

We will now turn to look at the burden and standard of proof in election petitions relating to a councillor. In the case of *Austin Liato v. Sitwala Sitwala (3)*, the Constitutional Court cited with approval the sentiments of the Supreme Court in the case of *Lewanika and Others v Chiluba* wherein the Court asserted that it could not be seriously disputed that parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probabilities and that it followed that the issues raised were required to be established to a fairly high degree of convincing clarity.

In the case of *Brelsford James Gondwe v Catherine Namugala(6)* , the Supreme Court reiterated that:

"the burden of establishing 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 the required standard in election petitions namely fairly high degree of convincing clarity."

Having warned ourselves of the burden and standard of proof in election petitions, this Tribunal will now examine whether the evidence provided by the Petitioner and set out above is sufficient to prove to the standard as set out in the *Brelsford James Gondwe v Catherine Namugala(6)* *Austin Liato v. Sitwala Sitwala (3)* cases that:

1. That the 1st Respondent (or an agent of the 1st Respondent with the consent or knowledge of the 1st Respondent) committed a corrupt practice, illegal practice or other misconduct ; and
2. As a result of such corrupt practice, illegal practice or other misconduct, the majority of voters in Kapwepwe Ward were or may have been prevented from electing the candidate whom they preferred; or
3. That there has been non-compliance with the provisions of the Electoral Process Act relating to the conduct of elections, and it appears to this 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.

In relation to whether the Petitioner proved, as matter of fact that the 1st Respondent or his agent (acting with the consent of the 1st Respondent) distributed of facemasks on polling day, the Tribunal finds that the only evidence in support of this ground was the testimony of PW1 who was the Petitioner herself and PW4.

PW1 did not witness the said distribution of facemasks by the named Amake Kumbuso and in fact informed the Tribunal during cross examination that she did not even know Amake Kumbuso herself.

PW4 did testify to knowing Amake Kumbuso but during cross examination admitted that he did not know her real name. This called into question whether or not he truly knew her enough to identify her at the polling station. Furthermore, PW4 did not testify to the fact that the 1st Respondent was either in person, or by his agent (with the consent of the 1st Respondent) distributing facemasks in exchange of votes.

This Tribunal therefore finds that the Petitioner has failed to prove the allegation that the 1st Respondent committed a corrupt practice or illegal act or other misconduct by the distribution of masks on behalf of PF.

We now turn to the ground that a corrupt practice or illegal act or other misconduct was committed by the 1st Respondent because a voter was caught with 2 ballots. The evidence provided in support of this allegation comprised only the testimony of PW1 herself and during cross examination, PW1 informed this Tribunal that she personally did not witness the incident alleged but merely heard of the incident. No further witness was called to support this testimony and as such the evidence amounts to hearsay evidence.

This Tribunal cannot therefore find as a fact that the 1st Respondent or his agent was caught with two illegal ballots and therefore committed a corrupt practice, illegal act or other misconduct contrary to the Electoral Process Act.

Turning to the allegations that the Petitioner was unable to campaign either due to election violence or due to the removal by the 1st Respondent of the Petitioner's campaign materials voting, this Tribunal states as follows:

1. The video evidence tendered by the Petitioner in support of the allegation of election violence in Kapwepwe Ward is not sufficient to prove the fact of violence as it did not contain any material linking the 1st Respondent or his agents to the burning vehicle. In fact, it appears that the burning did not even occur in the Petitioner's ward nor did the Petitioner take the video herself.
2. The testimonies of PW1, PW2 and PW3 are not sufficient to prove the ground that the 1st Respondent or his agents engaged in acts of violence because PW1's testimony in cross examination showed that she herself did not experience any violence from the 1st Respondent or by his agent with the consent of the 1st Respondent. PW1 was unable to identify which ward the cadres who prevented her from campaigning were from nor was she able to show that the 1st Respondent or the 1st Respondent agents committed any acts of violence against her. The testimonies of PW2 and PW3 were further unable to prove the allegations of PW1 in that they could not provide any evidence linking the 1st Respondent or his agents to the alleged violent attacks. Their testimonies were only able to show that they were attacked by suspected PF cadres.
3. The Petitioner failed to provide any evidence to support her allegation to the effect that the 1st Respondent or his agent removed the Petitioner's campaign material. The only evidence provided for this allegation was the testimony of PW1 herself which in itself contained some inconsistencies as during cross examination, she was unable to state which parts of her ward her campaign material was removed and by whom. The only person PW1 was able to identify in the acts of removing her campaign material was a man named Mago whom the Petitioner did not mention in her Affidavit in Support of Petition nor did she call as a witness.

