA MWALE

PETITIONER

AND

TRUST PHIRI

RESPONDENT

*Before the Honourable Tribunal:*

*Jennipher Bwalya – Chairperson*

*Waicha Ndhlovu – Member*

*Amanda D.A. Theotis – Member*

*For the Petitioner :*

*In Person*

---

*For the Respondent:*

*Ms. N. Nambao – Messrs Mulungushi  
Chambers*

---

## JUDGEMENT

---

### CASES REFERRED TO:

1. *Mabenga v Wina and Others (2003) Z.R. 110*
2. *Anderson Mazoka and Others v Mwanawasa and Others (2005) Z.R. 138*
3. *Mubika Mubika v Poniso Njeulu, SCZ Appeal No. 114 of 2007*
4. *Jonathan Kapaipi v Newton Samakayi, CCZ Appeal No. 13/2017*
5. *Mubita Mwangala v Inonge Mutukwa Wina, SCZ Appeal No. 80 of 2007*
6. *Josephat Mlewa v. Eric Wightman (1995/1997) Z.R. 106*
7. *Nkandu Luo and the Electoral Commission of Zambia v. Doreen Sefuke Mwamba and the Attorney General, Selected Judgment No. 51 of 2018*
8. *Munyamba Likando v. Mayeya Mayeya – 2016/LGET/22*

### LEGISLATION AND OTHER WORKS REFERRED TO:

1. *Section 97 of the Electoral Process Act No. 35 of 2016*
2. *Section 83 (1) of the Electoral Process Act No. 35 of 2016*
3. *Section 47 of the Interpretations and General Provisions Act CAP 2 of the Laws of Zambia*
4. *Order 5 Rule 13 of the High Court Rules CAP 27 of the Laws of Zambia*

### 1. FACTS

1.1. The Petitioner Fostina Mwale and the Respondent Trust Phiri were candidates during the Councilor elections held in Luangwa on the 12<sup>th</sup> of August 2021. The Petitioner stood on the Patriotic Front (PF) ticket and the Respondent stood on the United Party for National Development (UPND) ticket.

1.2. Following the elections, the Respondent was declared victorious and duly elected Councilor for the Luangwa District.

## 2. PLEADINGS

2.1. The Petitioner commenced these proceedings by way of petition on the 25<sup>th</sup> of August, 2021. The petition is brought under Articles 47, 154 and 159 of the Constitution of Zambia, Section 83, 97,98 and 99 of the Electoral Process Act No. 35 of 2016, The Local Government Elections Tribunals Rule No. 60 of 2016, The Schedule to the Electoral Process Act and The Electoral (Code of Conduct) Regulations S.I No. 52 of 2011.

2.2. In her petition, the Petitioner made several allegations. It is alleged under paragraph 3 of the petition, that electoral malpractices were committed by the Respondent and his political cadres, Patriotic Front (PF) during the campaign period and during voting day, that mealie meal and money was distributed by them to the voters and that voters were told to vote for the PF Candidates. It was alleged further that they told Social Cash Transfer beneficiaries that each polling station would be equipped with cameras to monitor those who will not vote for PF candidates and these would be removed from the program or from the list of beneficiaries for the Social Cash Transfer (SCT). It is further alleged that the SCT payments were made two days before voting day as opposed to normal routine of paying beneficiaries at the month end. It was also alleged that Community welfare assistant committee (CWAC) members were threatening SCT beneficiaries against voting for United Party for National Development (UPND).

2.3. The Petitioner prays that she should be granted the following reliefs and declaration:

- (i) A declaration that the election of the Respondent as Councilor for Phwazi Ward Luangwa District is null and void.
- (ii) A Declaration that the illegal practices committed by the Respondent and their respective political cadres so affected the election results that the same ought to be nullified.

- (iii) An order that the cost occasioned by the Petitioner be borne by the Respondent.

2.4. The Respondent filed his answer on the 10<sup>th</sup> of September 2021. In brief, he denied that he or any members of the PF cadres committed any electoral malpractice such as distribution of mealie meal and money to voters or engaged in deceit over the social cash transfer program or any form of victimization of voters before or on poll day. He further denied that he had any control over the alleged conduct of the members of the CWAC. He contends that he was validly elected as area Councilor for Phwazi Ward in the Luangwa District.

