MICHAEL MABENGA *v* SIKOTA WINA, MAFO WALLACE MAFIYO AND GEORGE SAMULELA

Supreme Court
Sakala, CJ, Chirwa, Chibesakunda, Mambilima and Silomba, JJS
11th February and 24th September, 2003
(SCZ Judgment No. 15 of 2003)

Flynote

Election Law – Election Act – Proof of one corrupt or illegal act sufficient to void election.
Election Law – Election Petition – Standard of proof – Higher than balance of probability, but less than beyond reasonable doubt.

Headnote

This is an election petition brought under Article 72 (2) of the Constitution of Zambia. It arises from a decision of the High Court in an election petition brought in the High Court by the respondents, following an election the High Court declared null and void. The appellant was dissatisfied with the decision of the High Court and hence this appeal.

Held:

1. An election petition is like any other civil claim depends on the pleadings and the burden of proof is on the challenger to that election to prove to a standard higher than on a mere balance of probability.

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

3. The activities of the appellant were so improper that they eroded the electoral process and induced the electorate to vote for a candidate not of their choice.

4. The allegations against the appellant were of a criminal nature.

Cases referred to:

1. *Lewanika and Others v Chiluba,* SCZ 14 of 1998.
2. *Mlewa v Wightman* (1995-97) Z.R. 171

Legislation referred to:

1. Constitution of Zambia, Chapter 1 of the Laws of Zambia . Article 72 (1).
2. Electoral Act, Chapter 13 of the Laws of Zambia .Section 18 (2) (a).
3. Electoral Code of Conduct .Statutory Instrument Numner 179 of 1996. Regulation 7 (1) and (2).
4. Statutory Instrument Number of regulation 51.
5. Financial (Control and Management Act, Chapter 347 of the Laws of Zambia.
6. Evidence Act, Chapter 25 of the Laws of Zambia. Section 15 (1).

Work referred to:

Rules of the Supreme Court (White Book), 1999 Edition. Order 15.

C. L. Mundia of Mundia and Co., R. Mainza of Mainza and Co. and M. Zaloumis of Dove Chambers for the appellants
S. Sikota of Central Chambers for the respondent

Judgment

CHIRWA, JS, delivered judgment of the court: -

This is an election petition to this court brought under Article 72 (2) of the Constitution of Zambia. It arises from a decision of the High Court in an election petition brought at the High Court by the respondents, namely, Sikota Wina (1st Respondent), Mago Wallace Mafiyo (2nd Respondent) and George Samulela (3rd Respondent), challenging the election of the appellant, Michael Mabenga, which election the High Court declared null and void, thereby declaring the Mulobezi Parliamentary Constituency vacant. An election petition is like any other civil claim that depends on the pleadings and the burden of proof is on the challenger to 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": See *Lewanika and Others v Chiluba (1).* Before we go into details of this appeal, we wish to put it on record that the Attorney-General applied to be joined to this appeal as a second appellant under Order 15 of the Rules of the Supreme Court, 1999 Edition because of the learned trial judge's remarks in his judgment at J57 that "I would further like to mention that the Electoral Commission and the Attorney -General allowed what happened in Mulobezi Parliamentary Constituency". We declined to allow the application because that remark by the learned trial judge was on obiter dictum, that did not go to the root of the judgment appealed against.

Coming to the present appeal, any appeal against a determination of an election petition lies to this court only on points of law, including the interpretation of the Constitution article 72 (2). As we have said, an election petition is like any other civil claim governed by the pleadings, in this case by the petition and answer and the parties are bound by their pleadings. The election petition as presented contained a number of allegations of corrupt or illegal practices allegedly committed by the appellant.

In order to render the election void, any corrupt practice or illegal practice proved is sufficient if proved to the satisfaction of the court. (see *Mlewa v Wightman* (1). The corrupt

and illegal practices and election offences are contained in Part IV of the Electoral (General) Regulations.

