

IN THE LOCAL GOVERNMENT ELECTION TRIBUNAL 2021/EP/LWN/LG/013
HOLDEN AT LUANGWA

IN THE MATTER OF: COUNCILL ELECTION FOR LUANGWA
DISTRICT

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

IN THE MATTER OF: SECTIONS 83, 97, 98 AND 99, OF THE
ELECTORAL PROCESS ACT NO.35 OF

IN THE MATTER OF THE LOCAL GOVERNMENT ELECTION
TRIBUNAL RULES SI.NO.60 OF 2016

IN THE MATTER OF THE ELECTORAL (CODE OF CONDUCT)
REGULATIONS SI. NO. 52 OF 2011

BETWEEN:

LEO MPHANDE PETITIONER

AND

MULIMBA MUMBA 1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA 2ND RESPONDENT

CORAM: HON. MAKALICHA -CHAIRPERSON

S.N KATEKA-MEMBER

B. MPALO-MEMBER

FOR THE PETITIONER: IN PERSON

FOR THE 1ST RESPONDENT N. NAMBAO, MESSRS MULUNGUSHI

JUDGMENT

LEGISLATION REFERED TO

1. The Constitution of Zambia, Amendment Act No. 2 of 2016
2. The Electoral Process Act, No. 35 of 2016

CASES REFERED TO

1. DOREEN SEFUKE MWAMBA VS. NKANDU LUO SELECT JUDGMENT NO.51 OF 2018
2. MARGARET MWANAKATWE VS CHARLOTTE SCOTT JUDGMENT NO. 50 OF 2018
3. AKASHAMBATWA MBIKUSITA LEWANIKA VS FREDRICK TITUS CHILUBA (1998)ZR 49
4. BERELSFORD GONDWE VS CATHERINE NAMUGALA APPEAL NO. 175 OF 2012

This is the judgment of the Tribunal for the Election Petition filed by Leo Mpande who contested the August, 12, 2021 Local Government Elections as Councilor for Mankokwe Ward in Luangwa District under the United Party for National Development (UPND). The 1st Respondent also contested the same elections as candidate for then Ruling Party Patriotic Front. There were other candidates from other political parties who contested the elections but are not party to this Petition.

The Petitioner being dissatisfied with the outcome of the election petitioned for the nullification of the election of the 1st Respondent on the following grounds:

- 1.1 Electoral malpractices were committed by the said Mulimba Mumba and his political cadres (PF) during the campaign period and during voting on voting day.
- 1.2 The Respondent together with his political cadres (PF) distributed mealie meal to voters and told them to vote for PF Candidates.
- 1.3 The (PF) members were telling lies to social cash transfer beneficiaries that each polling station will be equipped with cameras to monitor those who would not vote for PF candidates and they would be removed from the program or from the list for social cash transfer beneficiaries.
- 1.4 The social cash transfer payments were made two days before voting as opposed to normal routine of paying beneficiaries at the monthend.

1.5 Community Welfare Assistant Committee members were threatening beneficiaries against voting for the UPND.

The Petitioner testified as PW1 and called 3 other witnesses. PW1 testified that he participated in the August, 12, 2021 as Councilor on the UPND ticket for Mankhokwe Ward. That during the election period, the 1st Respondent was distributing mealie and salt to the electorate on 11th August 2021. PW1 testified that the mealie meal was being distributed in the night. Because of that, he concluded that the elections were not free and fair.

PW1 further testified that the 1st Respondent was telling people on the social cash transfer list of beneficiaries that there would be a camera in the booth and if they vote for UPND, they would be captured and removed from the Social Cash Transfer list.

He informed the tribunal that people from Community Welfare Assistant Committee were telling people not to vote for UPND but vote for PF instead.

In cross examination PW1 was asked how members of CWAC were chosen and he responded that they were chosen by the community. PW1 conceded that the 1st Respondent never addressed him concerning Social Cash Transfer and that he was not present when the 1st Respondent was addressing the electorate. PW1 also conceded that he was not given any Mealie Meal by the 1st Respondent and that he was not present when the 1st Respondent was allegedly Distributing mealie meal.