### 3. HEARING

3.1. The matter came up for hearing on the 14<sup>th</sup> day of September 2021. At the hearing, the Petitioner informed the Tribunal that she was wished to discontinue the matter against the 2<sup>nd</sup> Respondent, Electoral Commission of Zambia. There being no appearance on behalf of the 2<sup>nd</sup> Respondent and no objection from the 1<sup>st</sup> Respondent, this application was granted and the matter proceeded against Trust Phiri as sole Respondent.

### 4. PETITIONER'S EVIDENCE

4.1. The Petitioner testified and called one other witness. In summary the Petitioner (**PW1**) testified that she was a candidate in the elections held on 12<sup>th</sup> August 2021 for the position of Councilor. The Respondent was declared the winner and she was not satisfied with the outcome because there were certain anomalies such as the Respondent giving a K20.00 to a voter and voters who were SCT beneficiaries being told that there were cameras in the polling stations and if they voted for any party other than PF, their names would be removed from the list. She further testified that some people were given mealie meal the day before elections and people were told that as they go to vote they should vote as a suit from top to bottom, that is from President to Councilor.

4.2. Under Cross Examination **PW1** stated that she contested at the Phwazi Ward, that there were 3 polling stations and that she came out in third position. An independent candidate came out in second position. She confirmed that there were 816 registered voters and that 679 turned out to vote. She also conceded that she was not present when mealie meal was being given out or when the Respondent was allegedly telling her witness to vote for him. She conceded that the Respondent was not part of CWAC and that she was not present when the discussion regarding SCT took place. She also confirmed that the Respondent got 340 votes, she got 132 and the candidate that came second got over 200 votes.

4.3. **PW2, Grace Tembo**, testified that on the 10<sup>th</sup> of August 2021, she received money from the SCT and that on the following day, 11<sup>th</sup> of August 2021, the Respondent came to her house and told her that the money she had received was to motivate her to vote for him and to follow suit for all the PF candidates. She alleges that the Respondent told her that there was a camera at the polling stations and if she voted for any other party, they would be able to see and she would be removed from the SCT beneficiaries list. She told the court that she was afraid and therefore did in fact vote for all the PF candidates as threatened.

4.4. On Cross-Examination **PW2** told the Court that ECZ officials did educate them on the voting process and what to do if threatened by anyone. She however stated that she did not report the incidence to the police. She also conceded that the Respondent was not responsible for the SCT.

## 5. RESPONDENT'S EVIDENCE

5.1. The Respondent (**RW1**) relied on his Answer filed into Court on the 10<sup>th</sup> of September 2021 together with his affidavit in support filed on the same date. **RW1** gave further oral evidence to the effect that he stood as a candidate for councilor for the 2021 elections on the PF ticket. He stated that before campaigning, the Electoral Commission of Zambia (ECZ) sent educators to sensitize voters. The said educators guided the electorates that electoral

corruption and malpractices should be reported. He told the court that on the day of elections there were 3 candidates, himself for PF, an independent candidate, and the Petitioner for the UPND. He testified that he came first, the independent came second and that the Petitioner came last. He told the Tribunal that the elections were free and fair.

5.2. On Cross Examination, RW1 stated that he had people from the PF party assisting in his campaign. During campaign the party members assisting him would wear the PF party regalia. He confirmed that these cadres were working on his instructions. He further confirmed that when there were floods in the area, the government through DMMU would assist the people with food but he couldn't remember the last time they had done so. He confirmed that when relief food came, it was offloaded at the Community Hall. He stated that a candidate's house does not receive such food and that it is the State that oversaw the distributing of such food.

## 6. SUBMISSIONS

6.1. The Petitioner and the Respondent filed written submissions for which we are truly grateful.

## 7. THE LAW

7.1. Section 97 (2) of the Electoral Process Act No. 35 of 2016 deals with the grounds upon which the election of a Councilor shall be void if proved to the satisfaction of the trial court. It states that:

- (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*



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

- (4)** *An election shall not be declared void by reason of any act or omission by an election officer in breach of that officer's official duty in connection with an election if it appears to the High Court or a tribunal that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such act or omission did not affect the result of that election.*

7.2. The above provision essentially shows that the grounds for nullification of a petition are found under Section 97 (2) (a) and (b) of the Act. Further, the malpractice must be such that it is capable of influencing the outcome in an election in that the majority of voters in the district or ward will be prevented from voting for a candidate of their choice.