Finally, regarding the ground that the 1st Respondent distributed material during his campaign, the Tribunal notes that the Petitioner presented documentary evidence in her

President, which are permitted by the Constitution and which are not frivolous should not be inhibited by unwarranted condemnation in costs. In the event, it is only fair that each of the parties should bear their own costs."

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

Petition dismissed.

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

Dated the day of September 2021

.....
Hon. F Hamaundu

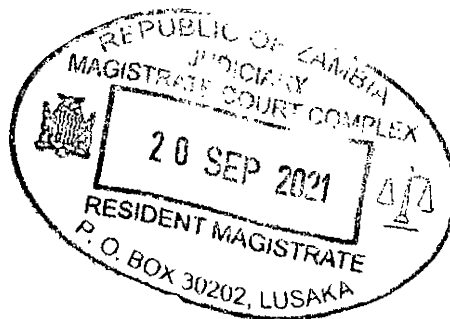
Chairperson

.....
Hon H Mdala

Honourable Member

.....
Hon K Banda

Honourable Member



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

2021/LGET/20

IN THE MATTER OF: THE LOCAL GOVERNMENT TO KAPWEPWE WARD IN
THE MATERO CONSTITUTENCY HELD ON THE 12TH DAY
OF AUGUST 2021

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

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

BETWEEN:

CHOOOLWE SIMUNCHEMBU

PETITIONER

AND

MWAMBA PATRICK S

1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA

2ND RESPONDENT

Before the Honourables F Hamaundu (Chairperson), H Mdala (Member) and K Banda (Member)- Delivered on 20 September 2021

For the Petitioner: Ms M Mwiinga of Messrs Doris & James Legal Practitioners and Ms Phiri of P N P Advocates

For the 1st Respondent: LC Lemba and Ms N Nambao of Messrs Mulungushi Chambers

For the 2nd Respondent : H Mulenga of Messrs Philsong & Partners Legal Practitioners

JUDGMENT

The Honourable H Mdala delivered the Judgment of the Tribunal

Cases referred to

1. Matilda Mutale v Emmanuel Munaile SCZ Judgment Number 14
2. The Minister of Information and Broadcasting Services and the Attorney General v Fanwell Chembo on his Own Behalf and On Behalf of Other Members of The Media Institute of Southern Africa and Others (SCZ no 11 of 2007)
3. Austin Liato v. Sitwala, Selected Judgment No. 23 of 2018
4. Akashambatwa Mbikusita Lewanika, Hicuunga Evaristo Kambaila, Dean Namulya Mungomba, Sebastian Saizi Zulu, Jennifer Mwaba V Frederick Jacob Titus Chiluba (1998) ZR 79
5. Anderson Kambela Mazoka v Levy Patrick Mwanawasa(2005) ZR 138
6. Brelsford James Gondwe v Catherine Namugala, SCZ Appeal No. 129

Legislation referred to

1. Electoral Process Act No 35 of 2016
2. Electoral Act, Chapter 13 of the Laws of Zambia
3. The Local Government Elections Tribunals Rules, Statutory Instrument No 60 of 2016
4. Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No 2 of 2016

On 12 August 2021, the people of Kapwepwe Ward in in the Matero Constituency went to the polls to elect a councillor. The Petitioner and the 1st Respondent were amongst the candidates who stood for election as councillor. The former on the United Party for National Development ("UPND") ticket, and the latter on the Patriotic Front ("PF") ticket and the returning officer declared the 1st Respondent winner. The Petitioner does not state in her Petition or her Affidavit in Support of her Petition filed before this Honourable Tribunal when the 1st Respondent was declared winner, or when the said results were announced.

The Petitioner now challenges the election of the Respondent under the Electoral Process Act No 35 of 2016 (the "**Electoral Process Act**").

In her Petition and Affidavit Verifying facts filed into this Honourable Tribunal on 25 August 2021, the Petitioner alleges, and the 1st Respondent denies, that the 1st Respondent was not a duly elected candidate as there was noncompliance with the Constitution of Zambia and the Electoral Process Act. In her Petition and accompanying Affidavit (which the Petitioner relied on at the hearing), the Petitioner contended that:

