

LUCIA MASEKESA
Vs
ISAIAH SHUMBA

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE 19 October 2001

Ms *M Gwaunza*, for Petitioner.
Adv *A Matika*, for Respondent.

ELECTION PETITION: MWENEZI CONSTITUENCY.

MAKARAU J: This is the judgment in the election petition of Lucia Masekesa of the Movement for Democratic Change (“MDC”), the petitioner, against the Member of Parliament for the Mwenezi Constituency, Isaiah Shumba, of the Zimbabwe African National Union (Patriotic Front), (“ZANU-PF”), the respondent.

The petition has been brought in terms of section 132 of the Electoral Act [*Chapter 2.01*], (“The Act”). The Petitioner brings the petition in her capacity as one of the candidates in the general elections that were held in the constituency on June 24 and 25, 2000. In the election, the petitioner polled 1881 votes against 22 219 cast for the respondent.

In the petition, the petitioner complained of certain corrupt and illegal practices on the part of the respondent and other named persons. The alleged corrupt practices include the alleged confiscation of identity cards of members of her party, alleged widespread intimidation and random acts of violence within the constituency, the alleged barring of members of the MDC from voting at one polling station and the alleged barring of the MDC from holding campaign rallies in the constituency. As illegal practices, the petitioner complained that known ZANU-PF sympathisers who assisted

illiterate voters without any supervision from neutral organisations manned many of the polling stations. She also alleged that at one polling station, the voters' roll arrived late and at some polling station, the ultra violet scanner was allegedly out of order. The petitioner also complained that she and other polling agents were not given adequate notice of the sealing of the ballot boxes and the subsequent transportation of the boxes to the counting venue.

On the basis of the above allegations, the petitioner prayed that the election of the respondent be declared void, and that she be declared the duly elected Member of Parliament for the constituency. The petitioner also prayed that the respondent be declared for a period of five years from the date of the order, to be incapable of being registered as a voter and of holding any public office in the country. In addition to praying for costs against the respondent on the higher scale, the petitioner concluded by praying for the order to be served upon the respondent, to be advertised in the gazette and to be transmitted by the Registrar of the High Court to the Registrar General of Elections.

The petition was opposed. In his opposing affidavit, the respondent took preliminary issue with certain procedural irregularities concerning the service of the petition. He also opposed the petition on the merits. I will mention at this stage that the procedural irregularities relating to the service of the petition were not taken *in limine* at the commencement of the trial nor at any time thereafter. I therefore take it that these preliminary issues were abandoned.

In support of her petition, the petitioner called three witnesses before she gave evidence.

The petitioner first called Abel Runesu who gave the following evidence. He resides in Rutenga, Mwenezi. He is the District Youth Chairman of the MDC. At the time of the general elections, his function was to move around all the wards in the constituency, campaigning for his party. He was also responsible for distributing campaign material in the form of pamphlets and t/shirts.

On April 8, 2000, he went to Maranda Business Centre with the Petitioner. At the business centre, a rally was held and he managed to sell 200 party cards. On their way back, around 5 p.m., their vehicle was pursued by a motor vehicle bearing the words "ZANU-PF" on its side panels. Amongst the people riding in this vehicle, he managed to identify one Mapfacha, a popular ZANU-PF supporter in the area. The pursuing motor vehicle overtook theirs and then blocked their further passage. The witness and the other occupants of the vehicle including the petitioner, who was driving the vehicle, did not manage to alight and flee from the vehicle before the people from the ZANU-PF vehicle approached them. The witness and one Sibanda were wearing t/shirts bearing the MDC logo. The people from the ZANU-PF vehicle got hold of them and tried to force off the t/shirts. The witness then saw the petitioner being struck on the face with an open hand by a lady from the other group. A firearm was then taken from one of the vehicles. A discussion ensued on whether or not to use the firearm on the petitioner. The firearm was however not used and the witness and his group was freed to go after being ordered not to have anything to do with the MDC in the constituency. The incident was reported at Rutenga Police Base.

The respondent was not present when the petitioner was assaulted. It was on this day that the respondent was elected as the ZANU-PF candidate for the constituency. The witness however recognised the assailants as part of respondent's campaign team.

On April 29 a rally was held to introduce the respondent as the candidate for the constituency. In addressing the gathering, the respondent urged all his supporters to assault members of the MDC and to stop them from holding rallies in the constituency.

