

PAUL JOHN FIRMINO LUSAKA v JOHN CHEELO (1979) Z.R. 99 (H.C.)

HIGH
CULLINAN,
7TH,
1978/HP/ NO. EP5

COURT

MARCH

1979.

J.

Flynote

Election petition - Illegal practice allegations - Undue influence, bribery, threats of force and restraint - Election void.

Headnote

The respondent was elected MP for the Kafue Constituency. The petitioner, a defeated candidate for the same seat, filed a petition alleging that the respondent was guilty of undue influence, threatening to use force, and bribery in divers instances. On the evidence, the court found the respondent guilty of the illegal practice of bribery.

Held:

According to reg. 74 (1) (d) of the Electoral (National Assembly Elections) Regulations, if the court finds an elected candidate to have committed the corrupt practice of bribery, it may declare that he was not duly elected and that the election was void.

Cases referred to:

- (1) Re Three Election Petitions 1968/HP/EP/5, 21 and 22 (Unreported).
- (2) Limbo v Mututwa 1974/HP/EP/2 (Unreported).
- (3) Sligo Borough Case (1869) 10 M. and H. 300.
- (4) Youghal Election Petition (1869) I.R. 3 CL 530.

Legislation referred to:

Electoral Act, Cap. 19, ss. 17 (2) (a) and (c), 20 (3).

Electoral (National Assembly Elections) Regulations, regs 2 (1), 74, 76, 25 77, 78, 83 (1) and (2)

Representation of the People Act, 1949 (England), ss. 99, 100.

Corrupt Practices Prevention Act, 1854 (England).

For the petitioner: N. R. Fernando, Gib Chigaga and Co.

For the respondent: M. F. Sikatana, Veritas Chambers.

Judgment

CLLINAN, J.: delivered the judgment of the court

The petitioner was a candidate at the National Assembly final election for the Kafue Constituency held on 12th December, 1978. On 14th December the returning officer duly declared the respondent to have been duly elected.

The petition is based on the provisions of s. 17 (2) (a) and (c) of the Electoral Act, Cap. 19, which

read as follows:

"(2) The election of a candidate as a member shall be void on any of the following grounds which is proved to the satisfaction of the High Court upon the trial of an election petition, that is to say:

(a) that by reason of any corrupt practice or illegal practice committed in connection with the election or by reason of other misconduct, the majority of voters in a constituency

p100

were or may have been prevented from electing the candidate that constituency whom they preferred, or . . .

(c) that any corrupt practice or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or of his election agent or of his polling agents;"

Such grounds are based on some four allegations. The first of those is that the respondent's election agent was guilty of "intimidation and threats of force and restraint" upon the petitioner and his agents and supporters amounting to undue influence under the provisions of reg. 77 (1) (a) of the Electoral (National Assembly Elections) Regulations (which I shall hereafter refer to as "the regulations" and by regulation). The petitioner gave evidence; so also did Charles Moomba Vice - Chairman of the Kafue Party Constituency, Alexis Mwiya, a Councillor in Kafue Township Council and a polling agent of the petitioner, and also Mrs Zelesi Mwanza, Lady Chairman of the Chawama Party Branch. It was their evidence that the petitioner, Mr Moomba and Mr Mwiya after contacting the Chawama Branch Chairman at Kafue had approached Mrs Mwanza, the Lady Chairman, at her house in Chawama in the afternoon of Sunday, 3rd December, 1978. While speaking to Mrs Mwanza Mr Tryson Phiri, the Chawama Branch Publicity Secretary, acknowledged by the respondent to be his election agent, approached them brandishing a knobkerrie and telling them to leave as they had not sought permission of the Chairman to campaign at Chawama. Mr Phiri was informed that such was not the case. He departed for Kafue, failed to find the Chairman, returned and apparently accepting that he had been in the wrong apologised to the petitioner and his party, and accompanied them when the petitioner was introduced to voters at some three houses. The petitioner had felt intimidated by Mr Phiri's earlier behaviour. He considered that such behaviour was not conducive to free campaigning. For that reason he visited only three houses. He did not campaign again in Chawama as a result of such incident.