7.3. The law on Undue Influence comes from Section 83 (1) (a) (b) and (c) and (2) of the Electoral Process Act No. 35 of 2016 which states as follows:

- (1)** *A person shall not directly or indirectly, by oneself or through any other person—*
- (a) make use 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, or pretended supernatural or non-natural means, any physical, psychological, mental or spiritual injury, damage, harm or loss upon or against any person;*
  - (c) do or threaten to do anything to the disadvantage 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 political party or candidate;*

- (iv) *to support or not to support any political 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 political event;*
- (2) *Subject to the other provision of this Act, a person shall not prevent another person from exercising a right conferred by this Act.*

## 8. BURDEN AND STANDARD OF PROOF

8.1. The burden of proof in an election petition lies with the Petitioner. This has been emphasized in a plethora of case law.

8.2. In **Mabenga v Wina and others (1)** the Supreme Court stated:

*“an election petition is like any other civil claim that depends on the pleadings and that the burden of proof is on the challenger that election to prove ‘to a standard higher than on a mere balance of probability; issues raised are required to be established to a fairly high degree of convincing clarity’.”*

8.3. In the case of **Anderson Mazoka and Others v Mwanawasa and Others (2)** the Supreme Court had this to say:

*“...for the petitioners to succeed..., it is not enough to say that the respondents have completely failed to provide a defence or not call witnesses, but that the evidence adduced establishes the issues raised to a fairly high degree of convincing clarity in that the proven defects and the electoral flaws were such that the majority of voters were prevented from electing the candidate whom they preferred; or that the election was so flawed that the defects seriously affected the result which could no longer reasonably be said to represent the true free choice and free will of the majority of voters.”*

8.4. In the case of **Mubika Mubika v Poniso Njeulu, SCZ** which the Constitutional Court cited with approval in **Jonathan Kapaipi v Newton Samakayi**, the Supreme Court stated that:

*“The provision for declaring an election of a Member of Parliament void is only where, whatever activity is complained of, it is proved satisfactorily that as a result of that wrongful conduct, the majority of voters in a constituency were, or might have been prevented from electing a candidate of their choice, it is clear that when facts alleging misconduct are proved and fall into the prohibited category of conduct, it must be shown that the prohibited conduct was widespread in the constituency to the level where registered voters in greater numbers were influenced so as to change their selection of a candidate for that particular election in that constituency; only then can it be said that a greater number of registered voters were prevented or might have been prevented from electing their preferred candidate.”*

8.5. Further, in **Mubita Mwangala v Inonge Mutukwa Wina**, the Supreme Court said:

*“In order to declare an election void by reason of corrupt practice or illegal practice or any other misconduct, it must be shown that the majority of voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred...”*

8.6. In the earlier case of **Josephat Mlewa v. Eric Wightman**, the Supreme Court held that:

*“The Court must be satisfied about the scale or type of wrong doing. By scale, it is meant widespread as to influence the*

*majority of voters in the constituency not to vote for their preferred candidate.”*

8.7. In *Nkandu Luo and the Electoral Commission of Zambia v. Doreen Sefuke Mwamba and the Attorney General*, the Constitutional Court stated that:

*“In order for a petitioner to successfully have an election annulled pursuant to section 97(2)(a) there is a threshold to surmount. The first requirement is for the petitioner to prove to the satisfaction of the court, that the person whose election is challenged personally or through his duly appointed election or polling agents, committed a corrupt practice or illegal practice or other misconduct in connection with the election, or that such malpractice was committed with the knowledge and consent or approval of the candidate or his or her election or polling agent...”*

8.8. From the above-mentioned authorities, it can be seen that the standard of proof is generally higher than the usual balance of probabilities. This is because the subject matter of a petition is of critical importance to the welfare of the people and their democratic governance. Elections are also a costly affair and it would not be in public interest to have them voided unless it can be shown that the alleged malpractices was so widespread that it prevented the majority of voters from choosing their preferred candidate.

8.9. Further it is incumbent upon the Petitioner to produce cogent evidence as they are required to prove their case with a high standard of convincing clarity. Accordingly, for the Petitioner to prove her case in this petition, she not only has to prove malpractice on the part of the Respondent but also that such malpractice was widespread so as to prevent the majority of voters from choosing their preferred candidate.

