

REPORTABLE (132)
Judgment No. SC. 143/04
Civil Appeal No. 98/02

MFANDAEDZA HOVE v JORAM GUMBO

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
HARARE, FEBRUARY 5, 2004 & AUGUST 23, 2005

S Hwacha, for the appellant

T Hussein, for the respondent

MALABA JA: This appeal is against the judgment of the High Court delivered on 6 March 2002 dismissing with costs the election petition presented by the appellant (hereinafter referred to as "the petitioner") challenging the election of the respondent as the Member of Parliament for Mberengwa West Constituency ("the Constituency"). The Parliamentary election ("the election") was held on 24 and 25 June 2000.

The petitioner was a candidate in the election, sponsored by the Movement for Democratic Change ("the MDC"), whilst the respondent was a candidate sponsored by the ruling party, Zimbabwe African National Union – Patriotic Front ("ZANU-PF"). There were 43 949 registered voters in the Constituency, of which 24 691 cast their votes in the election. The respondent secured 18 315 votes as against the petitioner who secured 3 889. There was a majority of 14 426 votes. The remaining votes were divided between two independent candidates. On 27 June 2000 the respondent was declared the duly elected Member of Parliament for the Constituency.

On 17 July 2000 the petitioner presented an election petition to the High Court in Harare in terms of s 132 of the Electoral Act [*Chapter 2:01*] (“the Act”), complaining of “irregularities, illegal practice and corrupt practice” in the election of the respondent. The relief sought was an order declaring that the respondent was not duly elected; the setting aside of the result of the election; and barring of the respondent from standing as a candidate in a Parliamentary election for a period of five years.

Section 132 of the Act provides that:

“(1) A petition complaining of undue return or an undue election of a Member of Parliament by reason of want of qualification, disqualification, corrupt practice, illegal practice, irregularity or other cause whatsoever may be presented to the High Court ...”.

The particulars of the specific grounds on which the election was questioned were stated in para 7 of the supporting affidavit as being:

- “7.1 The abduction, kidnapping and torture of members of the MDC by supporters and sympathisers of the respondent and his party ZANU (PF). The respondent’s supporters were made up largely of the war veterans in the area who were based at Texas Ranch which is a farm that they had occupied and ZANU (PF) youths most of whom were also based at Texas Ranch occupied by the war veterans. The commander of the entire operation was Wilson Kufa Chitoro, popularly known as Biggie Chitoro of Mawani School P/Bag Mberengwa presently held at Zvishavane Prison.
- 7.2 Intimidation and threats to the lives of MDC officials, supporters and members of their families making campaigning impossible in the Constituency and threats of physical harm to these people.
- 7.3 Robbery, assaults and rapes on members of the MDC.
- 7.4 The murder of MDC supporters.
- 7.5 Arson and general destruction of property belonging to MDC supporters.
- 7.6 Making a physical and threatening presence at some polling stations by supporters of the respondent who were wearing prohibited campaign material within prohibited distances from the polling station.”

Although “illegal practice and irregularities” were pleaded as some of the causes of the alleged undue election of the respondent as a Member of Parliament, no evidence of probative value was adduced in support of them. No more shall be said about them.

The evidence led at the trial of the petition sought to prove the charge made against the respondent that he was personally or by his agent guilty of the offence of undue influence within the meaning of s 105 of the Act.

Section 105 of the Act provides that:

“(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 refrain from signing a nomination paper; or
 - (ii) to vote or refrain from voting;

shall be guilty of the offence of undue influence.”

There was no allegation that the respondent by himself committed the acts of violence which constituted the cause of complaint to the election court. The *gravamen* of the charge against the respondent was that the acts of violence were committed on MDC supporters in order to induce or compel them to vote or refrain from voting by his agent, Biggie Chitoro (“Chitoro”), or by his

supporters with his knowledge and consent or with the knowledge and consent of his agent.

The respondent denied the allegations.

The question for determination by the court *a quo* was whether the evidence adduced had established the charge of undue influence levelled against the respondent. The court *a quo* held that the evidence of the acts of violence committed on MDC supporters did not establish that they were committed by Chitoro or that those who perpetrated them did so with the knowledge and consent of the respondent or with the knowledge and consent of Chitoro. A document produced in the trial of the petition showed that the respondent had listed Chitoro as a member of his campaign team. The fact of Chitoro being the respondent's agent was therefore established.