Mr Phiri denied that he had brandished a knobkerrie or stick. His evidence indicates however that his behaviour was such that he considered it necessary to subsequently apologise to the petitioner and his party. His evidence was supported by Mr Bruno Mwiinga, the Chawama Branch Secretary, to the extent that the latter's evidence is neutral as to any alleged violence used by Mr Phiri.

Regulation 77 in part reads as follows:

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

(a) makes use of or threatens to make use of any force, violence or restraint upon any other

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; or

p101

- (iii) to refrain from claiming registration as a voter; or
- (iv) to refrain from offering himself as a candidate for election; Soon account of that person having-
 - A. signed or refrained from signing a nomination paper; or
 - B. voted or refrained from voting at any election; or
 - C. refrained from claiming registration as a voter; or
 - D. refrained from offering himself as a candidate; shall be guilty of the offence of undue influence.

- (2) Any person who, by abduction, duress or any fraudulent device or contrivance, impedes or prevents the free exercise of his vote by any voter or thereby compels, induces or prevails upon any voter either to give or to refrain from giving his vote at any election, shall be guilty of the offence of undue influence."

There are issues of credibility involved in the evidence. I do not see however that it is necessary to resolve them. A study of reg. 77 indicates that in any event Mr Phiri's alleged behaviour does not fall within the compass of the provisions thereof. Neither as I see it does such behaviour constitute a corrupt or illegal practice under the regulations. It may be said that it constitutes "misconduct" as defined by the late Hughes, J. (as he then was), in the judgment delivered in *Re: Three Election Petitions*. I do not see however that any evidence whatsoever has been adduced, to show that the majority of voters in the constituency may have been (much less, were) prevented from electing the candidate in the constituency whom they preferred. Hughes, J., found that such conditions were satisfied in the above case, but that was a case where aspiring candidates were prevented from lodging their nomination papers. Again in the case of *Limbo v Mututwa (2)*, a case which came before me, I similarly found that such conditions were satisfied for the very same reason. Those conditions are not satisfied in the present case.

It is also alleged that the respondent gave a crate of beer and a crate of soft drinks to Mrs Vastina Phiri Muzyamba, the Lady Chairman of Musambazi Party Constituency, in order to corruptly influence her to vote for and to secure the votes of others for the respondent. The alleged transaction, which is completely denied by the respondent, took place on 15th October 1978, some four days before polling day for the primary election. Mr Sikatana for the respondent submits that such evidence is admissible as it is connected with the primary and not the final election: this petition was lodged on 22nd December, 1978, and under the provisions of a. 20 (3) of the Act, which in effect provide that a petition in respect of the result of a primary election shall be presented within thirty days of the declaration of that result, the evidence of Mrs Muzyamba is statute barred. Mr Fernando for the petitioner submits that the petition has been presented in respect of the result of the final and not the primary election, and the evidence is admissible, even though the alleged transaction occurred before the primary election, if it can be shown that the transaction

was in fact connected with the final election. With that general
p102

proposition I agree, though difficulties may be encountered in applying it where it is shown that the transaction affected both the primary and the final election. In the present case however Mrs Muzyamba as Lady Chairman of a Party Constituency was a voter in the primary election: further in such capacity she was in a position to influence Constituency and Branch officials who were also voters. She testified that the respondent's exact words when presenting the beer and soft drinks were "I would like you to assist me so that you organise Branch officials to vote for me. My symbol is a 'plane'". Mrs Muzyamba was asked further questions by the court. The answers thereto served but to confirm the impression that the alleged transaction concerned the primary election only. The onus is on the petitioner in the matter. I am not satisfied, issues of credibility apart, that Mrs Muzyamba's evidence is connected with the final election and it is therefore not relevant to the present petition. I would add n passing that it was her evidence that she did not accept the drink in question: indeed the respondent and his supporters drank it all. There could then be no "giving or providing" of such drink as specified in the provisions of reg. 76. Mrs Muzyamba's evidence would, prima facie, constitute evidence of an attempt to treat. Such Exempt an would not, as I see it, constitute a corrupt or illegal practice, as for example would an attempt to commit an illegal practice at the poll under reg. 83 (1) and (2). It would certainly constitute misconduct but as I have said the Provisions of s. 17 (2) (a) do not otherwise apply.