## 9. ISSUES TO BE DETERMINED

9.1. From the pleadings and evidence, the issues for determination by this Tribunal are as follows:

- (i) Whether the Respondent engaged in the following malpractices:
  - a. Together with his political cadres distributed mealie meal and money to the voters and told them to vote for PF candidates.
  - b. Misled SCT beneficiaries into believing that each polling station was equipped with cameras to monitor those who will not vote for PF candidates and that if they didn't vote accordingly, their names would be removed from the SCT beneficiary list.
  - c. Caused SCT funds to be paid two days before voting day as opposed to month end as was customary.
  - d. Caused CWAC members to threaten SCT beneficiaries against voting for UPND.
- (ii) Whether the above was proved to a sufficient degree to warrant nullification of the election of the Respondent.

## 10. ANALYSIS AND FINDINGS

10.1. PW1 the Petitioner attested to certain anomalies occurring prior to and on election day such as one person being given a K20, mealie meal being distributed the day before election and beneficiaries of SCT being told that there were cameras in the polling stations that would observe them voting and they would be removed from the beneficiary list of SCT if they didn't vote for PF candidates. She admitted on cross examination that her evidence was hearsay as she did not witness any of the above activities but it was based on what witnesses informed her.

10.2. We find the evidence of PW1 to be hearsay and therefore unreliable and inadmissible.

- 10.3. PW1 further did not bring any physical evidence to the Tribunal. She did however call PW2 as a witness. PW2 informed the Court that she received money from SCT on the 10<sup>th</sup> of August 2021 and that the Respondent visited her on the 11<sup>th</sup> of August and told her money she had received was an incentive to vote for him and all the PF candidates starting from the top and following suit to the councilor. She was informed that there were cameras at the polling stations which would capture how she voted and if she voted for any party other than the PF, she would be removed from the SCT list as a beneficiary. She further told the Tribunal that she believed the Respondent and accordingly voted for PF.
- 10.4. We found PW2's testimony to be credible and are satisfied that she believed that there were cameras at the polling stations and that if she did not vote for all PF candidates she would be removed from the SCT list.
- 10.5. PW2's evidence however amounts to an isolated incidence of a malpractice. For an election to be nullified, it is not enough to show malpractice on the part of the Respondent but that the malpractice was so widespread as to prevent the majority of voters from choosing their preferred candidate.
- 10.6. We are not satisfied that the Petitioner has discharged the required standard of proof. We echo the sentiments of our colleagues in the case of **Munyamba Likando v Mayeya Mayeya** where they stated:
- “The candidates or indeed the general citizenry would do well in future to gather sufficient cogent evidence and bring credible witnesses”.*
- 10.7. We reiterate that it is for the Petitioner to prove her case on a high standard of convincing clarity. From our reading of Section 97 of the Electoral Process Act, it is not enough to show that the Respondent engaged in malpractices but also that it was on such a large scale as to affect the

outcome of the election result. We do not believe the Petitioner has succeeded in doing so in this case.

10.8. Accordingly, we dismiss this Petition. We order that each party shall bear their own costs.

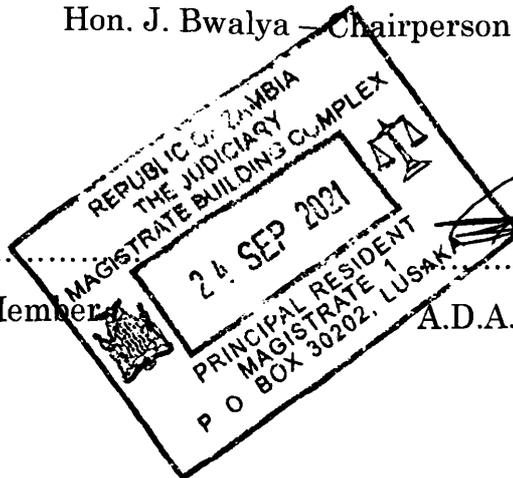
11. Leave to Appeal is granted in accordance to rule 24 of the tribunal rules.

12. All exhibits are to be returned to the persons who produced them.

*Bwalya*

.....  
Hon. J. Bwalya – Chairperson

*Waicha Ndhlovu*  
.....  
Waicha Ndhlovu – Member



*A.D.A. Theotis*  
.....  
A.D.A. Theotis – Member