After May 6, 2000, the campaign rallies for the MDC were hindered by the supporters of ZANU-PF who would mount roadblocks looking for known supporters of the MDC. At the roadblocks, ZANU-PF supporters would stop buses and search for anything to do with MDC. The atmosphere was dangerous for MDC members. The witness spent most of his time away from home in fear.

While in the main, the witness gave his evidence well and was not shaken in cross-examination, there were some inconsistencies in his evidence that I will highlight. He indicated that it was only after the assault upon the petitioner on May 6, 2000 that the MDC could not campaign in the constituency. This then waters down the veracity of and/or the weight to be given to the remarks allegedly made by the respondent on April 29 that the MDC should be stopped from holding rallies in the constituency. His version of the pursuit of their vehicle by the ZANU-PF vehicle is slightly different from that of the petitioner. I however do not put much score on this difference as it can be attributed to lapse of memory.

The petitioner then called as her second witness Zivanayi Wanyara who gave the evidence that follows. He resides in Sarahuro, Mwenezi. He is not employed. He is a member of the MDC where he holds the post of Vice Secretary for the youth wing. During the general elections of June 2000, he did assist in campaigning for the petitioner. He did not find his task in this regard easy as he received threats of violence against his person. Members of his party who were found wearing party t/shirts were harassed or assaulted. On the eve of a rally to be addressed by the president of his party in May 2000, he and a colleague were pursued by a group of ZANU-PF supporters who

were chanting slogans. They were at Muzenda's place when they were so pursued. He was struck by a stone on the head and fell to the ground. He was then struck with more stones and sticks and was kicked with booted feet. After being so assaulted, he was then taken to Neshuro School and along the way, was further assaulted. At the school, he was thrown into a ditch and covered with tree branches and left for dead. He managed to identify two of his assailants. These were Jimmy Chikepe and Charles Tshuma, both supporters of ZANU-PF. After this incident, he could not campaign. ZANU-PF supporters would mount road blocks where they would stop all vehicles and search for MDC members.

The witness was not shaken in cross-examination and I will accept his testimony.

The petitioner then called Paradzai Mawire who gave the following evidence. He resides in Masvingo. During the run-up to the general elections of June 2000, he resided in Sarahuro Township in Mwenezi. He is a member of the MDC.

On May 12 2000, he was in a bottle-store drinking with friends when they received a report that the security situation outside had deteriorated and they should leave. He was the last one to leave the bottle-store. At the gate, he was grabbed by one Hove a former freedom fighter, who cuffed him. Following this, he was assaulted by other people in Hove's company who ordered him to proceed to a base where a ZANU-PF flag had been hoisted. At the base he was ordered to sit down which he did. One Jimmy Chikepe then kicked him on the mouth with a booted foot. Five men accompanied his wife who was also at the base, to their residence to retrieve his MDC membership card and t/shirt. When the material was brought back to the base, he was ordered to lie on the ground to receive his 25 strokes as a penalty. He was thereafter released.

The witness gave his evidence well and remained credible after cross-examination. I shall accept his testimony.

The petitioner then gave the evidence that follows. She is unemployed. She resides in Rutenga, Mwenezi. She was the MDC candidate for Mwenezi in the June 2000 general elections. Before she became the MDC candidate in the elections, she was the organising secretary for her party and as her duties, she was responsible for recruiting members. At one stage her party had 10 000 members. Before the day on which she was assaulted, she managed to campaign peacefully. After that event she was unable to campaign at all.

It was on April 8 when she was assaulted. She was coming from a rally at Maranda Business Centre when she saw a red vehicle trailing her. Although she indicated that it was safe for the vehicle to pass her, it did not. She then pulled off the road and stopped. The passengers in the other vehicle accused her of insulting them. She got back into her vehicle and drove off. The other vehicle pursued her and along the Rutenga-Sarahuro Road, it overtook her and then blocked her passage. About 15 people alighted from the vehicle and one of them removed the ZCTU cap that she was wearing. She was then assaulted. One of the occupants of the pursuing vehicle came holding a firearm and pointed it at her head. Someone shouted that she should not be shot. The assailants then left after taking with them campaign material that the petitioner had.

After this incident the petitioner and her party had problems with roadblocks. Due to these roadblocks, she could not access other parts of the constituency for purposes of campaigning. She did come across a roadblock along the Rutenga-Sarahuro Road and made an about turn before she got to it. She did not manage to identify any of the people manning the roadblock. She did not hold any further rallies until the poll.

