

BORNFACE MUDZINGWA
versus
ZEVEZAI COURT

HIGH COURT OF ZIMBABWE
ELECTORAL COURT DIVISION
ZISENGWE J
MASVINGO, 19 October, 23 & 14 November 2023, 18, 19 & 26 January, 8 & 9 February 2024
Judgement delivered on 25 February 2024

Election Petition: Ex-tempore judgment

J Bamu, for the petitioner

S Kachere, for the respondent

ZISENGWE J: The contest for the seat of member of parliament for the Bikita East Constituency in the August 2023 harmonized elections was a two-horse pitting the petitioner and the respondent. They did so on the tickets of the Zimbabwe African National Union (Patriotic Front) (ZANU PF) and the Citizens Coalition for change (CCC) parties respectively. At the conclusion of that election the respondent was declared duly elected having garnered 9880 votes against the petitioner's 7544 votes.

The petitioner seeks a nullification of the result of that election. He claims that these results are not a true reflection of the will of the electorate in that constituency as the election was marred by myriad of electoral mal-practices and other acts of non-compliance with the electoral Act [Chapter 2:13] ("the Act"). He further avers that but for those electoral mal-practices committed by various actors to the election, he would have easily triumphed over the respondent.

The constituency in question is predominantly rural and covers a vast geographical area. It comprises 10 wards namely wards 15,16,17,18,20,21,24,25,28 and 31. Of those wards only two wards (wards 17 and 20) voted for the petitioner and the rest voted for the respondent.

In this petition enumerated several complaints of electoral mal-practice which according to him rendered the election not free and fair. These are:

- a) voter intimidation in the run up to and during the elections
- b) vote buying both before and during the elections
- c) voter coercion
- d) voter suppression and disfranchisement during elections with the direct or indirect support of ZEC, FAZ and traditional leaders
- e) prohibited conduct including campaigning within 300 metres of the polling station
- f) a faulty voters' roll which was not searchable verifiable and auditable and resulted in the disfranchisement of many voters and the inclusion of negligible voters
- g) coercion by traditional leaders and FAZ
- h) treats of retribution
- i) intimidation and a sense of impunity on the part of perpetrators
- j) A conspicuously inflated number of assisted voters
- k) Assaults perpetrated on his supporters
- l) The setting up of Exit poll survey clerks within the polling stations manned by ZANU (PF) personnel.
- m) Threats of eviction issued by Traditional leaders should the voters vote for the opposition.
- n) Petitioner's polling agents having been forced to sign blank election return forms (V11 forms) after which the figures were then inserted in their absence.

The petitioner therefore seeks an order captured in his draft order which reads as follows:

- a) The respondent was not duly elected as a member of Parliament for the Bikita East Parliamentary Elections I the elections held on 23 August 2023. Accordingly, his election be and is hereby set aside.
- b) Consequent to the above, respondent be and is hereby deemed to have vacated his seat as a member of Parliament for the Bikita East Parliamentary Constituency.

- c) The petitioner be and is hereby declared as having been declared as having been duly elected as the member of Parliament for Bikita East Parliamentary for the purposes of election on 23 August 2023.
- d) **Alternatively**, Bikita East Parliamentary Constituency be and is hereby declared vacant
- e) There shall be no order as to costs.

The respondent's position

The petition stands opposed by the respondent who vehemently disputes the perpetration of any electoral malpractices by him or anyone associated with his party. I briefly pause here to indicate that in his opposing affidavit the respondent raised a number of preliminary points some of which were withdrawn and the remainder dismissed pursuant to arguments being heard thereto. This judgment therefore is concerned solely with the merits of the application.

The respondent insists that the elections were held in peaceful environment and denies the allegations of coercion, intimidation or vote buying. He also disputes allegations levelled against traditional chiefs of the eviction of villagers should they not vote for him.

Respondent further denies having worked in cahoots with the Zimbabwe Electoral Commission (ZEC), FAZ or traditional leaders in the run up and during the elections. He also avers that he lacked the capacity to suppress or disenfranchise any section of the electorate as alleged by the petitioner and that even if this happened it was of limited or minimal impact to the overall outcome of election.

He further denies having campaigned within 300 metres of the any polling station.

He equally denies allegations of vote buying on his part nor coercion of any section of the electorate to attend his campaign rallies and meetings. He further dissociates himself from the compilation and management of the voters roll and pointed out that in any event the voters roll was common to both candidates and therefore affected both candidates alike.

He denies all allegations of violence levelled against him by the petitioner and charges that it was in fact his supporters who were on the receiving end of violence perpetuated by CCC supporters. In this latter respect he named two of his supports who were allegedly assaulted by CCC members in ward 15.