After the trial of the petition, the learned trial judge found that the appellant:

(a) Wrongfully requisitioned for drugs from Medical Stores and he used his agents who are unauthorized drug handlers to collect and distribute the drugs;

(b) The appellant caused the collected drugs to be stored at a house at Sichili Basic School from where he distributed the same to various polling stations up to voting day;

(c) As a result of (a) and (b) above some unauthorized drug handlers were arrested by the Police for the same;

(d) The appellant used a Government facility, namely a house at Sichili Basic School, as his MMD campaign post and paid nothing for this service;

(e) The appellant used Constituency Development Fund totaling K39 million for his campaign; and

(f) The appellant used GRZ transport for his campaign in particular, he collected Indunas from various places to Mwandi for the purposes of holding secret campaign strategic meetings.

There were 17 grounds of appeal, which were supported by detailed written submissions. We will not deal with all these grounds of appeal in the order as presented and we will not deal with all these grounds as we decided in *Mlewa v Wightman (2),* that satisfactory proof of any one corrupt or illegal or misconduct in an election petition is sufficient to nullify any election. The grounds of appeal may sound many, but they basically revolve on the drugs: - their requisition, collection and distribution; the use of Government transport during the campaign, in particular, collection of Indunas from various places to Mwandi for the purposes of strategizing his campaign; the use of Government facilities at Sichili Basic School and the use of Constituency Development Fund for campaign. In considering this appeal, we will also bear in mind the pleadings as presented in the form of petition and answer.

The allegations on drugs are contained in paragraphs 5.1 to 5.1.5 of the petition. The appellant's answer is in paragraphs 5 to 15, which in sum the appellant admits requisitioning the drugs from the Medical Stores for the Rural Health Centres and Community Health Centres in Mulobezi Constituency, but that this was done in the interest of the public in the Constituency, since there was an outbreak of a mysterious disease; further that he used his transport to transport these drugs as a Minister and his civil responsibility at the Health Centres concerned, had no transport. He denied distributing the drugs at polling stations up to the Election Day using his agents. He further denied that he collected the drugs for the use in his campaign to induce voters to vote for him during the election.

Evidence on record shows the manner in which drugs are normally requisitioned from the Medical Stores. These are normally done by the hospital which in turn distributes them to the Health Centres under it. The respondent adduced evidence to the effect that the

manner in which the drugs were requisitioned by the appellant was abnormal and that there was no mysterious disease in November 2001. The learned trial judge further found that the people handling the drugs were unqualified to handle and transport the drugs and that it was not a mere coincidence that these people were all MMD officials and MMD vehicle was used in distributing them. Looking at the evidence, the learned trial judge found that the drugs were requisitioned by the appellant from Medical Stores for the purposes of using the same to lure voters to vote for him. These findings are the subject of grounds 3-7 in the grounds of appeal and further detailed in the written arguments. In these grounds, it was argued that the findings that it was unreasonable for the appellant to requisition the drugs long after the outbreak of the mysterious disease had been contained, was unsupported by evidence. Further, that, the fact that the drugs were transported by MMD officials, in MMD motor vehicle, does not go to the root of the matter that they had a bearing on election results. It was further argued that the alleged act is not an offence under Regulation 51 of the Electoral (General) Regulations and for it to affect the result of the elections, it must come within Section 18 of the Electoral Act and that there was no evidence on record that the MMD officials were appointed by the appellant as his agents.

In reply, generally on the issue of drugs, it was submitted on behalf of the respondents that there was no doubt that the drugs were requisitioned at the instigation of the appellant and that there was no reason for it as the alleged mysterious disease had been contained in July 2001 and there was no need for the appellant's involvement in the procurement of drugs in November 2001. Further, there was no need to use MMD transport and officials and to keep the same at a house used by the appellant during the campaign period. It was submitted that the only inference that could be made from the facts is that the appellant got involved in order to gain and booster his popularity in the Constituency during the election. Further, that in any event, these were findings of fact against which no appeal lies in an election petition.

In considering this ground of appeal on drugs, we will look at the pleadings and evidence generally and see if the conclusions made by the learned trial judge are unattainable on the evidence on record.

The obtaining of the drugs at the instigation of the appellant from Medical Stores is not denied by the appellant in his answer. It is further not denied that he used some people, not officials in the Ministry of Health, and that he used MMD transport. The appellant states that the people who transported and handled the drugs were qualified to do so having attended some courses to handle the drugs. The reasons given for requisitioning the drugs were that there had been an outbreak of a mysterious disease in Mulobezi Constituency and being community conscious, he took the initiative to requisition the drugs and as the Health Centres had no transport, he took it upon himself to secure transport to ferry the drugs to Mulobezi.