The election petition had not raised as a ground on which the election should be set aside the occurrence of general violence in the Constituency. It was nonetheless argued on behalf of the petitioner that the acts of violence established on the evidence given by the petitioner's witnesses were so widespread as to constitute general violence, which permeated the Constituency so that the election result may have been affected.

The learned judge held that s 132 of the Act required the petition to specify, at the time of presentation to the High Court, the ground upon which the validity of the election was being challenged. To wait until general violence was revealed by evidence adduced from witnesses in the course of the election trial as a cause of complaint was contrary to the statutory requirements and placed the respondent in the disadvantaged position of not knowing in advance what the petitioner's case was so as to be able to meet it.

The learned judge nonetheless made the factual finding that the acts of violence established by the evidence adduced by the petitioner were not so widespread in the Constituency to constitute general violence that may have affected the election result. It was the finding of the court *a quo* that the election result was in fact not affected by the acts of violence.

In this appeal it was contended on behalf of the petitioner that the court *a quo* misdirected itself on each of the questions it was called upon to determine. In determining the appeal it is important to bear in mind that the purpose of prohibiting acts constituting undue influence on a voter under s 105 of the Act, and holding a candidate accountable not only for his own actions but for those of his agent or any other person if committed with his knowledge and consent or with the knowledge and consent of his agent, is to safeguard the purity and freedom of the election process upon which the democratic system of government depends.

An allegation that a candidate committed acts constituting undue influence within the meaning of s 105 of the Act personally or through his agent can have serious consequences on his personal integrity and political career upon being proved. He or she may be disqualified for a period of five years from fighting any election or voting in an election. An election dispute concerns the entire Constituency. It is therefore of paramount importance in a parliamentary democracy that the electoral process is not set at naught and the elected candidate thrown out unless the grounds mentioned in the Act and on which the petition was presented have been clearly and fully proved. The allegations made in an election petition against an elected candidate must be proved beyond reasonable doubt.

To determine whether the court *a quo* was correct when it decided that the evidence adduced by the petitioner on corrupt practice allegedly committed by the respondent or by his agent or by some other persons with his knowledge and consent, or with the knowledge and consent of his agent, did not meet the standard of proof against which it was appreciated I narrate the evidence led by the parties.

Robson Gambiza

Robson Gambiza ("Gambiza") was the chairman of the petitioner's local campaign co-ordination committee. On 30 April 2000 at 11 am he met seven young men on a dusty road in the Constituency. The young men invited him to accompany them to Texas Ranch, which was occupied by some war veterans and landless villagers. At the farm he was confronted by one Francis Ncube ("Ncube"), who appeared to him to be the leader of the people there. Ncube accused him of opposing farm invasions and having MDC membership cards and T-shirts. Gambiza said he was struck on the buttocks with a stick and ordered to climb a tree. The following day he was taken to Ncube's piece of land and ordered to dig up tree stumps. Later that day he was taken to Chitoro, who had just arrived at the farm. He said that Chitoro was surprised to see him there and ordered his immediate release. He said he was told by Chitoro to surrender the MDC membership cards and T-shirts. Scared of remaining in the Constituency and continuing with the campaign for the petitioner, he left the Constituency to live in Bulawayo.

There was no mention of the respondent having knowledge of the assault perpetrated on this witness. It was not made clear that the assault on him by Ncube was with the view of influencing him to vote for the respondent or to refrain from voting. There was also no evidence that the assault was with the knowledge and consent of Chitoro. Chitoro was apparently surprised to see him

at the farm and ordered his immediate release. The court *a quo* did not accept as credible the evidence that Chitoro told the witness to surrender the MDC membership cards and T-shirts.

Lewellin Sibanda

Lewellin Sibanda ("Sibanda") was the petitioner's election agent. On a date in June 2000 he boarded a bus to go to Zvishavane when seven men demanded that he should disembark. They accused him of campaigning for the MDC. When he remained seated in the bus, the men caught hold of him in a bid to pull him to the door. On seeing what was happening the bus driver drove to the police station, where his assailants were arrested on the orders of the officer-in-charge. He remained at the police station before being driven to Zvishavane in a police car.

There was no evidence of the acts of his assailants having been committed with the knowledge and consent of the respondent or Chitoro.

Fani Gedson Hove

Fani Hove ("Hove") is a relative of the petitioner. He was a member of the MDC. On 31 May 2000 at about 2 am a group of people came to his home. They forcibly entered the bedroom and started assaulting him and his wife. He was struck on the body with sticks and sustained bruises on the left leg and wrists. A machete was used to deliver a blow to his left arm, causing a fracture of the ulna. His assailants were arrested by the police a few days later. He could not say whether Chitoro knew of the assault on him. Chitoro later told him that he would not be assaulted again.