The second witness, PW2 was Edward Mwanza. He testified that on 11th August 2021 in the night there was a knock on his door. When he came out someone said do you recognize me? It was Mr. Mulimba Mumba. PW2 informed the court that the 1st Respondent told him that he was asking for his vote and he gave him some mealie and some salt in a plastic bag. PW2 further testified that the 1st Respondent told him to vote for him and if he didn't, the 1st Respondent would know what to do.

According to PW2, the 1st Respondent told him that there would be a camera in the voting booth and that whatever he was going to do, the camera would capture who he voted for. PW2 informed the tribunal that on the voting day he voted for the 1st Respondent out of fear of what was going to happen to him if he did not.

PW2 described the bag of mealie meal as being white and green and written DMMU and marked not for sale. PW2 told the Tribunal that the salt was in a white transparent plastic. The salt and mealie meal were produced as evidence as there was no objection to their production.

PW3 was Winifreda Mweemba who testified that on 10th August, 2021 she had gone to collect her Social Cash Transfer payment. The following day on the 11th August, 2021, Mr. Mulimba Mumba went to her house in the morning and told her he was asking for her vote and that when voting she should make sure that she votes for PF from the Presidential candidate down to councillor. She also told tribunal that Mulimba told her that if she did not vote for PF, they would be a camera in the booth and when the PF wins the elections she would be removed from the list of cash transfer beneficiaries.

In cross examination she was asked whether ECZ went to her ward to educate them and responded that she did not know. She also told the tribunal in cross examination that she had no her evidence to show that the 1st Respondent to her house. This marked the close of the Petitioner's case.

The 1st Respondent offered to call no evidence.

In order for an election of a Councilor to be nullified, the Petitioner has to satisfy the provisions of Section 97 (2) (a) and (b) of the Electoral Process Act , No. 35 of 2016 which provide that:

(2) the election of a candidate as Member of Parliament, mayor, council chairperson or councilor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the high court or a tribunal , as the case may be that:

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

- i. By a candidate; or*
- ii. With the knowledge and consent or approval of a candidate or that candidate's election agent or polling agent; and*

The majority of the voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred.

(b) subject to the provisions of subsection (4), there has been noncompliance with the provisions of this act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non compliance affected the result of the election.

We have looked at several authorities and we remind ourselves that the burden of proof lies on the Petitioner and the standard of proof is higher than in civil matters but lower than beyond reasonable doubt. The Supreme Court in the case of **BERELSFORD JAMES GONDWE VS CATHERINE NAMUGALA APPEAL NO. 175 OF 2012** held that

“the burden of establishing anyone 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 grounds must be established to required standard in election petitions namely a fairly high degree of convincing clarity.”

Furthermore, in the case of **DOREEN SEFUKA MWAMBA AND NKANDU LUO SELECTED JUDGMENT 51 OF 2018**, the Supreme Court held as follows:

“In order for a Petitioner to successfully have an election petition annulled pursuant to Section 97 (2) (a) of the Electoral Process Act, No. 35 of 2016, 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 being nullified 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. Sections 81 to 95 in part VIII of the Act and also relevant provisions of the Electoral Code of Conduct outline the corrupt or illegal practices or misconduct in the election process.

In addition to proving the electoral malpractice, or misconduct alleged, the Petitioner has the further task if adducing cogent evidence that the electoral malpractice or misconduct was so wide spread that it swayed or may have swayed the majority of the electorate from electing a candidate of their choice.

Recently, in the Austin Liato case vs. Sitwala Sitwala case, we said

It is not sufficient for a Petitioner to prove only that a candidate committed an illegal or corrupt practice or engaged in other misconduct in relation to the election without proof that the illegal or corrupt practice or misconduct was widespread or prevented or may have prevented the majority of voters in the constituency, district or ward to elect a candidate of their choice.

From the above authority, the Petitioner must therefore prove the following in order to succeed in nullifying an election:

1. That the Respondent or his election agent personally committed the offence complained about; and
2. That the electoral malpractice must be so widespread that it prevented the electorate in the area from voting for a candidate of their choice.