There is evidence on record that the so-called mysterious disease was mysterious when it first broke out and a few people died but medical authorities diagnosed this disease to be pneumonia and they controlled it in July, 2001. The appellant could have been a Member of Parliament, but there is no evidence of what the appellant did to assist to contain this mysterious disease before it was discovered to be pneumonia. If the appellant requisitioned the drugs before the disease was controlled, this he did not support by evidence. Further, accepting that the appellant is a very spirited community conscious person, after getting the report of a mysterious disease from his brother, he never queried the health authorities at Sichili Mission Hospital about it, for if he did, he would have been told that the mysterious

disease was not a mystery at all, but pneumonia and the drug kit would have concentrated on containing this disease. But the appellant, on the strength of the report from his brother, disregarded the procedure obtaining in the Ministry of Health on the procurement of drugs, namely, that the same are ordered by the hospital manning or controlling the satellite health centres.

As if this were not enough, when the drug kits were collected, they were not taken to Sichili Mission Hospital for distribution to the affected areas, but taken to Sichili Basic School and kept under the control of a teacher who had no connection with Ministry of Health. The evidence of PWs 7, 8 and 9 show total disregard of the normal procedure in the ordering and storage of drugs. The evidence of PW 7, the Principal Environmentalist, PW 8 the Clinical Officer PW 16, District Director of Health, PW 9 the Officer-in-Charge, Sichili Police Post, shows that the drugs were ordered without the authority of the hospital and kept in places other than health centres and an attempt was made to regularize the anomaly after elections when the headmaster of Sichili Basic School attempted to send the kits to people who were marginally connected with health institutions. There is evidence of PW 9 and PW 18, that there was a distribution list for the drugs and these were not to health centres only, but to individuals and MMD. The evidence further shows that some of these people marginally connected with health, are trained in sanitation, mosquito control and boreholes, such as RW 27. We shudder that it is the Ministry of Health Policy to give such ill-equipped personnel drugs to administer to people as it was clearly shown in evidence that they did not know the dosage for simple malaria. Also, there is evidence that drugs were handled and recovered from teachers, such as, RW 29, 30 and 31. There is further evidence from PWs 9 and 17, about a failed attempt by the appellant to have the former Republican President donate some drug kits at a rally he addressed drumming support for the appellant, but which the President did not fortunately do.

The evidence adduced by the appellant to justify the movement of the drugs goes completely against the commonest sense and reason and also against his answer to the petition. Taking the totality of the appellant's conduct in the handling of the drug kits, the activities of the appellant go beyond philanthropic activities, we said were not covered in the *Lewanika and Others v Chiluba.* The appellant's activities were so improper that they eroded the electoral process as to amount to "other misconduct" as provided in Section 18 (2) (a) of the Electoral Act, Cap. 13. We are satisfied on the evidence on record that the learned trial judge drew the only reasonable conclusion that the whole scheme of drug procurement and distribution was made to boost his campaign as a Parliamentary candidate in the Mulobezi Constituency in the December 2001 elections. The activities, did unfairly, have an effect on the electorate that they were induced to vote for a candidate not of their choice, so as to make the election result void. We would therefore dismiss grounds 3, 4 and 6 of the grounds of appeal as far as they touch the acquisition and distribution of drug kits in November and December 2001.

Before we leave this ground of appeal, we wish to express our displeasure at the apparent harassment and victimization of PW 9, Sgt. Sinjabu, who according to the evidence, in the course of performance of his duties as officer-in-charge of Sichili Police Post, he was harassed by the authorities that-may-be and immediately put on a "verbal" transfer. Such harassment and victimization of Civil Servants in performance of their duties should be frowned upon by all who wish free and fair elections.

The next finding appealed against is the allegation contained in paragraph 5.5 to 5.5.3 of the petition, in which the respondent alleged that the appellant received K30 million from the Constituency Development Fund. The appellant in his answer to this allegation denied

that he abused the fund on his campaign and that his constituency received K30 million after dissolution of Parliament. The appellant averred that the money was administered by a committee which was entrusted with the responsibility of disbursing the money on behalf of the fund. The learned trial judge disbelieved the evidence that the funds were withdrawn with the consent of the committee for specific projects in that no minutes of such meeting were produced and he did not believe that the money so withdrawn was kept by one Mabula until produced in court, but that the money withdrawn was used by the appellant for his campaign and only organised some other money to look as if the said Mabula was keeping it.