As regards the role traditional leaders he denies that they were is deployed as his polling agents nor having witnessed any of them threatening villagers with eviction should they not vote for him or ZANU (PF).

He also denies that the petitioner's polling agents were forced to sign blank V11 forms and that if the petitioner's polling agents did sign blank V11 forms It was grossly negligent for them to do so.

In a word, therefore, the respondent categorically denies the commission of any acts of electoral malpractice by him or his party or by traditional leaders or ZEC.

In all instances he accuses the petitioner of making bald and unsubstituted allegations. He therefore challenged the petitioner to avail evidence to support those allegations.

In his answering affidavit the petitioner stuck to his guns and undertook to produce the requisite evidence at trial.

The evidence

Inclusive of the petitioner, a total of 11 witness testified for the petitioner's case. Meanwhile five witnesses, including the respondent, testified for the respondent's case. In addition, several witnesses' affidavits were produced as exhibits for both parties.

The petitioner's case

The witnesses who testified for the petitioner's case apart from the petitioner himself were (in the order they testified) the following: Gordon Ndava, Chitsidzo Makaya, Remeredzai Meke, Zebron Gumireshe, Addmore Chikomba, Naboth Mucheyi, Lawrence Tawedzera, Decent Chikwiya, Styra Mangwiwo and Phillimon Maperezanwa.

I shall not endeavour to recount the evidence of each witness in detail- however an overall summary of the evidence of the petitioner and the respondent will be given, and the evidence of their respective witnesses will be given as when same is necessary for the resolution of any point in issue.

The broad contentious issues to which the witness testified were violence, intimidation and coercion, the role of an organization commonly referred to as FAZ (which I gather is acronym for Forever Alliance Zimbabwe), the alleged meddling by traditional leaders in political matters, and the prohibition Notices issued by the police against petitioner's rallies and meetings. These categories are solely for convenience as they related and interwoven. The alleged role of FAZ for example dovetails with intimidation and violence, so too is the alleged role of traditional chiefs and so on.

The petitioner testified that the elections on the constituency was held in an atmosphere of voter intimidation, voter suppression, violence and several other electoral malpractices. He gave a ward by ward account of what transpired and the factors or events which militated against a just outcome.

He had a lot to say about the role allegedly played by FAZ in the election. In this regard there were two main issues relating to this organization as testified by the petitioner alongside virtually all of his witness. Firstly, there was the setting up by this organisation of what were referred to as “terror bases” at two major business centres namely Mbuya and Chikuku business centres. Secondly and perhaps more importantly, there was an allegation of the setting up by FAZ of what was referred to as “exit poll survey desks” at virtually all polling stations across the constituency.

The tenor of the petitioner and his witnesses’ account was basically that this organization is affiliated to the respondent’s party and that it basically laid siege on the constituency in the run-up to the election and instilled dread the electorate.

According to petitioner either the petitioner or his agents would traverse the constituency in the company of FAZ members demonstrating the connection between respondent’s party and the said organization.

As for the so-called exit poll survey desks it was the petitioners’ evidence that these were even captured in the Southern African Development Community (SADC) report on Zimbabwe’s August 2023 elections making their existence undeniable.

It would be suggested to him under cross examination that he could not have polled 7544 votes if there was wide spread intimidation as he alleged. In response the petitioner insisted that he would undoubtedly have fared much better and easily beaten the respondent had it not been of the intimidatory antics of the respondent alongside FAZ.

He would deny suggestions put to him during cross examination that FAZ were only election observers. He stressed that it’s the setting up of exit poll survey desks where *inter alia* table clothes emblazoned with ZANU (PF) logos and colours dispelled that notion.

The petitioner indicated that the (SADC) observer report corroborated his version of not only of presence of FAZ at the polling station and their influence on the overall outcome of the elections but also on intimidation by traditional leaders, violence, coercion voter suppression and

all other election malpractices. The report was produced as an exhibit violence intimidation and coercion.

The petitioner testified that violence and intimidation were widespread in most wards in the constituency. He singled out ward 24 which he described as one of his best wards where he had nonetheless lost. He attributed the loss to intimidation he indicated that some 5 days before the election a group calling itself Heritage camped at Mbuya Nehanda Business centre which is the centre of the ward. They had about 40 motor bikes and 35 double cab motor vehicles and they roamed around the area and assaulting any person wearing the CCC regalia.

The petitioner also testified that in the resettlement areas the villagers were threatened with eviction from their plots should they dared vote for him.

As for the cases of assault, the petitioner conceded during cross examination that he had not been personally attacked nor did he witness any such assaults. He reiterated that he had received reports of assaults but in one instance he had seen some of his injured supporters.