There was no evidence linking the respondent or Chitoro with the assault on the witness. It was also not made clear in the evidence whether the

assault was intended to induce him to vote for a particular candidate or to refrain from voting altogether.

Obey Siwela

Obey Siwela ("Siwela") was not a member of the MDC but an admirer of the petitioner. He used to move around the Constituency in the company of the petitioner. At the end of May 2000 a group of people wearing ZANU (PF) T-shirts arrived at his home in the evening. They assaulted him several times on the back with sticks. He said he did not report the assault to the police; nor did he go to hospital for treatment. A few days later he attended a public gathering addressed by the respondent at Rengwe. Chitoro addressed the people first and talked about the need for them to get land. He said in his address the respondent expressed surprise at the large number of people in attendance and exclaimed that people feared Chitoro. The respondent is said to have threatened that those who continued to support the MDC would be assaulted, just as a donkey must be assaulted to get to a drinking hole.

The learned judge did not believe the evidence that the respondent threatened people with assault if they continued supporting the MDC. He believed the evidence of Dean Jama, who was at the same meeting. The evidence of this witness was that the respondent encouraged people to live together peacefully. The learned judge was in a position to see the witnesses give evidence and had material on which to appreciate their credibility. There is nothing in the record of proceedings to suggest a misdirection on his part, necessitating a re-appreciation of the evidence given by this witness.

James Zhou

Nhamoineus Nzira ("Nzira") was shot at Ndanga Growth Point by Obediah Nemasanga ("Nemasanga"), a member of the MDC. On 4 June 2000 six people – four youths and two war veterans – went to Don Bosco area in search of Nemasanga. They arrived at James Zhou's ("James") homestead at midnight and forced their way into his bedroom hut. James and his brother Fainos were known members of the MDC. James was apprehended and taken to his brother's homestead. The two brothers were handcuffed to each other and ordered to walk towards Texas Ranch. On the way there they were asked to point at Nemasanga's residence, which they did. Three people went towards the homestead, whilst the others remained guarding the Zhou brothers.

Nemasanga opened fire at the advancing team from the direction of the homestead. One of the three men was shot and injured seriously. The shooting of their colleague seems to have angered the members of the group. They thereafter repeatedly assaulted the Zhou brothers as they force-marched them to Texas Ranch. They arrived at Texas Ranch on 5 June 2000, but the vicious assaults continued. The Zhou brothers were now swollen all over their bodies. They had lacerated buttocks. They were told to bathe and cold compress was applied on the wounds. One of their captors gave them a shirt and jersey to wear in an attempt to conceal their injuries from Chitoro, who arrived at the farm on 6 June 2000. When Chitoro saw the Zhou brothers, he asked James whether they had come to the farm to be allocated pieces of land. When the reply was in the negative, Chitoro is said to have accused the Zhou brothers of being puppets of white people and supporting the MDC so that whites could take over the country. James said when he retorted that they only supported the MDC, Chitoro kicked Fainos who was lying on the ground once on the chest. He said he was not assaulted by Chitoro, who ordered that they be released.

The Zhou brothers were released on 7 June 2000 and walked to the petitioner's brother's homestead. Fainos was too weak to walk home. James left him behind, but he died the same day of asphyxia and assault.

It is highly unlikely that Chitoro would kick Fainos for an answer given by James to a question he (Chitoro) had asked. The evidence did not establish that Chitoro knew of the assaults perpetrated on the Zhou brothers at the time they were administered. The fact that he ordered their release suggests that he did not approve of what had been done to them.

Mavis Tapera

Mavis Tapera ("Mavis") is Fainos' widow. She said the kidnappers of James and her late husband stripped her naked and pushed a metal object into her private parts. The learned judge *a quo* disbelieved her evidence. She claimed that the assault took place in the presence of James and her late husband. The learned judge took into account the fact that James did not mention the incident. She had not told the police about her experience. There is nothing in the record to gainsay the correctness of the learned judge's finding on the credibility of this witness.

Elizabeth Tati

Elizabeth Tati ("Elizabeth") and Barbara Tati ("Barbara"), who was married to Elizabeth's brother-in-law, and other villagers were kidnapped by a group of men. They were told to walk to Texas Ranch. In the group of kidnappers was Ncube. On the way to Texas Ranch Ncube told the two women that he was going to sleep with them at the farm. When they arrived at the farm, he took Elizabeth to a secluded place and had sexual intercourse with her once, before sending her off to spend the night with another woman at the farm. He later had sexual intercourse with Barbara.