During the polling days, some agents reported that the ultra violet scanner was not functioning. Kraal-heads manned the entrance to some polling stations ticking the names of those who presented themselves to vote. Due to these occurrences, she concluded that the election in her constituency was not conducted fairly.

After the poll result was announced, the petitioner was approached by a number of people who swore to affidavits stating that they were not pleased with the outcome. She gave the names of 12 people who expressed a willingness to testify on her behalf. When the matter was called, some of the witnesses declined to attend court. The petitioner declined to have the subpoenaed witnesses brought to court by warrants, as she feared that they would lie if compelled to testify. On that note the petitioner closed her case.

At this stage I wish to mention that the Legislature regards the trial of election petitions as very important and has accordingly granted the Court wide powers to examine any witness who may assist in the determination of the proceedings before it.¹ This is in addition to the inherent powers vested in the court to safeguard the integrity of its proceedings by, where necessary and appropriate, bringing witnesses to court under warrant. However, in proceedings which are essentially adversarial in nature such as the proceedings before me, it is my view that the court may only exercise its powers to secure the attendance of witnesses by warrant where the litigant concerned has not expressed a reluctance for such power to be used.

I find that the petitioner gave her evidence well and was not shaken in cross-examination. I will accept her testimony as credible. I have already alluded to the slight

1. Section 138 of the Electoral Act [Chapter 2:02].

variation between her evidence and that of the first witness concerning the sequence of events when the vehicle bearing ZANU-PF supporters pursued them.

The respondent then took the stand and gave the following evidence. He is the Deputy Minister of Education and the Member of Parliament for Mwenezi, which is a vast rural constituency. His method of campaigning included a clear manifesto, which he distributed to the electorate. He also held several rallies at various points in the constituency. He held meetings with teachers and the seven chiefs in the constituency. At the meetings he held, he did not urge anyone to beat up members of the MDC.

He was not aware of any base set up by ZANU-PF supporters in the constituency. He was also not aware of any roadblocks mounted by his supporters in the constituency. All vehicles were moving freely according to his knowledge. He was not aware of the incident of May 8 2000 when the petitioner was assaulted. He was not aware of the alleged intimidation of petitioner's witnesses.

The respondent was subjected to very perfunctory cross-examination that left his evidence credible.

The respondent then called Joel Mapfacha whose testimony was to the effect that he was in Bikita on May 8 when the petitioner was allegedly assaulted. He did not know the petitioner in person until the trial of the petition. He is a member of ZANU-PF and during the year 2000, he was the political commissar for the province. He further denied that he forced people to attend a rally at which the respondent was introduced as the ZANU-PF candidate nor that he was part of the group that mounted any roadblock in the constituency.

The respondent called two other witnesses, namely Shepherd Komani and Jimmy Chikepe. They gave almost similar evidence. They are members of ZANU-PF. They were not part of the respondent's campaign team and they did not participate in the mounting of roadblocks in the constituency. They both denied assaulting members of the MDC as alleged against them.

The respondent then closed his case.

On the basis of the evidence before me, I now have to determine whether or not the petitioner has made a case for the relief she seeks. In so doing, I must first seek and define the legal principle or principles that ought to guide me.

It is trite that the law regarding elections to public office is not known to Roman Dutch Law that forms the basis of the common law in Zimbabwe². Elections and election petitions are a creature of the common law of England. The law regarding elections and election petitions has been introduced into our jurisprudence through the provisions of the Electoral Act, which is cast along the lines of its English counterpart.³ In my view, it follows therefore that whatever legal principle ought to guide me has to find its basis within the provisions of the Act.

The petitioner approached this court under the provisions of section 132 of the Act. In her affidavit she alleged that the election of the respondent was rendered void by reason of corrupt practices and electoral irregularities. During trial, evidence was led on alleged acts of corrupt practices. Counsel for the petitioner advised in her address that she was abandoning the other ground based on alleged irregularities. The allegation that some members of the MDC had their identity documents confiscated before the poll was similarly abandoned.

² De Villiers v Louw 1931 AD 241, 267, per Wessels J.A.

Corrupt practices are defined in Part XX of the Act. It is worth noting that this part of the Act creates certain five offences that are referred to as corrupt practices. These are: treating, undue influence, bribery, personation and the illegal transportation of voters. The part concludes by providing for the penalties to be imposed on persons convicted of the offences.