It is also alleged that the respondent corruptly gave a chitenge material to Mrs Enid Banda, a Constituency Publicity Secretary, on 15th November, 1979. The respondent completely denies such transaction. Regulation 74 in part and reg. 76 read as follows:

- "74. (1) Any person who, directly or indirectly, by himself or any other person -
- (a) gives, lends, or procures, or agrees to give, lend or procure, or offers, promises, or promises to procure, any money to or for any person on behalf of any voter or to or for any other person in order to induce any voter to vote or refrain from voting or who corruptly does any such act as aforesaid on account of such voter having voted or refrained from voting at any election;
 - (c) makes any such gift, loan, offer, promise, procurement of agreement to or for any person in order to induce such person to procure or to endeavour to procure the return of any candidate at any election or the vote of any voter at any election;
 - (d) upon or in consequence of any such gift' loan, offer, promise, procurement or agreement, procures or engages, promises, endeavours to procure, the return of any candidate at any election or the vote of any voter at any election;...

p103

- (h) conveys or transfers or is concerned with the conveyance or transfer of any property, or pays or is concerned with the payment of any money, to any person for the purpose of enabling him to be registered as a voter, thereby to influence him vote at any future election, or pays or is concerned with the payment of any money on behalf of any voter for the purpose of inducing him to vote or refrain from voting, shall be guilty of the offence of bribery.

(2) Nothing in this regulation shall be construed as applying to any money paid or agreed to be paid for or on account of any expenditure bona fide and lawfully incurred in respect of the conduct or management of an election.

76. Any person who corruptly by himself or by any other person either before, during or after an election, directly or indirectly gives or provides or pays wholly or in part the expenses of giving or providing any food, drink, entertainment, lodging or provisions to or for any person for the purpose of corruptly influencing that person or any other person to give or refrain from giving his vote at an election shall be guilty of the offence of treating."

A close examination of reg. 74 (1) reveals that the, corrupt practice of bribery involves the consideration of "money", that is, with the sole exception of para. (h) which also involves the consideration of "property", but the reference there has no application to the present case. Paragraph (c) does make reference to "any such gift", but those words are clearly in reference to the giving of money specified in para. (a). It will be seen that reg. 74 is broadly based on the provisions of s. 99 of the Representation of the People Act 1949. Section 99 (2) however contains a provision extending the meaning of the word "money" to include a "valuable consideration". There is no such provision in reg. 74. Neither is there any such extended definition in reg. 2 which covers interpretation, or in the Electoral Act itself, or indeed in the Interpretation and General Provisions Act. The word "money" has been given many an extended meaning, particularly in authorities dealing with probate. In reg. 74 it is used in places with the words "lend", "loan", "paid", "pays" and "payment": further, para. (h) it is used in contrast to the word "property". In view of that, and the Act that the extended definition in s. 99 (2) of the 1949 Act was not repeated in our Act, I am of the opinion that it was the intention in framing reg. 74 that the word "money" should bear its ordinary meaning. I consider it would be straining that meaning to so extend it as to cover a chitenge material.

In my view reg. 76 is equally inapplicable. That regulation is based on s. 100 of the 1949 Act, but its origins go back over one hundred years. Section 100 covers the giving of "meat, drink, entertainment or provision". Regulation 74 extends the corrupt practice to cover the giving of "food" and "lodging". The word "provision" has been replaced by "provisions". The word "provision", in the plural, is defined in the Concise Oxford

p104

Dictionary as meaning a "supply of food, eatables and drinkables". The basis of the corrupt practice of treating is the exceeding of the normal bounds of hospitality for a corrupt purpose. All of the old authorities, and they are legion, cover such transactions as the giving of food, drink and entertainment. The very title of the corrupt practice seems to me to be self explanatory. I cannot see that the word "provisions" could be so strained as to include a chitenge material. As I see it therefore, issues of credibility apart, the allegation does not amount to one of a corrupt practice. It does in my view amount to an allegation of misconduct, but then as I have said previously, the provisions of s. 17 (2) (a) do not otherwise apply.