He also referred an incident where he claims the respondent and his supporters vandalized a solar powered borehole which he had installed in ward 18. According to him this was meant to sabotage his credentials in that area and dent his chances in the elections. A report to the police did not yield any meaningful results creating an impression of impunity of the perpetrator's which in turn created an intimidatory atmosphere.

According to petitioner other electoral malpractice under this rubric was the partisan distribution of food handouts. He indicated that in the run-up elections only ZANU (PF) were the recipients of such food handouts.

As far as the alleged involvement of traditional leaders is concerned, the evidence of the petitioner was that the traditional leaders, contrary to their duty to remain apolitical dabbled in political activities wherein they took sides with ZANU (PF). According to him some of them would threaten villagers with a recurrence of the violence which characterised the June 2008 Presidential run-off elections should they vote for him. The net effect according to him was the creation of an atmosphere of fear particularly amongst his supporters much to his detriment.

The petitioner further testified that the respondent was the beneficiary of the meddling by traditional leaders in political matters. He dismissed respondents' denial of this fact pointing out

as he did that the respondent or his agents would be at the meetings addressed by the traditional leaders.

In this regard he testified that some three weeks before the elections several gatherings were held by traditional leaders to drum up support for the respondent and to coerce people to vote for the respondent. According to him threats were issued to the villagers' reprisals should they dare defy the order. According to petitioner the villagers were threatened with violence, torture or arson if they did not vote for the respondent.

He also testified that Traditional leaders and other ZANU (PF) leaders moved around the constituency telling people not to wear CCC regalia. According to him this was particularly around 10-13 August 2023, some 10 days before polling day which the Vice President of Zimbabwe addressed a rally in the constituency.

The role allegedly played by Chief Budzi took centre stage during the trial. The evidence in this regard was basically that he was brazen about his support for the respondent and his party. The petitioner and other witnesses testified that on one occasion he gathered all the headmen and village heads in his area of jurisdiction and introduced the respondent to vote for the respondent. The consequences for defying this instruction were dire- banishment from whichever village they hailed from.

Further, the petitioner testified that he personally witnessed Chief Budzi campaigning for ZANU (PF) at Mbuya Nehanda Business Centre in ward 24. He would be taken to task during cross examination on why he omitted that crucial piece of evidence in his affidavit. He explained that the affidavit was not meant to be a comprehensive account of all the incidents but a mere precis thereof awaiting a fuller account during oral evidence in court.

He would vehemently deny assertions put to him in cross examination that the respondent won owing to the popularity of ZANU (PF) and its policies and activities in the constituency. He reiterated that the victory was tainted by the electoral vices stated earlier. He would also dispute that he lost the election owing to lack of support or any in-fighting within his party.

With regards to police prohibition notices, the petitioner testified that most of the applications he made the police to hold meetings on rallies were turned down. He also made reference to one incident in Ward 25 where both a prohibition notice and an approval order were issued for the same rally making it impossible for him to hold that rally.

In all, 14 prohibition notices were produced in evidence. One common thread running through the Prohibition Notices was that the petitioners' rallies could not be sanctioned by the police owing pre-booked rallies by the respondents' party in the same area. The Prohibition Notices were produced in evidence.

In his view there was clear favouritism on the part of the Zimbabwe Republic Police towards the respondent most of whose rallies were not similarly prohibited.

The petitioner pointed out that in some instances, a rally by the ZANU (PF) some 25 or so kilometres away would be used as justification prohibit CCC rally yet no foreseeable clash could possibly ensue.

As far as the blank V11 forms is concerned it was the petitioner's evidence that he received information from his election agents that they were forced by ZANU (PF) agents to sign blank poll return forms (V11 forms). According to those reports the figures relating to the outcome of the ballot at the polling stations were inserted later. He produced two letters addressed to ZEC registering his dissatisfaction with such a course of action and requesting a re-count of the ballots. The letter to ZEC also expressed the belief that the numbers announced had be swapped for the contesting candidate. The request for a recount was turned down.

He would be taken to task during cross-examination on the apparent omission in his letters to ZEC of the complaint that his election agents were forced to sign blank V11 forms by respondents' agents.

The Respondent's case

The petitioner testified for his case and called four other witnesses namely Chief Budzi (Herbert Chimene), Garisikayi Ngwangwani and Zivanai Nhongo

The respondent's evidence consisted mainly of an attempt at the rebuttal of the evidence of the various witnesses for the petitioner. He insisted that not only were the elections free and fair but also that they were held in a relaxed atmosphere free from hostility and violence. He attributed his electoral triumph to his vigorous campaigning, the development initiatives he undertook and his overall popularity in the constituency where he also happens to be a businessman of some standing. He singled out his efforts in rehabilitating hundreds of boreholes as having endeared himself with the electorate.