1. During campaigns an identified woman known as Amake Kumbuso was seen at the gate of Twalumba Primary School and Desai Primary School giving out masks and telling the voters that the facemasks were from Edgar Chagwa Lungu and his other candidates and that such voters should vote for him;
2. At Lilanda Primary School, in Lilanda East 06 Polling Station, a voter was caught with 2 ballots but was shortly thereafter captured before the said ballots could be utilized;
3. On 10 August 2021, and during the door to door campaigns of the Petitioner's Party in Mwembeshi, the 1st Respondent's Party accosted the campaign team and caused extensive damage to property and endangered a lot of lives. The Petitioner averred that the 1st Respondent's Party put ablaze a motor vehicle belonging to the UPND;
4. On 13 July 2021, an aspirant under PF posted on his Facebook page pictures presented in form of an event reflecting PF distributing campaign materials to would be voters during the campaign ban and that the said incident was reported to the 2nd Respondent but that no action was taken;
5. The PF cadres threatened some UPND members between 28 and 30 July 2021 by stating to the UPND party members that if the meetings being held by the said UPND members were not cancelled, the house at which the meetings were being held would be set ablaze;

6. The Petitioner and his agents were victims each time any of the UPND members were seen wearing their party regalia and in most cases, were mercilessly beaten and asked to remove their regalia. In addition to this, there was a lot of intimidation and violence during the campaigns. To this effect, the number of registered voters in Kapwepwe was very low;
7. Each and every time the Petitioner attempted to put up posters and flags on walls and poles within minutes, a horde of unruly cadres from across the Matero constituency would be transported in the area where they were putting up posters and all the posters would be removed immediately;
8. On 27 May 2021, there was scheduled to be a Road Show in the Kapwepwe Ward where the Petitioner together with other UPND members would be in attendance. However, during the course of the Road Show, the PF cadres blocked the Petitioner and her agents as they were going around the market; and
9. The UPND did not have a level playing field during elections because at most of the UPND programmes, the PF chased the UPND.

As a result of the aforesaid, it is the Petitioner's case that the 1st Respondent was not duly elected as the said election was void.

From the onset, we wish to note that in accordance with article 159 of the Constitution of Zambia this Tribunal only has 30 days to hear and determine an election petition. In light of the clear and strict time constraints of the Tribunal, during the Scheduling Conference of the matter, this Tribunal ordered the parties to adduce all evidence of their witnesses by way of Affidavit in accordance with rule 20 (3) of the Local Government Election Tribunal Rules which allows the Tribunal, at any stage of the proceedings, to make an order requiring evidence to be adduced by way of affidavit.

In compliance with the Orders of the Tribunal, the Petitioner filed 3 Affidavits in Support of the Petition and submitted the said witnesses for cross examination.

The 1st and 2nd Respondents each filed an Answer to the Petition together with Affidavits accompanying the said Answers.

The 1st Respondent, in his answer denied the allegations of the Petitioner . The 1st Respondent contended that he is the duly elected Councillor of Kapwepwe Ward. We shall deal with the specific responses of the 1st Respondent in our Judgement below.

After trial, we requested for the parties to file their written submissions. At the time of writing our judgement, we had only received the submissions of the 2nd Respondent for which we are indebted.

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

Distribution of facemasks

The Petitioner called 4 witnesses in total. She was PW 1. She also called Sylvia Chiyuka who was PW2, Fredson Luwaile who was PW3, and Temba Miyoni who was PW4.

In support of the ground relating to the distribution of masks, PW 1 informed the Tribunal that at Twalumba Primary School and Desai Primary School, an identified woman known as Amake Kumbuso, who is a member of PF was seen at the gate of the polling station giving out facemasks and telling the electorate that the facemasks were from PF President Edgar Lungu and his candidates and they should vote for them. The Petitioner averred that the witnesses to the act of handing out masks was PW4 and Mrs Febby Kabunda. The Petitioner did not call Febby Kabunda.

During cross examination by counsel for the 1st Respondent, PW1 confirmed that she was not the one who saw Amake Kumbuso distributing the face masks. She confirmed that the one who perceived the distribution of the masks was PW4. She further confirmed that she does not know who Amake Kumbuso is. During cross examination, PW1 admitted that she did not have any evidence to support her claim that the named Amake Kumbuso was distributing facemasks to potential voters.

PW4 informed the Tribunal that he witnessed the distribution of facemasks by Amake Kumbuso to would be voters and that the said Amake Kumbuso informed the recipients of the facemasks that they should vote Edgar Lungu and his other candidates.

During the cross examination of PW4 by the 1st Respondent, PW4 averred that he knew Amake Kumbuso but could not identify her by her actual name. He further testified that he only saw Amake Kumbuso distribute the facemasks to 3 people.