> In arguing against this finding in ground 12, it was argued that, having found no direct evidence to prove that the appellant had abused the fund or misused the same for his campaign, the learned trial court erred in finding that this allegation in the petition proved. The main point of criticising the learned trial judge is that there was no direct evidence that the money was withdrawn for the purposes of the campaign by the appellant and that the money was produced in court when the court ordered it to be produced. To have a proper perspective on this allegation, the evidence of Mr. Sipalo, the Bank Manager, PW 6, is pertinent. His evidence is to the effect that the appellant kept on ringing him if the Constituency Development Fund account had been funded and when it was finally funded, the appellant, in the company of Mabula went to the bank and withdrew, on a cheque, the sum of K29,800,000-00 and this withdrawal is confirmed by the bank statement. The withdrawal of the money is confirmed by Mr. Mabula himself. The circumstances under which the appellant and Mr. Mabula met, according to the evidence by the appellant and Mr. Mabula on total analysis, create a circus scene to say the least. The appellant gave conflicting reasons as to why he went to Sesheke. The Chairman of this Development Fund never produced any minutes of the committee authorising the withdrawal of the money. In fact, the committee had been dissolved. Who authorised the withdrawal and for what projects? Further, it is unbelievable that if the funds were withdrawn for a genuine and legitimate purpose was not utilized on those projects, instead Mr. Mabula kept public funds in his village house for months only to produce it in court. Why not return it to the Council Treasurer who would have banked it for safety.

It is not a mere coincidence that Mr. Mabula was the Fund Chairman and at the same time an MMD Constituency Chairman and he is the one who went to cash the cheque at the bank and met the appellant who had been making inquiries at the bank if the Constituency Fund account had been funded. These factors are too much of a coincidence to have no bearing an election. The appellant was no longer a Member of Parliament, Parliament having been dissolved and therefore had no dealing with the Fund. The Constituency Development Fund Committee itself was dissolved. In these circumstances, one can only conclude that there was undue pressure on the poor civil servant to withdraw the money on 3rd December, 2001, with elections coming on 27th December, 2001. This in fact amount to theft of these funds.

The handling of the money was contrary to Financial (Control and Management) Act. The learned trial judge cannot be faulted for arriving at the conclusion that the K29,800,000-00 was withdrawn to finance the appellant's election campaign. The idea of Mabula "keeping" the money up to when he produced it in court was meant to throw a smoke screen around the transaction. Certainly, there was no spirited fight against the learned trial judges conclusion that the Constituency Development Funds were drawn to fund the appellants election campaign. The appeal against this finding is therefore dismissed. We now turn to the finding by the trial judge that the appellant used government transport during this campaign. The allegations in the petition are contained in Paragraphs 5.6 to 5.6.2. The evidence led to support these allegations is that the appellant used GRZ 757BP during the

campaign and also used some other/same motor vehicle to ferry Induna's for secret meetings to boost his election campaign. In his answer, the appellant denies using GRZ 757BP during his campaign but instead used his personal vehicle registration No. AAR 1487, one vehicle belonging to a Mr. Zumla, registration No. AUA 659, one vehicle belonging to a Mr. Lubinda, registration No. AUA 177, and one MMD motor vehicle, registration No. AAX (whose full number the appellant was not able to give in his answer).

He, however, admitted availing a GRZ vehicle to Indunas to enable them to travel to Mwandi, but denied that it was for a secret meeting to tell them to tell their people not to vote for the 1st respondent. To support this allegation, the respondents adduced, in addition to their own evidence through PW 9 and 17, both Police Officers. The evidence of these Police Officers is to the effect that GRZ 757 BP was used by the appellant during the campaign period and that at one stage members of the public got so infuriated that they wanted to damage the vehicle and they had to keep it at the Police Post for safety.