He distanced himself and his party from the exit poll survey desks if ever they existed referred to by the petitioner and his witnesses pointing out that the petitioner failed to provide tangible evidence of their existence.

He also disputed the existence of “terror” bases manned by either FAZ or HERITAGE at the shops branding evidence of their existence “a fabrication”. He indicated that he only heard of the existence of FAZ on the day of the election but only as an election observer organisation with no affiliation to his party. He completely dissociated himself from FAZ as a member or affiliate.

As for assisted voters the respondent indicated that there was nothing amiss about the phenomenon or the numbers thereof because as far as he was concerned all such assisted voters deserved such assistance on account of their disability or illiteracy.

The respondent also categorically denied acts of intimidation on his part, his party and anyone associated with him.

He also refuted claims of assaults allegedly perpetrated by members of his party on members of the CCC. He pointed out that in any event the persons accused of committing these assaults had either denied any involvement in such assaults, or did not exist given the variance or inconsistencies in the names of such perpetrators supplied by the complainants. He also denied having witnessed any such assaults being committed. In the latter regard he denied the events at Negwari Business centre as narrated by Makaya Chitsidzo. He claimed to have been elsewhere some 20-25 kilometres away on the day of the alleged assault. Needless to say, he denied that any assault was perpetrated at his behest.

As for the role of traditional leaders, he testified that as far as his was aware no traditional leaders was involved in any political activities in the constituency let alone support him in his campaign.

In particular he refuted the evidence of Zebron Gumireshe that Chief Budzi convened a meeting of village heads where he allegedly campaigned for the election of the respondent. He also dismissed assertions that his father Boas Zevezai who happens to be a village head also campaigned for him. He further denied that traditional leaders threatened villagers with eviction from their respective villages should they dare vote for the petitioner or his party.

Although he did not say so on terms, he suggested that the petition is nothing more than a case of sour grapes on the part of the petitioner who unlike him is not ordinarily resident in the constituency.

Invalidation of an election under the electoral Act

There are two provisions in the Electoral Act, in terms of which an election result may be declared invalid namely ss155(a) & 177.

Section 155(a) reads:

155 When election void owing to corrupt or illegal practices

Subject to sections *one hundred and forty-eight, one hundred and fifty-six and one hundred and fifty-seven*—

- (a) if upon the trial of an election petition the Electoral Court declares that any electoral malpractice has been committed with reference to the election the subject of the petition, by or with the knowledge and consent or approval of the candidate returned at that election, or by or with the knowledge and consent or approval of any of his or her agents, and the effect of such practice was, in the opinion of the Electoral Court, such as to have materially affected the outcome of that election, the election of that candidate shall be void, and a fresh election shall thereupon be held;

Section 177 of the Act, on the other hand provides as follows:

177 When non-compliance with this Act invalidates election

An election shall be set aside by the Electoral Court by reason of any mistake or non-compliance with the provisions of this Act if, and only if, it appears to the Electoral Court that—

- (a) the election was not conducted in accordance with the principles laid down in this Act; and
- (b) such mistake or non-compliance did affect the result of the election.

Section 155(a) therefore deals with electoral malpractices the commission of which may lead to the invalidation of an election result. Section 177 on the other hand deals with acts of mistake or non-compliance with the Act.

The term “electoral malpractice” is defined in s4 of the Act in the following terms:

“electoral malpractice” means an intimidatory practice, corrupt practice, illegal practice or other offence in terms of Part XX;

The Act in parts XIX & XX lists a wide array of practices which are deemed “corrupt” and “illegal”, respectively, in relation to the conduct of elections. In a word therefore, the definition of “electoral malpractice is sufficiently wide in its ambit to encompass most of the allegations raised by the petitioner in the present matter and only those that were raised by the petitioner will be dealt with. A few of the allegations, as earlier stated however relate to non-compliance with the Act, one such example being the allegation that campaigning took place within 300 metres of any given polling station.

Before undertaking to determine if the any electoral practice was committed and if so whether such electoral malpractice or non-compliance with the Act had the effect of invalidating the election, a word needs to be said about the onus and burden of proof.

Onus of proof in election petitions

The onus to prove the commission of an alleged electoral malpractice and the assertion that the election result ought therefore be declared invalid rests with the person making that allegation. This principle stems from the presumption of the validity of an election, see *Nelson Chamisa v Emmerson Dambudzo Mnangagwa & 24 Ors CCZ 21/19 & Mudzingwa v Madhuku* [2019] ZWECH 1.