The evidence of the women being kidnapped and made to indulge in sexual intercourse with Ncube did not incriminate the respondent or Chitoro. There was no evidence on which a finding could be made that the respondent personally, or through Chitoro, knew of the acts of violence perpetrated against these witnesses. The evidence established that the villagers were released the following day. It is not said whether Chitoro knew of their fate at that stage. Although the two women told the petitioner's legal practitioner that they had been raped by Ncube, the court *a quo* disbelieved the evidence of rape. They had not told each other of their experiences, nor had they reported the incidents to the police. They had declined medical examination. More importantly, Chitoro would not have known of such acts, the occurrence of which the women kept a secret.

Simbarashe Muchemwa

Simbarashe Muchemwa ("Muchemwa") left Harare for Mberengwa East Constituency. On his way back the motor vehicle they were using broke down in Mberengwa West. The evidence established that they had in their custody axes, grenades and teargas canisters. Earlier that day occupants of a Toyota Hilux motor vehicle had severely assaulted a war veteran in the area and left him for dead. These people also had in their possession axes.

A group of war veterans in pursuit of the people who had assaulted their colleague came upon Muchemwa's motor vehicle. They surrounded it and ordered the occupants to surrender. Muchemwa and his group were mistaken for the fugitives who had assaulted the war veteran. He was set upon and struck several times on the body with sticks. He sustained injuries on the stomach. This evidence also failed to link the respondent or Chitoro with the commission of the violence perpetrated on the witness.

Josephine Ngwenya

Josephine Ngwenya ("Josephine") left her home in the southern part of the Constituency on 6 June 2000 at 4 am, going to Shauro in the northern part of the Constituency. Although she had claimed in evidence that she was on a church visit, the evidence of Lyton Shumba ("Shumba"), the independent candidate in the election, was that she went to Shauro to put up campaign posters for him. The register produced at the trial of the petition showed that Josephine had been Shumba's polling agent.

It appears that Josephine put up posters for Shumba near a place where a public meeting being addressed by the respondent was in progress. She was apprehended by ZANU (PF) youths and taken to the place where people were gathered.

Josephine said that when she protested to the respondent about her arrest he did not protect her. She said one of the youths asked the respondent what they should do with her. He is said to have replied that they should "sort her out". She said she was then assaulted by Chitoro.

The learned judge *a quo* found this witness to be unreliable and disbelieved her evidence about the respondent inciting the youths to assault her and that Chitoro assaulted her. He considered the fact that she had lied about the purpose of her visit to Shauro. She had not disclosed to the court that she was Shumba's polling agent. She had denied that at the time of her arrest she was putting up posters near the place where ZANU (PF) was holding a public meeting. She had told the police that her assailant was Tekere and not Chitoro. As a result of her report, the police had organised an identification parade, but

she failed to identify Tekere. On the perusal of the evidence, I am inclined to agree with the learned judge's assessment of her credibility.

The respondent

The respondent denied that he had knowledge of the acts of violence perpetrated on the witnesses called by the petitioner. He said he always preached peace at the public meetings he addressed. His message was that people should not be treated like cattle, which have to be beaten to be forced to jump into a dip tank. He admitted that he met Josephine at the public meeting he addressed at Shauro on 6 June 2000. When she was brought to him, Josephine looked distressed. When she told him that ZANU (PF) youths had found her putting up campaign posters for Shumba, he told the youths not to molest her. He said Chitoro was included as a member of his campaign team because he was the chairman of the war veterans association in the area. Chitoro was given platforms to address people on the land issue at six of his campaign rallies.

Biggie Chitoro

Chitoro was sixty-one years old at the time. He fought in the war of liberation as a member of the ZANLA forces operating from his home area of Mberengwa. He was the chairman of the Zimbabwe National Liberation War Veterans Association ("ZNLWA") in the district.

Chitoro said that the war of liberation had been fought primarily to take back the land that had been forcibly taken from Africans by white settlers. After Independence the war veterans believed that the process of land redistribution was progressing too slowly. They could not wait for negotiations between the government of Zimbabwe and Britain on the funding for the land reform programme. He went on:

"We occupied all commercial farms in Mberengwa East and West, whether government or private. I, as a person in charge, gave strict instructions to war veterans and villagers on the farms to deist from in any way engaging in violence. As a result, it will be noted that there was never a violent clash between occupiers and white farm owners. In fact, we usually communicated amicably with white farmers. I told my war veterans to peacefully mobilise people onto the farms by teaching the people the history of the land. I warned people not to physically assault or force people to come to the land. However, the occupiers and war veterans were a very diverse grouping of people and, as such, there were some persons who engaged in violence such as assault and poaching."