Finally, it is alleged that the respondent gave the sum of K4 to Mr Bramwell Zandu to induce him

to procure the return of the respondent at the election. Mr Zandu, testified that he received K4 from the respondent on 12th October, 1978, that is some seven days before the polling day in the primary election. Mr Sikatana submits that, as with Mrs Muzyamba's evidence, Mr Zandu's evidence is also not relevant to this petition. That depends, as I see it, on the content of Mr Zandu's and other evidence adduced.

With regard to Mr Zandu, an application to treat him as a hostile witness was granted. He testified that he was the Musambazi Constituency Youth Chairman. On 12th October 1978, he met the respondent at a garage in Kafue. He needed some K2.50 for transport but borrowed K4 from the respondent as he required an extra K1.50 to cover "break-downs". He volunteered the evidence that the respondent "never mentioned any elections". Subsequently, he met the respondent at Kafue railway station on 5th December when the latter approached him and angrily accused him of going around "despising him", and saying that he would make a "bad MP". As a result of this meeting, Mr Zandu went to the Regional Secretary that day and made a complaint to the latter. He wished that the Regional Secretary should call the respondent and "discuss the matter to hold no grudge against me", he said, later qualifying that to indicate that he wished to repay the K4 in the presence of the Regional Secretary. The Regional Secretary had earlier in evidence produced a statement, written by him, in part in the third person and again in the first person, signed by Mr Zandu, and date stamped 17th December 1978. Mr Zandu acknowledged the statement as his, but denied the contents, the relevant part of which reads:

"A Bramwell Zandu was given K4.00 by Cheelo in order to campaign for him. He told him that he has a lot of money for elections . . .
Earlier when Cheelo learned that I was not supporting him, he threatened to deal with me
after the elections".

Mr Zandu, however, denied the contents of his statement when read out to him. In cross-examination, he contradicted himself many times.

p105

He said he made the written statement date stamped 17th December 1978, on the 5th December. He then said that he had made two statements to the Regional Secretary, one on the 5th December, which was lost, and the other on the 17th December. Nonetheless, despite his evidence that the latter statement was false, he testified that the two statements were identical. When cross-examined by Mr Sikatana, he advanced the evidence that he had been threatened by the Regional Secretary with imprisonment unless he made the written statement stamped on 17th December, and repeated such statement to the petitioner's advocates and to the court. He subsequently enlarged the allegation of duress to a threat that he would be "shot". He admitted making a statement to such advocates alleging that the respondent had given him K4 to vote for and campaign for him and that the respondent was subsequently angry that he was not doing so. Again he admitted to having said just that to the Regional Secretary. He admitted that what he had told the petitioner's advocates was true, but seemingly retracted that again.

As for the respondent, he did not impress me as a witness. He testified that he met Mr Zandu at the garage sometime in September. He "heard someone behind saying he had problems", and instructed

the petrol attendant to give Mr Zandu the K4 change from the respondent's payment for petrol. He did not know Mr Zandu at the time. He retracted that and said he did know him, qualifying that to mean he "knew he was in Kafue". It was Mr Zandu's evidence however that the respondent had said to him on the 5th December, " Zandu, you are my close friend and I don't want to hear this again." The respondent would have it that he gave Mr Zandu the K4 in September when he was not even thinking of elections but in re-examination he said he could not remember if it was September or October. He admitted to meeting Mr Zandu on 5th December when he said to the latter, "Let us speak the truth", an apparent reference to Mr Zandu's alleged unfavourable comments concerning the respondent. The respondent testified that M Zandu "thought I was getting annoyed about the K4" and went to the Regional Office.