Section 132 of the Act provides that a petition complaining of an undue return or an undue election of a Member of Parliament by reason of want of qualification, disqualification, corrupt practice, irregularity or any other cause whatsoever, may be presented to the High Court. In my view, where an election petition has been brought in terms of this section, complaining of an undue election by reason of corrupt practices, the onus is on the petitioner to prove that an offence as defined in Part XX of the Act has been committed. Proof of the commission of the offence may either be in the form of proof of conviction by the High Court after due prosecution, (where the accused has been convicted before the election petition is filed), or, proof beyond reasonable doubt of the fact that the offence was committed although no prosecution has ensued. Needless to say, the burden on the petitioner where there has been no prior prosecution is most onerous. It is akin to and cannot be less than the burden borne by the State in criminal prosecutions. That this was the intention of the lawmaker is borne out by the provisions of section 137 of the Act, which provide that:

“If the High court states in the report on the trial of an election petition that any person has or may have been guilty of a corrupt practice or illegal practice or that there is reason to believe that corrupt practices or illegal practices have extensively prevailed at the election to which the petition refers-

- (a) *that statement, with the evidence taken at the trial, shall be transmitted by the registrar of the High Court to the Attorney-General with a view to the institution of any prosecution proper to be instituted in the circumstances; and*

³ Mutongwizo v Makamure 1998 (2) ZLR 154.

(b) the report shall in so far as it concerns any such person, be transmitted by the registrar of the High Court to the Registrar-General.”

It is clear in my view that although the trial of an election petition cannot in itself result in a person being convicted of the offences grouped under corrupt practices, the weight of evidence necessary to declare an election void by reason of such corrupt practices cannot be less than that required for a conviction of the offence after proper prosecution. This, to me, appears to be the legal principle that ought to guide me in assessing the evidence before me.

Having defined what the guiding legal principle is, I now turn to define the essential elements of the offence that the respondent stands accused of. This is so because the evidence led by the petitioner has to be sufficient enough to show that beyond reasonable doubt, the respondent committed acts that constitute the essential elements of the offence.

The petitioner complained that she was assaulted and was prevented from campaigning for her party by ZANU-PF supporters who mounted roadblocks along the main roads in the constituency. She also alleged that some members of her party were assaulted in random acts of violence before the general election.

In my view, the totality of the petitioner’s factual allegations is an accusation that the respondent is guilty of the offence of undue influence. This then is the offence whose essential elements I must define. The offence is defined in section 105 of the Act as follows:

“(1). Any person who, directly or indirectly, by himself or by any other person-

(a) makes use of or threatens to make use of any force, violence or restraint or any unnatural means whatsoever upon or against any person; or

- (b) *inflicts or threatens to inflict by himself or by any other person any temporal or spiritual injury, damage, harm or loss upon or against any person; or*
- (c) *does or threatens to do anything to the disadvantage of any person;*

in order to induce or compel that person

- (i) *to sign a nomination paper or to refrain from signing a nomination paper ; or*
- (ii) *to vote or refrain from voting*

shall be guilty of the offence of undue influence.

(2). *Any person who, directly or indirectly, by himself or by any other person-*

- (a) *makes use of or threatens to make use of any force, violence or restraint upon or against any person; or*
- (b) *inflicts or threatens to inflict by himself or any other person any temporal or spiritual injury, damage, harm or loss upon or against any person; or*
- (c) *does or threatens to do anything to the disadvantage of any person;*

on account of that person-

- (i) *having signed or refrained from signing a nomination paper; or*
- (ii) *having voted or refrained from voting at any election;*

shall be guilty of the offence of undue influence.

(3). *Any person who by abduction, duress, threats to invoke any unnatural means whatsoever or references to such unnatural means or by fraudulent device or connivance-*

- (a) *impedes or prevents the exercise of his vote by a voter; or*
- (b) *compels, induces or prevails upon a voter to either vote or refrain from voting at an election;*

shall be guilty of the offence of undue influence.”

In my view, the section is widely cast in cataloguing the acts of undue influence that a respondent and/or his agents may employ to induce or compel a voter to sign a nomination paper, to vote or to refrain from so doing and to prevent or impede a voter from exercising their right to vote. In other words, every conceivable act of undue

influence that might be brought to bear upon any person, including the use of unnatural means, is prohibited. The section is however narrowly cast when defining the target and purpose of the undue influence. The respondent and/or his agent must commit any of the prohibited acts with the intention of compelling or inducing the person to sign or refrain from signing a nomination paper, to vote or refrain from voting or on account of that person having done or refrained from doing the listed acts. The offence is committed if the undue influence is brought to bear on the particular person with the intention of influencing them as specified in the section even if the person is not so influenced.