Where a candidate and/or his agent are found guilty of an electoral malpractice the onus shifts to the respondent to show that despite the commission of such an electoral malpractice the result should not be declared void. This is on account of the provision of s156 of the Act which reads:

156 When election not void

When upon the trial of an election petition the Electoral Court finds that a candidate at the election the subject of the petition has been guilty by his or her agent of an electoral malpractice with reference to that election, and the candidate has proved to the satisfaction of the Electoral Court that—

(a) no electoral malpractice was committed at that election by the candidate himself or herself or by his or her chief election agent and that the offences mentioned in the said finding were committed without the sanction or connivance of the candidate or his or her chief election agent; and

(b) the candidate and his or her chief election agent took all reasonable precautions for preventing the commission of electoral malpractices, corrupt practices and illegal practices at that election; and

(c) the offences mentioned in the finding were of a trivial, unimportant and limited character;

then the election of that candidate shall not, by reason of the offences mentioned in the finding, be void, nor shall the candidate or the chief election agent be subjected to any incapacity under this Act.

Standard of proof in election petitions.

The Constitutional Court of Zimbabwe in *Nelson Chamisa v Emmerson Dambudzo Mnangagwa & 24 Ors* (supra), after reviewing different approaches from different jurisdictions concluded that where allegations of a criminal nature are made regarding the conduct of the election in dispute then those allegations should be proved beyond a reasonable doubt. Similarly, where the allegations are “civil” in nature the standard of proof is the same as with other civil claim – i.e., on a balance of probabilities. MALABA CJ had this to say:

“The purpose of election laws is to obtain a correct expression of the will of the voters. Where the allegations of electoral malpractices do not contain allegations of commission of acts requiring proof of a criminal intent, such as fraud, corruption, violence, intimidation and bribery, the standard of proof remains that of a balance of probabilities. In allegations that relate to commission of acts that require proof of criminal intent, the criminal standard of proof beyond reasonable doubt would apply. There is no basis for departing from settled principles of standards of proof to hold a petitioner to a higher standard of proof in electoral petition cases simply by reason of their *sui generis* nature. In the view of the Court, there is no justification for an “intermediate standard of proof” to be applied in election petitions.”

Violence, intimidation and coercion

This was arguably the mainstay of the petitioner’s case. He claimed that the respondent either personally or through his agents or organisations affiliated to his party perpetrated various acts of violence, intimidation and coercion. Although the petitioner did not say so in as many words, he alleged that in some instances the intimidation was direct and brazen (for instance where direct threats of eviction from particular villages or other settlements were issued) and in some instances the intimidation was subtle and nuanced (say where the exit poll desks were set up within the confines of the polling stations and voters were ordered to submit their names and other relevant information)

Section 133 A of the Act, provides a definition of intimidation, it reads:

133A Meaning of “intimidation”

For the purposes of this Part, a person shall be regarded as having done or attempted to do something through intimidation if he or she achieves or attempts to achieve an object through any of the following methods–

- (a) inflicting or threatening to inflict bodily injury upon a person; or
- (b) abducting a person or detaining a person against his or her will; or
- (c) causing or threatening to cause unlawful damage to a person's property; or
- (d) withholding or threatening to withhold from a person any assistance or benefit to which that person is legally entitled; or
- (d1) persuading or attempting to persuade another person that he or she can or will be able to discover for whom that other person cast his or her vote in an election; or
- (e) illegally doing or threatening to do anything to the disadvantage of a person.

Section 133B of the Act criminalises acts of intimidation in relation to an election - it reads:

133B Intimidation

A person who, through intimidation–

- (a) [*not relevant*]
- (b) [*not relevant*]
- (c) compels or attempts to compel a person or persons generally–
 - (i) to vote for a political party or candidate; or
 - (ii) not to vote;

or

(d) compels or attempts to compel a person or persons generally to attend or participate in any political meeting, march, demonstration or other political event;
shall be guilty of an offence and liable to a fine not exceeding level ten or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

What this means therefore is that all acts of intimidation alleged by the petitioner needed to be proved beyond reasonable doubt.

The cases of assault

An assault therefore committed with the intention of compelling someone to vote for a particular political party or candidate is regarded as an act of intimidation. Although there were

generalised allegations of assault in the petitioner's case, three specific incidents of assault were referred to. The first relates to the assault allegedly perpetrated against Gordon Ndava. Ndava testified that he and his fellow CCC supporters were on the receiving end of an unprovoked physical attack at the hands of persons who were in a ZANU (PF) branded motor vehicle. According to him this incident occurred on 17 August 2023 at Mushuku bus station as they were on their way to a CCC rally. He testified that one of the persons in his company was slapped and when they all took flight, they were pursued by their assailants in the course of which he was struck on the back of the head with a stone. When he fell down the assailants descended on him in one fell swoop and kicked him before ripping his CCC branded tee-shirt off his body.