A voter was caught with 2 ballots

In her Affidavit Supporting the Petition, the Petitioner alleged that at Lilanda Primary School, in Lilanda East 06 Polling Station, a voter was caught with 2 ballots but that the said lady was caught before she could cast them. The Petitioner did not call any witnesses in support of this allegation.

During cross examination by the 1st Respondent, PW1 confirmed that she did not witness the incident alleged but merely heard of the incident. PW1 further informed the Tribunal that she did not have any evidence linking any evidence of Amake Kumbuso to the claimed ballots. She further stated that she did not provide any evidence regarding the ballots.

The Petitioner further informed the Tribunal during cross examination by the 2nd Respondent's counsel that she did not make any report to the 2nd Respondent over the alleged incidents.

Allegations regarding damage to the Petitioner's property, acts of violence and acts preventing the Petitioner from campaigning

The Petitioner alleged that she was prevented from campaigning by the 1st Respondent in that on 10 August 2021, the UPND , during its door to door campaigns in Mwembeshi, was accosted by PF cadres and further set ablaze a motor vehicle, being a Nissan Van belonging to a Mr. Edward Kafula who was an aspiring candidate of the Petitioner's party.

The Petitioner informed the Tribunal that the burning incident caused a lot of panic to the residents of Mwembeshi and Kapwepwe.

In support of this, the Petitioner exhibited video evidence in her Affidavit marked "CS2". When played to the Tribunal during cross examination, the video merely depicted what appeared to be a burning car and contained some voices of people in the background. The Tribunal did not recognize the voices of the people in the video and the Petitioner did not give evidence regarding who the persons heard in the video were.

During cross examination, PW1 advised the Tribunal that the burning incident did not happen in the Petitioner's ward but happened in Zingalume which is in Mwembeshi Ward. PW1 further confirmed that the video evidence tendered before the Tribunal did not show the 1st Respondent in it nor was there any video images of the 1st Respondent's agents.

As regards the claim that the 1st Respondent damaged and destroyed the Petitioner's campaign material, the Petitioner informed the Tribunal that each time herself and her agents put up posters and flags on walls and poles, within few minutes a horde of unruly cadres from across Matero would be transported in the where such posters were hang and be removed by the PF immediately.

In cross examination, PW1 advised the Tribunal that she did not know which part of Matero the PF cadres removing the posters were from. PW1 further testified that she did not see the 1st Respondent removing the said campaign materials but that she only recognised a man she identified as Mago removing the material. Mago was not mentioned in the Affidavit evidence presented before the Tribunal and the 1st Respondent during cross examination objected to any further information regarding the said Mago. PW1 informed the Tribunal that other than her testimony, she did not bring any other evidence of the allegation that the PF cadres removed her campaign material.

On the allegation of election violence, the Petitioner informed the Tribunal that between 28 to 30 July 2021, UPND party members has a meeting at one of their members

residences. When the meeting ended, a PF cadre known as Festus told the owner of the house that he was going to set the residence of fire and burn the whole family if they continue holding such meetings. The incidence was apparently reported to the police.

The Petitioner further testified that each time she and her agents were seen wearing party regalia, the PF cadres would mercilessly beat them up. In addition, there was a lot of intimidation and violence during the campaigns which resulted in low voter turnout.

In support of the allegations of violence, PW2 and PW3 were called as witnesses. PW2 averred that while undertaking a road show on 10 August 2021, her and her members were attacked by PF cadres. PW2 averred that she was hit by an unregistered land cruiser which was carrying PF cadres.

On the other hand, PW3 averred that on May 27 2021, they were blocked by PF cadres during their campaigns and chased as they were informed that the market belonged to the 1st Respondent.

In cross examination, both PW2 and PW3 averred that they did not see the 1st Respondent during the alleged attack and further they did not have any evidence linking the 1st Respondent or his agents to the attacks they testified having occurred.

Distribution of campaign material during campaign ban

The Petitioner further alleges that on 13 July 2021, the 1st Respondent, an aspirant under PF posted on his Facebook page pictures in form of an event distributing campaign materials to could be voters. The Petitioner avers that this was reported to the 2nd Respondent through their agent in Matero but no action was taken. The Petitioner exhibited a document marked "CS3" as pictorial evidence to support the allegation. The picture showed 4 images of crowds undertaking various activities. It was not clear to this Tribunal which people were in the pictures before the Tribunal and the Tribunal could not make out what exactly was happening at the said event. In cross examination PW1

testified that the exhibit did not contain any images of any campaign material. The Petitioner did not call any other witnesses regarding the claim.

In response to the allegations of the Petitioner above, the 1st Respondent who is RW1 in this matter in his Answer and Affidavit in response to the Petition. The 1st Respondent only called one witness in support of his case.