Chitoro admitted that he was a ZANU (PF) supporter. He said he did not hold a post in the party, nor was he involved in the formulation of its campaign strategies. He said he addressed public meetings organised for the respondent on land occupation. He denied the allegation that he threatened people at the public gatherings with violence. He denied that he kicked Fainos Zhou on the chest. He also denied assaulting Josephine.

The learned judge *a quo* found Chitoro a credible witness. On whether the evidence adduced on behalf of the petitioner established that Chitoro had knowledge of the commission of acts of violence perpetrated on the witnesses, the learned judge said:

"... some of the petitioner's own witnesses exculpated Chitoro from any wrongdoing by saying that he was genuinely surprised to see them at the farm, which wouldn't have been the case had he ordered their capture in the first instance, that he inquired whether they had come to be allocated land (the Zhou brothers) and invariably ordered the immediate release of the detained persons (e.g. Robson Gambaza), or their evidence shows that he had absolutely nothing to do with their plight (e.g. Barbara Mavhundwe, Elizabeth Tati, Tafara Hove). While the power he seems to have had to order the release of persons may be taken to mean that he might have been in overall control of the whole campaign of abductions and beatings, it is also fair to say that his prompt release of persons brought to the occupied farm against their will could be taken as a genuine commitment on his part to stamp out any unlawful activities."

In my view, the learned judge made a fair assessment of the effect of the evidence adduced on behalf of the petitioner to establish knowledge of and consent on the part of Chitoro to the commission of acts of violence perpetrated

on the witnesses. It is important to note that some of the acts of violence established by the evidence were spontaneous reactions to provocation, which Chituro could not have anticipated. The evidence that he invariably ordered the release of those kidnapped corroborated his own testimony that he told war veterans not to assault people and force them to take part in farm occupations.

As I have already pointed out, the object of the Act is that the electoral process should not be reversed and an elected candidate thrown out unless the grounds on which the statute says the election may be declared void have been proved beyond reasonable doubt.

In *Kunju v Unni* 1984 (3) SCR 162 MISTRA J, of the Supreme Court of India, said at pp 167-168:

“There is total consensus of judicial opinion that a charge of corrupt practice under the Act has to be proved beyond reasonable doubt and standard of proof is the same as in a criminal case. See *Mahant Shree Nath v Chaudrey Ranbir Singh* [1970] 3 SCC 647. This proposition has even not been disputed by counsel for the appellant. We, therefore, do not propose to refer to the catena of decisions affirming the aforesaid view. The High Court applied the right standard in the matter of appreciation of the material placed before it and has come to hold that the allegations of corrupt practice within the meaning of section 123(4) of the Act has not been proved. In such a situation, as pointed out by this Court in the case of *Baddepalli Rajagopala Rao v N.G. Ranga* AIR [1971] Sc 261, this Court would not re-appreciate the evidence. SHAH J, as he then was, observed thus:

‘The finding of the learned trial Judge is based upon appreciation of evidence of the witnesses in the light of probabilities. A charge of corrupt practice under the Representation of the People Act must be established by clear and cogent evidence. When the Court of First Instance on a consideration of the evidence of the witnesses had refused to place any reliance upon their testimony the burden lying upon the party setting up a plea of corrupt practice becomes no lighter in appeal. The charge cannot be held established merely upon suspicion or preponderance of probabilities. Unless the appellant establishes that the appreciation of the evidence was vitiated by gross misreading or misconception of the evidence or because of failure to consider important pieces of evidence which had a bearing on the charge or because of serious irregularities in procedure which amount to a denial of a fair trial, the appellate court will not proceed to re-appreciate the evidence on which the findings

recorded by the court of First Instance on the credibility of witnesses."

See also *Robinson v Minister of Lands and Anor* 1994 (2) ZLR 171 at 175 A-C; *Barrows and Anor v Chimphonda* 1999 (1) ZLR 58 (S) at 62G-63A; and *Mthinkhulu v Nkiwane and Anor* S-136-01 at 3.

After a careful consideration of the circumstances of the case and the evidence of the witnesses, I find myself in agreement with the judgment of the court *a quo* that undue influence was not proved against the respondent. Indeed, it is very difficult to prove a charge of corrupt practice merely on the basis of oral evidence because in election cases it is very easy to get the help of interested witnesses but very difficult to prove charges of corrupt practice.