The second incident relates to the assault allegedly perpetrated upon Chitsidzo Makaya on 3 August 2023 at a place called Negwari Business Centre where there was a ZANU (PF) rally addressed by the respondent. He was in the company of one Brighton Mavedzenge. It was his evidence that as he was passing by one Oliver Dzinokwara- a well-known ZANU (PF) activist sent people to assault him because of his support for the CCC. He testified that he is a well-known supporter of the CCC, a fact known to Oliver Dzinokwara. He indicated that those people who were sent to assault him proceeded to strike him with booted feet and clenched fists. According to him they also "slapped" him against the wall (to use his own words). Further they tore his jacket to pieces. He claims that he only managed to escape by the skin of his teeth through what can only be divine intervention.

The third specific incident of assault was testified to by sixth witness for the petitioner – Addmore Chikomba. This incident is said to have occurred at a place called Gangari turn-off on 3 August 2023 where his campaign coordinator Moses Zivanai fell under attack from the respondent's chief election agent Zivanai Nhongo. He also stated that Zivanai Nhongo was in the company of two other persons. The reason for the attack was simply that Moses Zivanai donned a tee-shirt bearing CCC symbols and insignia.

In his evidence Zivanai Nhongo completely disputed these allegations.

A reading of s155 of the Act shows that there are three essential prerequisites for a declaration of the invalidity of an election on the basis of a corrupt or illegal practice, namely;

- a) An electoral malpractice must have been shown to have been committed in relation to that election, and

- b) The electoral malpractice was committed by or with the knowledge and consent or approval of any of his agents, and
- c) The malpractice must have materially affected the outcome of the election.

In the present matter one finds from an objective evaluation of the evidence that the assaults in question appear not only to have been committed but also that they were committed in relation to that election. The issues relating to the identities of the perpetrators did not detract from the overall impression about the occurrence of those events.

It is however the other two requirements that proved problematic for the petitioner. Firstly, there was hardly any proof that the assaults were perpetrated by the respondent or at his behest or by his agents.

Secondly, although as indicated above, the incidents testified to by the petitioner and the witnesses rang true despite the respondents' efforts to discredit such evidence, the fact remains that those incidents were sporadic and far between to justify an invalidation of the results. This finding does not in the least suggest condoning electoral violence, all that is being said is that the violence was not on such a scale as to undermine the overall credibility of the election in the constituency.

The petitioner was also let down by the reluctance of some alleged victims of political violence to come forward and depose to affidavits to that effect, let alone testify in court. Only incidents had fist hand accounts of such assault. It would be takings a giant leap of faith the extrapolate these two as being representative of the entire constituency.

The alleged FAZ “terror bases”

Before addressing points raised by the respondent under this heading, it is necessary to deal with the different names under which FAZ was referred to. Although the petitioner referred to the group of people who gathered at Mbuya Nehanda business centre as heritage, it is easy to appreciate why his other witnesses referred to it as FAZ. From the evidence these people essentially did the same thing towards the same cause, hence the confusion. This in my view does not detract from the fact of their existence at the time.

Be that as it may, allegations were made to the effect that FAZ set up what were referred to as terror bases where its members unleashed violence and intimidation on the local population

and threatening all and sundry against voting for the opposition. The evidence hardly supports the notion of “terror”. The use of that term was plainly hyperbolic. A foreboding sense of dread and tension may have descended on the constituency upon the arrival of these persons but from the evidence but it would be an exaggeration to refer to the same as terror bases. Terror conjures up images of people being subjected to serious acts torture, murder, severe assaults, kidnappings and so on. Yet the evidence does not in the least suggest such occurrences.

There was also an apparent contradiction between the applicant conceding that FAZ was an election observer organisation yet also painting it as a renegade terror group. It is hard to reconcile the two. More importantly, however, no witness was brought forward to confirm that they were a victim of FAZ’s terror.

It would therefore be taking a giant leap of faith to conclude that the presence of either FAZ and/or Heritage had the effect of inducing dread into the electorate to the extent that they either refrained from voting or that they voted against their conscience.

The alleged involvement of traditional leaders in political matters

In the petitioner’s case there were generalised allegations by the various witnesses of traditional leaders dabbling in matters political. Most of these accusations were directed at chief Budzi. There was evidence that Chief Budzi’s jurisdiction covers about 70% of the constituency.