The 1st Respondent averred that the evidence exhibited as "CS3" which RW1 also exhibited as MPS1 was meant to spread a message of love and not hate and further that he did not distribute campaign materials during the ban.

RW1 further testified that the 1st Respondent did not organise an event distributing any campaign materials but that the event was organised to say thank you for the past work. RW1 testified that Kapwepwe Ward was violent free and that the Petitioner had failed to show any violations by the 1st Respondent.

In cross examination, RW1 testified that he was present at the stadium where the images in exhibit CS31 were taken. RW1 however, testified that even though the campaigns did take place on 13 July 2021, he could not remember whether the campaigns lasted up to two weeks.

The 2nd Respondent also filed an Answer and Affidavit in Support of the Petition. The 2nd Respondent testified that there was no formal complaint made by the Petitioner that the evidence produced as exhibit "CS3" was never reported to the 2nd Respondent. The 2nd Respondent further averred that the 1st Respondent was duly elected considering the results which were counted and therefore that the Petitioner is not entitled to the reliefs sought.

After examining the facts and evidence in support of the Petition as well as the evidence in answer to the Petition given by the 1st and 2nd Respondent. We will now examine the law governing the nullification of election results.

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

"97. (2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that—
(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election—

(i) by a candidate; or

(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and

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

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

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

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

Under section 2 of the Electoral Process Act, "*corrupt practice*" means any conduct which is declared to be a corrupt practice in accordance with section 81 of the Election Process Act. Section 81 of the Act states as follows:

"81. (1) A person shall not, either directly or indirectly, by oneself or with any other person corruptly—

(a) give, lend, procure, offer, promise or agree to give, lend, procure or offer, any money to a voter or to any other person on behalf of a voter or for the benefit of a voter in order to induce that voter to vote or refrain from voting or corruptly do any such act as

aforesaid on account of such voter having voted or refrained from voting at any election;

(b) give, lend or procure, offer, promise or agree to give, lend, procure, offer or promise, any money to a voter or for the benefit of a voter or to any other person or on behalf of that person on behalf of any voter or to or for any other person for acting or joining in any procession or demonstration before, during or after any election;

(c) make any gift, loan, offer, promise, procurement or agreement to or for the benefit of any person in order to induce the person to procure or to endeavour to procure the return of any candidate at any election or the vote of any voter at any election;

(d) upon or in consequence of any gift, loan, offer, promise, procurement or agreement, procure or engage, promise or endeavour to procure, the return of any candidate at any election or the vote of any voter at any election;"

An "*illegal practice*" means an offence which is declared under the Electoral Process Act to be an illegal practice.

The wording "*other misconduct*", has not been defined under the Electoral Process Act. As such, regard shall be had to the canons of statutory interpretation in order for this Tribunal to arrive at the meaning of the phrase "*other misconduct*". In support of this, we shall refer to the Supreme Court in the case of *Matilda Mutale v Emmanuel Munaile* (1). In this case the Supreme Court held as follows on the construction of Acts of Parliament:

"The fundamental rule of construction of Acts of Parliament is that they must be construed according to the words expressed in the Acts themselves. If the words

of a statute are precise and unambiguous, then no more can be necessary than to expound on those words in the ordinary and natural sense"

In the case of *The Minister of Information and Broadcasting Services and The Attorney General v Fanwell Chembo (2)*, the Court considered a dictionary meaning of a word to draw the literal meaning of a word. This Tribunal shall therefore refer to the dictionary meaning of the phrase "*other misconduct*".

The Oxford Dictionary, Fourth Edition, 1951 at page 842 defined other to mean "*not the same as one or more or some already mentioned or implied*". It further defines the word misconduct to mean "*improper conduct*".

The phrase other misconduct as used in section 97(2) of the Electoral Process Act can thus be construed to mean conduct which is improper and which is not already mentioned or in section 97(2)(a) of the Electoral Process Act.

The Electoral Process Act further requires under section 97(2) (a)(i) that the illegal act must be committed either by a candidate, or his agent (with the candidates' knowledge). Section 2 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's nomination paper*". We are further guided by the case of *Lewanika v Chiluba* in which the Supreme Court held that not all of one's political party members can be agents and that agents must be appointed as provided for in the relevant legislation.

This Tribunal will also nullify the elections in question under section 97(2)(b) of the Electoral Process Act if it finds that the Petitioner's allegations indicate that there has been non-compliance with the provisions of the Electoral Process Act relating to the conduct of elections, and it appears to this 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.