If Mr Zandu was virtually unknown to the respondent, then it is difficult to appreciate how he could be appraised of Mr Zandu's unfavourable comments; or again why he should angrily react thereto or why he should lend K4 to a virtual stranger; or why in over four months, he never asked for its return. If Mr Zandu felt that the respondent's anger had some connection with the loan of K4 then I do not appreciate why he did not immediately repay a small loan, without the necessity of having the Regional Secretary to formally witness such repayment; or why indeed, if he felt so sensitive about the respondent's reactions, he has since made no repayment. Mr Zandu's evidence of the alleged duress is, to say the least of it unconvincing. I am satisfied that he made a complaint to the Regional Secretary on 5th December which, the latter decided to leave in abeyance, perhaps in view of the proximity of the final election, and thereafter reduced to writing on 17th December. It is significant that although Mr. Zandu alleges that the Regional Secretary concocted the statement to deceive the court, the latter was reluctant to produce it: he was clearly reluctant because he was being asked to

p106

produce a confidential Party document. Mr Zandu did not earlier in his evidence mention duress: he advanced it as a result of a direct suggestion thereof made to him by Mr Sikatana during cross-examination. During his earlier lengthy cross-examination by Mr Fernando he never advanced it as a reason for the inconsistencies in his evidence. I am satisfied that the only reasonable inference to be placed on all the evidence, is that the respondent gave the K4 to Mr Zandu to induce the latter to endeavour to procure his return at the election and that when Mr Zandu Ad not make such endeavour, but instead began to speak unfavourably of him the respondent reacted angrily thereto, such anger having the effect of precipitating Mr Zandu into making a complaint to the Regional Secretary, a complaint, which, he now perhaps regrets in view of his possible exposure to the sanctions of regs. 74 and 78.

Mr Zandu's evidence does not in any way indicate that the respondent wished him to campaign for the primary election: indeed the fact that the respondent approached him on 5th December, some seven days before the final election, protesting against his lack of support, indicates that the K4 was given in connection with the final election. There is the aspect that the payment was, nonetheless, effected on 12th October, some seven days before the primary election when the respondent had not qualified for candidature in the final election. In the *Sligo Borough Case* (3), the report of which is not available to me, it was held that to constitute the offence of bribery it does not matter how long before the election a bribe is given, provided the bribe is operative at the time of the election. In the

case of the *Youghal Election Petition* (4), a candidate was held guilty of treating, where such treating took place even before the dissolution of Parliament and before he came within the statutory definition of "candidate", which included a person who had declared himself a candidate after dissolution of Parliament. It can be said that those authorities have no relevance, as the respondent in this case could not be sure of being successful in the primary election, of passing scrutiny by the Central Committee and of becoming a candidate in the final election. The decision in the *Youghal* case however indicated that as the respondent subsequently became a candidate, his candidature then related back to the earlier treating, which under the Corrupt Practices Prevention Act, 1854, constituted an offence only when committed by a candidate. In this respect, reg. 74 prescribes the offence of bribery in respect of "any person" and not "any candidate". Further, the definition of "candidate" contained in reg. 2 (1) covers the present situation. That definition reads:

"'candidate' in relation to an election to the National Assembly includes any person who has lodged or intends to lodge his nomination for primary election, but does not include any person who has been unsuccessful at the primary election or whose candidature has been disapproved by the Central Committee;"

It will be seen therefore, that for the purposes of the regulations, that is, of constituting the offence of bribery, the respondent was, in fact, a candidate for the final election at the time of the payment of money, in this case and the word "candidate" in reg. 74 (1) (c) then applied to him.

p107

There is no evidence whatsoever to show that such payment was made in respect of expenditure bona fide on lawful election expenses. I am satisfied therefore, that the respondent gave the sum of K4 to Bramwell Zandu, in order to induce the latter to endeavour to procure the return of the respondent as a candidate at the final election, bringing the respondent's actions within reg. 74 (1) (c). Again, I am satisfied that Bramwell Zandu must in the least have promised to procure such return, but I am not satisfied that such was a genuine promise or that there was any consensus ad idem. I do not see therefore, that it can be said that his actions fall within reg. 74 (1) (d).

I am however, satisfied that the corrupt practice of bribery was committed by the respondent in connection with the final election. Accordingly, I determine that the respondent was not duly elected at the final election for the Kafue Constituency held on 12th December, 1978 and that the said election was void.

Election declared void