The first allegation contained in paragraph 3.1 of the Petition is that the electoral malpractices were committed by the said Mulimba Mumba and his political cadres (PF) during the campaign period and during voting on voting day. As has been stated above from the provisions of Section 97 (2) of the Electoral Process Act, the misconduct or illegality must be committed by the candidate or his election agent. Section 2 of the Act defines election agent as

“a person appointed as an agent of a candidate for the purpose of an election and who is specified in the candidate nomination form”

Paragraph 3.1 and the rest of the paragraph 3 refer to political cadres or members of PF. In the case of **AKASHAMBATWA MBIKUSITA LEWANIKA VS FREDRICK TITUS CHILUBA (1998) ZR 48**, the Supreme Court held that

“A candidate is only answerable for those things which are done by his election agent or with his knowledge or consent. In this regard, we note that not everyone in one’s political party is his agent. An election agent has to be specifically appointed.”

From the provisions of Section 2 of the Electoral Process Act and the Lewanika case cited above, the 1st Respondent cannot be held responsible for the actions of anyone who is not his duly appointed election agent. Therefore, any allegations against political cadres cannot stand against the 1st Respondent. Furthermore, we shall consider the specific allegations against the

1st Respondent to determine whether they have been established in accordance with the standard of proof for election petitions.

The second allegation contained in paragraph 3.2 of the Petition is that the Respondent together with his political party cadres (PF) distributed mealie meal to voters and told them to vote for PF Candidates. We have already determined that the 1st Respondent cannot be held responsible for any allegations against political cadres in accordance with the provisions of Section 97 (2) of the Act and Supreme Court decisions cited. On the allegation against then 1st Respondent that he was distributing mealie meal to the voters, PW1, the Petitioner himself testified to this and his evidence was not controverted in cross examination. PW2 testified that he was given a bag of mealie meal by the 1st Respondent and that the 1st Respondent asked him to vote for him and his party in exchange for the mealie meal. The bag of mealie was produced in evidence. PW2's evidence was however controverted in cross examination as he failed to show the Tribunal that the bag of mealie meal he produced was given to him by the 1st Respondent.

We therefore find that the Petitioner has failed to prove to convincing clarity that the 1st Respondent distributed mealie meal to some voters in exchange for their votes on the eve of voting day. Furthermore, there was no evidence as to how distribution of mealie meal affected the outcome of the election. Therefore, this ground fails.

The third allegation contained in paragraph 3.3 of the Petition is that the (PF) members were lying to social cash transfer beneficiaries that each polling station will be equipped with cameras to monitor those who will not vote for PF candidates and they will be removed from the program or from the list for social cash transfer. As has been explained above, in order for allegation to stand against the 1st Respondent, it must have been committed by him personally or his election agent. In this ground the allegation is against PF members. This allegation cannot stand as is there is no accusation against the 1st Respondent or his election agent.

The fourth allegation contained in paragraph 3.4 of the Petition is that social cash transfer payments were made two days before voting as opposed to normal routine of paying beneficiaries at the month end. There was no evidence led that this payment was made either by the 1st Respondent personally or by his election agent. Furthermore, there was no evidence as to how the payment of social cash transfer affected the outcome of the elections. This ground also fails.

The fifth and final allegation contained in paragraph 3.5 of the Petition is that Community Welfare Assistant Committee members were threatening beneficiaries against voting for the UPND. This allegation is not made against the 1st Respondent or his election agent. It therefore does not meet the threshold provided for in Section 97 (2) of the Act.

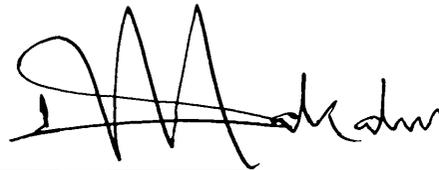
We find that the Petitioner has failed to prove that any of the allegations were committed by the 1st Respondent or his election agent. We also find that the Petitioner did not lead any evidence to show how any of the allegations affected the outcome of the election. The Petition therefore fails and we declare that the 1st Respondent was duly elected councilor for Mankhokwe Ward in Luangwa District.

Each party to bear their own costs. The parties are informed of their right to appeal within fourteen days from the date of this Judgment.

Dated at Luangwa this

day of

2021



**HON. D. MAKALICHA
CHAIRPERSON**



**S. N. KATEKA
MEMBER**



**B.MPALO
MEMBER**