

REPORTABLE (137)
Judgment No. SC. 147/04
Civil Appeal No. 189/01

ELLIOT CHAUKE v MOSES MARE

SUPREME COURT OF ZIMBABWE
CHIDYAUŠIKU CJ, CHEDA JA & MALABA JA
HARARE, JUNE 14, 2004 & SEPTEMBER 22, 2005

W J Mutezo, for the appellant

H Zhou, for the respondent

MALABA JA: This appeal is from a judgment of the High Court delivered on 20 June 2001 to the effect that the appellant was not duly elected as the Member of Parliament for Chiredzi North Constituency (“the constituency”) and that no other person was entitled to be declared duly elected in the Parliamentary election (“the election”) held on 24 and 25 June 2000.

The respondent (hereinafter referred to as “the petitioner”) was a candidate in the election sponsored by the Movement for Democratic Change (“the MDC”), whilst the appellant (hereinafter referred to as “the respondent”) was a candidate sponsored by the ruling party, Zimbabwe African National Union – Patriotic Front (“ZANU-PF”). There were 46 852 registered voters in the constituency, of which 18 919 cast their votes in the election. The respondent secured 10 154 votes as against the petitioner who polled 8 765. He was declared the duly elected Member of Parliament for the constituency on 26 June 2000.

On 24 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 practices and corrupt practices” which he alleged had rendered the election neither free nor fair. The basis for the complaint against the election result was that it had been secured by means of assaults, threats of violence, arson and malicious injury to property perpetrated by war veterans and ZANU-PF supporters led by one Boniface Mutemachani on members of the electorate in the constituency known or suspected to be MDC supporters. The allegation was that the corrupt practices, which took the form of undue influence as enacted in s 105 of the Act, were committed with the knowledge and consent of the respondent or his election agent.

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 ...”.

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.”

At the conclusion of the trial of the election petition the learned judge found that the evidence had not proved that the respondent had by himself

or by his agent committed corrupt practices within the meaning of s 105 of the Act.

The court *a quo* also found that the corrupt practices which extensively prevailed in the constituency had not been committed with the knowledge and consent of the respondent or his election agent. I can do no better than quote what the learned judge said in making the findings of fact, the correctness of which was not challenged on appeal. She stated:

“I find it proved that Chief Tshovanu was intimidated into gathering all the village heads at his residence to be addressed by Boniface Mutemachani and other war veterans to advise their families to vote for ZANU-PF or risk death.

The following MDC supporters and office bearers were assaulted or otherwise intimidated -

KUDZAYI CHISIRIMUNHU had the windows of his shop smashed and his patrons attacked and intimidated.

The MUJAJI family suffered the loss of their home which was razed to the ground with all their property therein contained and their children were assaulted by MUTEMACHANI and other war veterans causing them to flee from the area until after the election.

The house of PERCY MAVHENEKA was broken into, his windows destroyed and himself and his family assaulted with whips, knobkerries and sticks by war veterans.

ROSE CHAUKE and her husband were assaulted by MUTEMACHANI and other war veterans, their two year old child kicked from the arms of its father and the family forced to flee to Chikombedzi where they remained until the elections were over.

The petitioner had the windows at his residence smashed and was forced to flee from his home with his wife and children.

RICHARD NYEKWANI of Muteo Village was assaulted severely by MUTEMACHANI and three others and threatened with death.

KENNETH MWENGA was assaulted by MUTEMACHANI when he went to the assistance of an MDC supporter whose T-shirt was being forcibly removed by MUTEMACHANI.

CHADEMANA SUNGANO, an NCA supporter and a teacher at Chitepo School, had the walls of his house spray-painted with (the) words ‘down with Chademana’ and his friend PROUD ZAVA was assaulted in his presence.

JAMES JEKERO and the village heads in the constituency were told by war veterans to urge their subjects to vote for ZANU-PF or else there would be war."

A reading of the record of the evidence given by witnesses who were victims of acts of violence satisfies me that the above findings of fact made by the court *a quo* were justified. The facts established that the same type of acts of violence were perpetrated on MDC supporters at different places across the constituency. The evidence also established that MDC supporters also perpetrated acts of violence against ZANU-PF supporters.