I am of the further view that the section limits its operation to the influencing of a particular person and not the electorate at large because the section makes reference to “that particular person” in defining the offence. In other words, when the undue influence is exerted, the intended target must have been identified. The target cannot be the general populace in a given area. It has to be a particular person capable of being identified.

The petitioner complains of random acts of violence in the constituency and of the assault upon her of May 8. She further complains of the fact that her party was barred from campaigning in the constituency due to illegal roadblocks mounted by members of ZANU-PF.

I will start with the last complaint, that of the illegal roadblocks. Evidence was led to the effect that supporters of ZANU-PF would stop all traffic and search for members of the MDC. No evidence was led as to what the purpose of flushing out the members of the MDC was.

I am not persuaded that the conduct complained of, even if the respondent was responsible for it, is undue influence as defined in section 105 of the Act. I am further not persuaded that the mounting of illegal roadblocks was directed at any particular person to “ induce or compel that person from signing or refraining from signing a nomination paper or to vote or refrain from voting” nor on account of that person having signed or refrained from signing a nomination paper or having voted or refrained from voting. In my view, the roadblocks were illegal acts that ought to have been dealt with in terms of the common law.

I now turn to the assault on the petitioner on May 6 2000. I have accepted that the petitioner was assaulted as alleged. I have also accepted that the petitioner was assaulted by members of ZANU-PF. I however am not satisfied that the petitioner has led sufficient evidence to prove beyond reasonable doubt that the purpose of the assault was to exert any undue influence upon her as defined in section 105 of the Act. In her testimony she stated that the occupants of the red truck that pursued her alleged that she had insulted them, hence the assault. It was not part of her evidence that the assailants warned her in any manner against conducting herself at the polls as she wished. In other words, the purpose of the assault was not to compel or induce her to act as provided for in the section. On this basis, I cannot find that there is evidence beyond reasonable doubt that the assault upon the petitioner was such as to amount to the use of force that is prohibited by section 105. In my view, it remained a common assault for which relief ought to have been found under some other provisions of the law.

Apart from the evidence on the assault on the petitioner, there is evidence of the assault on Zivanayi Wanyara and on Paradzai Mawire. I have accepted that these witnesses were assaulted as alleged. It is on the basis of these assaults that the petitioner

alleged there was random violence within the constituency that led to the undue election of the respondent.

In my view, the evidence led by the petitioner regarding these assaults falls short of the evidence that would secure a conviction for the offence of undue influence as defined in section 105 of the Act.

The motive for the assault on Zivanayi Wanyara was not given in evidence. He stated that a group that was chanting slogans he did not understand pursued him. They caught up with him and assaulted him leaving him for dead. The assault on him was a cowardly act by people who neither identified themselves nor what their cause was.

The assault on Paradzai Mawire was on account that he had been found in possession of MDC material. He received 25 strokes as his penalty. Again this assault was unlawful. Zimbabweans are granted and guaranteed the right to belong to a party of their choice by the Constitution. Conversion from one party to the other ought to be through persuasion and campaigning rather than by the use of violence and force. That is the way of multi-partysm.

While the assaults upon the two witnesses cannot be excused, they are however not such as to be the basis of setting aside the election of the respondent as the Member of Parliament for the Mwenezi Constituency in terms of the provisions of the Act. I have indicated above that in my view the provisions of section 105 are very narrow in the target and purpose of the undue influence that it seeks to punish. It is not all acts of violence that will lead to an annulment of an election. The purpose of the violence must fall within the four squares of the provisions of section 105 and where this is not achieved, the act of violence remains an unlawful act for which relief has to be sought in terms of other provisions of our law.

On the basis of the foregoing I find that the petitioner has failed to lead evidence sufficient to discharge the onus on her. It has not been proved beyond reasonable doubt that the respondent, directly or indirectly, is guilty of the offence of undue influence. Accordingly, the election petition is dismissed with costs. In accordance with the provisions of section 136 (3) of the Electoral Act, I declare that the respondent is the duly elected member of Parliament for Mwenezi.

Messrs Wintertons, petitioner's legal practitioners.
Mucharebwa & Partners, respondent's legal practitioners.