Three incidents however stood out, two of which were testified to by the petitioner’s 5th witness Zebron Gumireshe. This witness was a candidate for the position of councillor under the banner of the CCC in one of the wards. He lost the election. He however claims to have personally observed Chief Budzi campaigning for the respondent and the ZANU (PF) party. He singled out two such incidents. The first was at Mbuya Nehanda under a baobab tree where he says Chief Budzi addressed a ZANU (PF) rally not only campaigning for the said party but also threatening villagers with eviction should they not vote for the respondent and his party. He also indicated that the said chief who had been recently installed to that position stated that he could not risk losing the motor vehicle which had recently been issued to him by the government by virtue of that position by virtue of people voting for the opposition CCC party.

The second incident to which Zebron Gumireshe testified occurred at Chief Budzi's homestead in the wake of his installation as chief. According to this witness, Chief Budzi gathered the village heads who fall under his jurisdiction and conveyed basically the same message. He averred that he overheard the goings on at Chief Budzi's homestead while standing at a tuckshop within a short distance away.

The third incident which according to Zebron Gumireshe demonstrated that Chief Budzi was dabbling in partisan politics occurred on polling day, i.e., on 23 August 2023. According to him on that occasion Chief Budzi ferried voters to a nearby polling in his vehicle making a number of trips in the process.

In his affidavit and oral evidence in court, chief Budzi completely denied all these allegations. While acknowledging that he resides in the same village as Zebron Gumireshe and being related to him, he categorically denied any involvement in partisan politics as alleged by Gumireshe. He denied ever addressed a ZANU (PF) rally. More specifically he explained that the meeting referred to by Gumireshe was not meant to campaign for the respondent, but to introduce himself to the various village heads and their families as someone who had recently been installed. He admitted that the respondent was present at that meeting but only in his capacity as his nephew. He vehemently denied that Gumireshe was present.

He also completely denied having ferried villagers to the polling station indicating as he did, that he only took his two wives and a couple of members of his extended family to the polling station.

The other relevant incident was recounted by the petitioner's 4th witness Remeredzai Meke, who was also a losing candidate for the position of councillor. In short, he indicated that towards the election the village chairperson one Samuel Mutangi gathered villagers and ordered them to vote for the ZANU (PF) candidates in the elections failing which the villagers would be banished from their respective plots. The witness claims to have overheard this while standing at his own homestead which neighboured that of Samuel Mutangi.

The evidence of Meke and Gumireshe suffers from two major shortcomings common to both. Firstly, these are losing councillor candidates in their respective wards. The danger of fabrication always lurked. This handicap could have been averted by corroborative evidence from a neutral source. Secondly these witnesses "eavesdropped" on the deliberations in two of the

incidents, namely Gumireshe's account of the meeting at Chief Budzi's homestead and Meke's account of the meeting at Village Chairperson Mutangi's homestead. Ultimately, I find it difficult to accept their versions at face value, particularly given that these incidents were denied by the persons concerned and that there was no corroboration of the same.

Further, and perhaps most significantly precious little was done by the petitioner to demonstrate that the electorate or a section thereof succumbed to the threats and actually refrained from voting or voted against their conscience on account of the threats.

Finally, on this subject, there was a lukewarm suggestion that some traditional leaders were used as polling agents for the ZANU (PF) party. One would have expected documentary evidence to be produced to support this allegation. The list of polling agents is readily available from ZEC. Equally easily obtainable is the list of traditional leaders. There was nothing that precluded the petitioner availing these.

Other miscellaneous complaints

Assisted voters

The petitioner did precious little to substantiate this allegation. Not even a single voter was called to demonstrate that they were ordered to feign either illiteracy or disability to be assisted to cast their vote. This remained a bald and unproven allegation.

The Voters' roll

This particular complaint was not pursued at all either in evidence or argument and therefore merits no further discussion.

The exit survey desks

The setting up of exit poll survey desks being one of the central issues in this petition needed to be supported by convincing evidence to that effect. There is little to choose between the evidence of the petitioner and his witness on the one hand and that of the respondent and his witnesses on the other. Exclusive reliance on the SADC report was insufficient as same is a

generalised report for the whole country. More could have been done by the petitioned in this regard.

There was a half-hearted attempt by the petitioner to introduce a video clip supposedly depicting a FAZ desk covered with ZANU (PF) paraphernalia within the confines of a particular polling station. Ultimately, however, no application was made for the introduction of that clip into the body of evidence, nor was the video clip shown to the court. Its probative value therefore was virtually non-existent.

The V11 forms

The complaints lodged with ZEC regarding the conduct of the elections were raised orally. ZEC not being party to the petition was not available to shed light to such complaint the allegation. Firstly, the petitioners' letter of complaint to ZEC did not allege that agents were forced to sign the V11 forms in blank which raises the question of the *bona fides* of this complaint. Secondly and perhaps more critically, should there have been a tempering with the ballot tallies, the petitioner's chief election agent should have listed the discrepancies in his evidence, polling station by polling station. He was unable to do so during his evidence in court.