Notwithstanding clear evidence of the fact that corrupt practices were extensively prevalent in the constituency, the learned judge based the determination that the respondent had been unduly elected and that no other person was entitled to be declared duly elected on "general violence", which had not been pleaded as a cause of the complaint against the election at the time the petition was presented. The learned judge stated:

"It was submitted by Mr *Zhou* that the grounds on which a court may find there was an undue election are not limited to corrupt practices, illegal practices or irregularity but extend to 'any other cause whatsoever'. He submitted that even if the respondent or his agent was not found by the court to have engaged in corrupt practices the respondent could be found to have been unduly elected and the elections could be set aside by the court if the elections were found not to be free and fair. He submitted that the evidence showed that there was such widespread violence and terror prevailing in the constituency during the pre-election period that no election could possibly be free and fair in these circumstances."

The learned judge then continued:

"I incline to the view that the grounds on which a finding of undue election may be made are not limited to want of qualification, disqualification, corrupt practice, illegal practice and irregularity but may extend to 'any other cause whatsoever' and that widespread violence and intimidation of the electorate can, depending on the degree thereof, be a valid cause for a finding of an undue election in terms of the Act. The degree of violence and intimidation must be such as is liable to induce persons of ordinary courage from exercising their votes."

It is clear from what the learned judge said that she determined that the respondent had been unduly elected by reason of the existence of "general violence" in the election as an independent cause from corrupt practices. To the extent that "general violence" had not been pleaded by the petitioner as a ground on which the election was to be declared an undue election, the learned judge misdirected herself in accepting the submission that she should invalidate the election because of the existence of general violence established by evidence in the course of the trial of the election petition.

Acts of violence that constitute extensively prevalent undue influence on voters in a constituency are not necessarily evidence of general violence, which is a condition akin to break-down of law and order in a constituency. To prove general violence as a cause of an undue election a petitioner does not have to show that particular voters were induced to vote or to refrain from voting, as is the requirement for the establishment of undue influence within the meaning of s 105 of the Act.

In *Snyman v Schoeman and Anor* 1949 (2) SA (1) at 6 it was stated that general violence manifests itself through "riotous behaviour" which:

"... must have been so grave as to amount to intimidation liable to induce persons of ordinary courage to refrain from exercising their votes; it must be general and of a nature that the result of the election might reasonably be supposed to have been affected, without proof that it was in fact affected – in other words conditions must have prevailed which negative the concept: free election."

Whilst acts of violence constituting corrupt practices which extensively prevailed in a constituency may have the same effect of producing an undue election as general violence, they are different causes which must be pleaded by the petitioner at the time of presentation of the petition to the High Court.

In *Hove v Gumbo* S-143-04 (not yet reported) it is stated at pp 20-21 of the cyclostyled judgment that:

“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 of the learned judge, the evidence established that corrupt practices committed by persons other than the respondent or his election agent and without their knowledge and consent extensively prevailed in the constituency so that it could not be said there was a free election. Section 105 prohibits the commission of undue influence on a voter by “any person” and an election may be set aside in terms of s 136 for being an undue election if corrupt practices found by the court to have been committed by persons other than the respondent or his agent were extensively prevalent in the constituency so as to have negated the existence of freedom of choice in the electorate. In this case the existence of corrupt practices had been pleaded as a cause of complaint against the election result; and the evidence

established that corrupt practices, in the form of undue influence on voters to refrain from voting at all or to vote for ZANU-PF committed by Muchemachani and other war veterans, extensively prevailed in the constituency so that it could not be said the election was free and fair.

Although for different reasons, I come to the same conclusion as was reached by the court *a quo*, that the respondent was not duly elected and that no other person was entitled to be declared duly elected as a Member of Parliament for Chiredzi North Constituency in the general election held on 24 and 25 June 2000.

The appeal is accordingly dismissed with costs.

CHIDAYUSIKU CJ: I agree.

CHEDA JA: I agree.

Mutezo & Co, appellant's legal practitioners

Kantor & Immerman, respondent's legal practitioners