On the other hand, the appellant and his witness testified that GRZ 757 BP, although his official vehicle, was kept in Livingstone except on one occasion that he called it to Mulobezi for use by security personnel the day the former national President visited Mulobezi and that after the Presidential visit, it returned to Livingstone. Further, although it was admitted that Indunas were transported to Mwandi in a GRZ vehicle provided by the appellant, the purpose was not for campaign. These allegations were argued as grounds 13 and 14 and we will treat them together as they are generic. In ground 13, it was submitted that the lower court misdirected itself in law and in fact by holding that the appellant used Government transport and facilities for his campaign and wholly accepted the evidence of PWs 9 and 17, as they were independent, disregarding the evidence of RW26 a Government Transport Officer. It was argued that this transport officer also had no interest in the matter and yet his evidence was disregarded without any reason. This, it was submitted, showed the trial judge assumed that a journey from Mulobezi to Livingstone, could not take 2½ hours. It was also argued that the learned trial judge failed to take into account that when a President travels to rural areas by helicopter, there is need to have sufficient transport and that the vehicle was returned to Livingstone after the Presidential visit to Mulobezi.

On providing transport to the Indunas, it was argued that it was not for the appellant to know what the Indunas discussed and that it was up to the Indunas themselves to decide who to vote for. It was also argued that providing transport to Indunas was not forbidden under the Electoral Regulations.

In reply, it was argued that the learned trial judge correctly found that the appellant used Government transport for his campaign as there was evidence which was not controverted that the vehicle in question was kept at Police Post for safety after some electorates protested against its use for campaign. It was also argued that the appellant's own witness, RW 28, told the court that the trip from Mulobezi to Livingstone could take at least six hours. On transporting Indunas, it was argued that the appellant admitted in his answer to the petition and his attempt to justify this in his evidence was rightly rejected by the trial court.

We have considered these two grounds carefully. A careful study of the evidence by the appellant that the vehicle was called for use by security personnel sounds very hollow. The President was visiting Western Province and it is the duty of the Minister responsible for the province to make logistical arrangements and not for candidates. His own evidence shows that in fact the vehicle was never used by security personnel because, in the first place, it

was never asked for. The evidence of the Police Officers on the ground was that in fact the vehicle was used for campaign and some electorates protected and nearly damaged it in protest, hence it was kept at the Police Post is more plausible and the learned trial judge cannot be faulted for rejecting the appellant's explanation. On the use of the Government transport to ferry the Indunas, the appellant never explained why the Indunas approached him, if they did, for transport. The secret meeting cannot be disbelieved when the appellant's own witnesses, such as RW 13 and RW 19, give a very unbelievable reason that they were collected around 0300 hours only to be told to be non-partisan during the election. Was it necessary to collect Indunas at 0300 hours just to impress upon them not to be partisan? It is clear that the Indunas were collected at his instance, certainly to be partisan. This was a secret meeting organized by the appellant for the purposes of soliciting their and their subjects' support in the election. We cannot also fault the findings of the learned trial judge on these allegations and the use of Government transport for campaign is contrary to Regulation 7 (1) (l) of the Electoral (Conduct) Regulations 1996. These two grounds cannot stand and are dismissed.

On the finding by the trial judge that the appellant used a Government house for his campaign should be looked at the appellant's answer to the allegation as contained in Paragraph 18 of his answer. The appellant admits using the house, but for lodging only and that it was given to him by the Headmaster. From the evidence, the learned trial judge found that the house in question, although authorized by the Headmaster, that authority was given contrary to instruction from the Ministry of Education not to permit the use of Government property for political activities. He further found that the house was not only used for lodging, but it was a meeting place for MMD cadres engaged in the election campaign and the appellant used the house as storage and distribution point of drugs. The learned trial judge further found that the appellant had not paid for the use of the house. These findings are the basis of grounds of appeal 7 and 8.