Further doubt is cast on these allegations by the prevarication by the petitioner on the identity of the persons who purportedly forced his election agents. In one breath he claimed it was ZEC who did so yet in the next breath he stated that it was respondents' agents before suggesting that it was in fact both ZEC and respondents' agents working in cahoots.

More tellingly however, none of the petitioners' 120 polling agents deposed to affidavits stating how and by whom they were forced to sign blank V11 forms.

The Prohibition notices

As regards prohibition notices by the police, although their number coupled with a disproportionality lower number of prohibition notices issued to the petitioners' party raises serious questions of the impartiality of the police, there was no evidence to suggest that the petitioner and his party appealed against such prohibition notices with the Magistrates Court in terms of the provision of Maintenance of peace Act.

Further contrary to the evidence that all ZANU (PF) rallies were given the greenlight by the police to hold their rallies, there was evidence that a number of them were in fact prohibited, (admittedly disproportionately lower than those of the petitioner.

Allegations of vote buying and partisan distribution of food hand-outs

There was one isolated case of vote buying levelled against the respondent's vote buying. This related to the conversion of one Mai Mlambo who was allegedly promised some immovable property in Birchnough Bridge in exchange for switching allegiance from the petitioner's party to that of the respondent. Not only was the evidence in this regard primarily hearsay but also that even if this did take place, it was a single isolated incident which in all probability was unlikely to have changed the course of the election.

Obstruction of voters

The petitioner did not elaborate in the context of this petition what he meant by "disenfranchisement of voters". In all probability he was referring to an incident testified to by his 10th witness, Styra Mangwiro who narrated an incident where one village head Godfrey Chihwe/Nyangara who ordered villagers to pass through a certain post where the latter had set up a desk. According to this witness, this occurred on polling day and the villagers who were on their way to the polling station were had their names checked against the ZANU (PF) cell register for that area and those whose names did not feature therein were informed that their names would equally be missing from the voters roll and therefore would not be allowed to vote. According to the witness the result was that those potential voters whose names were absent in that cell register who were predictably CCC supporters turn back.

Should this have happened, this would have amounted to an illegal practice. However, not a single person who was a victim of this exercise came forward to testify that they turned away as a result thereof. It would therefore not proper to upstage the election result on account of this particular allegation.

Alleged sabotage of the petitioner's projects

In this regard one incident took centre stage, namely the damage to the solar- powered borehole sponsored by the petitioner. It was averred that the respondent working in concert with some of his agents and supporters threw rocks into a borehole whose construction was sponsored by the petitioner in a bid to thwart his campaign. While it is common cause that the projects initiated by a candidate constitute an important campaign tool for that candidate, the petitioner's case was let down by the absence of cogent evidence that this incident actually took place and if so, by who.

Disposition

In summation, therefore, the petition stands to fail for the following reasons. The absence of convincing evidence that the acts of assault referred to earlier were as a form of intimidation perpetrated by or at the behest of the respondent. Further in this regard the absence of evidence demonstrating that the cases of assault were widespread enough in the constituency to justify the nullification of the election result. One gets the impression from evidence that they were, sporadic, few and far between.

Similarly, with regards to threats of eviction, the setting up of FAZ exit poll survey desks and a reversion to the June 2008 violence as forms of intimidation, not enough evidence was led to demonstrate that these were issued at the instance of the respondent and more importantly that these had the effect of altering the voting pattern of the electorate.

Allegations of disenfranchisement, voter coercion and vote buying were not pursued with any meaningful enthusiasm by the petitioner – they remained bald unsubstantiated allegations.

The allegations of non-compliance with the Electoral Act in form of the petitioner's election agents being instructed to sign blank V11 forms, the inflated number of assisted voters and poor state of the voters' roll, were not convincingly supported by the evidence.

The evidence of the alleged involvement of traditional leaders and the allegation of bias on the part of the Zimbabwe Republic police in issuing prohibition notices lacked in many material respects to sustain those allegations.

Costs

The respondent urged the court to award costs against the petitioner contending that the claim was unfounded. In my view the claim was not without foundation. It was a claim in my view brought with a bona fide intention of challenging the outcome of the election. The petition only failed on account of the relatively high threshold required to invalidate an election. In any event this is a matter of some significant public interest. An order of costs is not merited.

In the result I make the following order:

The petition is dismissed with no order as to costs.

Mbidzo Muchadehama & Makoni, applicant's legal practitioners.

Kachere Legal practitioners, respondent's legal practitioners