There was, for example, no proof that the acts of violence were in the nature of pressure on the minds of the victims as voters to prevent them from voting in a manner they wished for a candidate of their choice or to refrain from voting in the exercise of their free will. As CHANDRACHUD CJ observed in *Sahu v Singh and Anor* [1985] LRC 31, the offence of undue influence can be said to have been committed only if the voter is put under a threat or fear of some adverse consequence or if he is induced to believe that he will become an object of divine displeasure or spiritual censure if he casts or does not cast a vote in accordance with his decision. There was no evidence that the victims of the violence were told to vote for the respondent or not vote at all.

Realising, perhaps, that that evidence had not established the charge of undue influence against the respondent, Mr *Hwacha*, for the petitioner, argued in his address to the court that the evidence had established general violence which permeated the whole community such that the election result may have been affected. He contended that the election result should be invalidated

on the ground of general violence. Mr *Hussein*, for the respondent, argued that general violence had not been pleaded as a cause of the complaint raised against the election in the petition. He said s 132 of the Act did not give the court power to set aside an election on a ground not alleged in the petition.

The learned judge held that the words "any other cause whatsoever" in s 132 of the Act indicated that the causes specifically mentioned therein were not exhaustive. The petition may be presented on any cause of complaint known to the petitioner. He did not determine the fundamental question whether the court had the power to set an election result aside on a ground that had not been pleaded as a cause of complaint in the petition at the time of its presentation.

Notwithstanding the fact that it was common cause that the petition did not allege general violence as a cause of the complaint the petitioner had made against the election of the respondent, the learned judge determined the factual question whether there was general violence that was so widespread that it permeated the whole community in the Constituency that the election result may have been affected. He held that the violence established by the evidence of the witnesses was not extensively prevalent as to vitiate the election.

It appears to me the learned judge misdirected himself in accepting the proposition that he could invalidate the election on general violence established by evidence in the course of the trial of the petition when it was not pleaded as a cause on which the election of the respondent was challenged. A petition is not a common law cause of action. It is a special procedure created by statute. The law governing the manner and grounds on which an election may be set aside must be found in the statute and nowhere else.

In *Nath v Singh and Ors* [1954] SCR 892 at 895 MAHAJAN CJ said:

“The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power. It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law.”

About twenty years later the same principle was reiterated by CHANDRACHUD CJ in *Sahu's case supra*, where at p 39 he said:

“The rights arising out of elections, including the right to contest or challenge an election are not common law rights. They are creatures of the statutes which create, confer or limit those rights. Therefore, for deciding the assertion whether an election can be set aside on any alleged ground, the courts have to consult the provisions of law governing the particular election. They have to function within the framework of that law and cannot travel beyond it.”

For a court to set aside an election the cause of the complaint should have been pleaded in the petition at the time of its presentation and established by evidence beyond reasonable doubt. The duty of the court is to determine whether the petitioner has by evidence adduced established the cause of his complaint against the election result. The effect of s 132 of the Act is that a petitioner complaining of an undue election must state the nature of the cause of his complaint. The cause of complaint must be clearly and concisely stated at the time of presentation of the petition to the High Court.

The respondent is entitled to know the reason why his or her election is being challenged so that he or she can be able to answer the case. It is also clear that the relief the High Court may grant to a petitioner depends on the nature of the cause of the complaint against the election result as pleaded in the petition (see s 136).

The petitioner chose not to rely on general violence as the cause of his complaint against the election of the respondent. For general violence to be a valid ground, it should have been pleaded. As the laws of election are self-contained codes and the rights arising out of elections are the offspring of those laws, the petitioner had no right to have the election invalidated on the ground of general violence unless he had specified it as a ground in the petition. Such an election could be set aside on the grounds specified in s 132 of the Act only and those grounds not particularised in the petition must not be relied upon to set aside an election.

Notwithstanding the misdirection on the law, the learned judge found that the acts of violence established by the evidence of the witnesses were not so general and extensive in their operation as to have permeated the whole Constituency so that freedom of election may have ceased. That finding is correct.

There was no basis upon which the election of the respondent could be invalidated.

The appeal is accordingly dismissed with costs.

CHIDYAUSIKU CJ: I agree.

ZIYAMBI JA: I agree.

Kantor & Immerman, appellant's legal practitioners

Hussein Ranchod & Co, respondent's legal practitioners