In ground 7, it was argued that the learned trial judge erred in admitting in evidence on an unauthenticated document purported to have been issued by the Ministry of Education and by so doing the learned judge contravened Section 3 (1) (b) of the Evidence Act, Cap. 43. On ground 8, it was argued that the learned trial judge erred in law and fact in holding that the appellant used the house without paying when PW18 conceded in cross-examination that the agreement between the appellant and school authorities was that the appellant would provide paint and that the appellant did confirm that he complied with the agreement. The finding by the learned trial judge that the appellant did not pay for the use of the house cannot therefore stand. In reply, for the respondents, it was argued that the circular from the Ministry of Education forbidding the use of school property by Political parties, was a public document and it was produced by a person who was interested in implementing it as a School Board Member and it needed not to be produced by the author or any addressees. If the appellant said that the document was a forgery, it was incumbent upon them to prove the forgery. As regards to ground 8, it was submitted that this was against a finding of fact and as such it cannot be a ground in an election appeal as it is against the provisions of article 72 (2) of the Constitution. Further, the evidence of when the agent for the appellant wrote the request letter is doubtful as when he is supposed to have handed in the request, he was supposed also to be with the appellant in Lusaka.

We have considered these two grounds of appeal. The circular from the Ministry of Education is attacked on the basis of authenticity and it was submitted that this was contrary to Section 3 (1) (a) of the Evidence Act. It is addressed to all those manning schools and if the whole Section 3 of the Evidence Act is read in total, it is clear that this document is admissible and the court considered the contents and circumstances of the document as provided for under Section 3 (4) of the Act and we cannot fault him.

On ground 8, we are mindful of Regulation 7 (1) (l) and Regulation 7 (2) of the Electoral (Conduct) Regulations, Statutory Instrument No. 179 of 1996. Regulation 7 (1) (l) of these Regulations prohibits the use of Government transport or facility for campaign purposes. Appellant's answer to the allegations against him is that he had authority from the school authorities. The use of Government transport and facility is prohibited and school authorities cannot authorize that which is prohibited by the law. Further, there is no evidence that the facility was available for hire to all the people contesting election. Furthermore, the evidence by the appellant of having paid for the use of the property is most unsatisfactory. He does not know how much the paint cost, neither does he know who delivered it and when. Taking the totality of the evidence and bearing in mind that all those in position and who are alleged to have granted authority were MMD officials and in fact on the appellant's own evidence, they were his agents. There was clear evidence of use, by the appellant, of Government facility for the purposes of his campaign during the 2001 Parliamentary Elections. We see no merits in these two grounds of appeal and they are dismissed.

On the totality of this appeal, we cannot fault the findings of facts that the appellant requisitioned, collected and distributed drugs from Medical Stores during the election campaign in order to induce voters to vote for him. We cannot also fault the findings of fact that the appellant used Government transport and facilities during the campaign period. On the use of Constituency Development Funds, this cannot be faulted, in fact with evidence before the court, the learned trial judge should have recommended to the Director of Public Prosecutions for possible prosecution in terms of Section 29 of the Electoral Act. The smoke screen schemed by the appellant and his witnesses in the matter does not make any sense for if the money was meant for projects, there ought to have been invoices demanding payment and not keep the money because of a rumour of an election petition touching the same money.

The next question to determine in this appeal is whether our guidelines in the *Lewanika and Others v Chiluba (1),* case have been followed. In that case, we held that proof of an election petition, although a civil matter was higher than balance of probability, but less than beyond all reasonable doubt. We agree with the advocates for the appellant that the learned trial judge throughout advised himself and acted on proof on the balance of probability. This was a misdirection. However, the finding of standard of proof is based on the evidence before the court. As an appellate court, we have to look at the evidence supporting each allegation and see if, properly directing himself, the learned trial judge would have found the allegations proved to a degree higher than on the balance of probability. On our analysis of the evidence supporting the allegations found proved, we are satisfied that even if the learned trial judge properly directed himself on the standard of proof, he ought to have come to the same conclusion that the allegations were proved to the set standard. As the allegations in an election petition are of a criminal nature, this is a proper case for this court to exercise its powers under the provision under Section 15 (1) of the Supreme Court Act and we so hold that the allegations against the conduct of the appellant during the December 2001 Parliamentary Elections have been proved beyond the balance of probability. Grounds 1 and 2 of the appeal are therefore dismissed.

In conclusion, we are satisfied that the respondents proved the allegations of misconduct of the appellant as found by the learned trial judge and that the election of the appellant as a Member of Parliament for the Mulobezi Constituency is void in terms of Section 18 (2) (a) of the Electoral Act, Cap. 13. The appeal is dismissed. Costs are to the respondents both here and in the court below to be agreed, in default, to be taxed.

Appeal dismissed