

ELECTION PETITION FOR THE SEKE CONSTITUENCY

PHINEAS CHIVAZVE CHIOTA
versus

(1) REGISTRAR GENERAL OF ELECTIONS
and
(2) BEN TUMBARE MUTASA

HIGH COURT OF ZIMBABWE
ZIYAMBI J

HARARE, 18th July, 2001 and 23 January, 2002

A Kara, for the petitioner
Mr Mutsonziwa, for the first respondent
B Mtetwa, for the second respondent

ZIYAMBI J: In this petition, brought in terms of section 149 of the Electoral Act [*Chapter 2:01*], (the Act), the petitioner prays that the election held in the Seke Constituency on 24-25 June 2000 be set aside. It was alleged that there was non-compliance with the provisions of the Act to such an extent that the election was a nullity. The main complaint raised by the petitioner was that a large number of voters were denied their right to vote because their names were not found recorded on the voters roll at the polling stations where they tendered their votes. Both respondents denied that there was any justification for setting aside the election.

At the outset of the trial it was decided that a verification exercise in respect of the polling stations mentioned by the petitioner in his affidavit be conducted

HH 11-2002
HC 8221-2000

with a view to curtailing the proceedings. At the end of the exercise a number of witnesses gave evidence. The following is a summary of the evidence.

SUMMARY OF EVIDENCE

1 THE PETITIONER

The petitioner told the court that on 24 June 2000, the first day of the general elections held in the Seke constituency, he arrived at Mbuya Nehanda polling station at about 12 o'clock midday and was met by a crowd of some 250 people who complained that they had not been allowed to vote as they were not on the voters roll. He advised them to try the next polling station, Rusununguko, which was some 5 kilometres away. Some time later he drove to Rusununguko polling station where he found five of those persons in the queue. They were allowed to vote as their names were found on the voters roll at that station. The petitioner brought this discrepancy to the attention of the constituency registrar who undertook to deliver the correct voters roll to Mbuya Nehanda to enable the affected people to vote. At the same time, he also notified the constituency registrar that he would challenge the election. The errors were rectified on the second day of voting, namely 25 June, at about 2 pm.

On the same day, he drove to Kandava polling station

HH 11-2002
HC 8221-2000

where he saw a group of 150 people who complained that they had been denied the vote notwithstanding that they had registered and inspected the voters roll. The nearest polling station was 7 kilometres away. He discovered, after speaking to the presiding officer, that the M series was missing from the voters roll. This information was communicated to the constituency registrar who undertook to rectify the situation which she did on 25 June, the last day of the elections. However, the protocol register (exhibit 2) shows that up to 4.35 pm people were still being turned away.

He next drove to Dzumbunu polling station where he found that the same problem was being encountered with the M series. Mobile polling stations also experienced the same difficulties with the M series. Not being fixed stations they moved to different locations during the two voting days and a diary of their movements was given to the candidates prior to the elections setting out the movement of the mobile stations. He told the court that where there were anomalies, the people were disadvantaged because the programs did not allow the mobiles to return and no rectification took place in respect of the mobiles.

He was of the view that no election can be said to

HH 11-2002

HC 8221-2000

have taken place in Seke constituency as voting proceeded with defective or no voters rolls in some of the stations and, in the absence of the voters roll, no election can take place.

He told the court that the parties had agreed that only 7 stations would be verified as the exercise proved to be laborious and it was also agreed that the 7 stations would give a reasonable sample size from which it could be determined whether the voting was correctly conducted. However this last was denied by Mrs *Mtewa* who appeared for the second respondent, it being put to the witnesses, by her, throughout the trial that it was the petitioner who had elected that verification should proceed only in respect of the 7 polling stations.

He told the court that, according to his calculations based on the deputy registrar general's remarks on exhibit 3, a total of 268 pages were missing from the voters roll in respect of the 7 stations verified. In his estimation some 8 040 people would have been affected if one proceeded on the basis that there were 30 names on each page. He denied that the protocol register (exhibit 2) reflects the true position regarding the persons turned away from the polling stations.

In addition, he told the Court that persons queuing

HH 11-2002
HC 8221-2000

to vote were forced to flee from the polling station without voting because of violence perpetrated at the polling station by supporters of the second respondent.

2 ASAN SEREMANI

This witness told the court that he did not vote because supporters of the second respondent assaulted him while he was in the queue waiting to vote at Rusununguko polling station. He told the court that he was waiting with about 5-7 others in the voters queue when one Peter Gandidzanwa arrived at the scene in a motor vehicle driven by one Gambier who, he said, is the MDC leader for Melfort/Bromley. Gandidzanwa alighted from the vehicle while Gambier went to the car park. He then saw Gandidzanwa approaching him shouting that he and Gambier had been looking for him since Friday with the intention of killing him. So saying, Gandidzanwa struck him with clenched fists on the chest and tore his shirt accusing him of having frustrated the MDC campaign. On the advice of two persons, one of whom was constable Chidzingwa of the ZRP Marondera, he reported the matter to the presiding officer as well as the petitioners election agent.

Gambier arrived during the scuffle and summoned one S.O. Larson of a dog handling enterprise, ignoring the

HH 11-2002

HC 8221-2000

police who were present at the polling station.

The police were called and Gandidzanwa was arrested. He later signed an admission of guilt form and paid a fine for common assault. As a result of this incident, 5 of the people who were in the queue to vote fled fearing that they might also be attacked.

Although the evidence of this witness was challenged by the second respondent, it seems clear that the incident did take place. It was put to the witness that the presiding officer said that "the scuffle took place more than 100 metres from his area of authority", and later, that no report was made by the witness to the presiding officer - only a request to use the phone. It seems to me unlikely that the witness would ask for permission to use the phone without making a report to the presiding officer as to the reason for his request. In any event the questions put implied that the presiding officer was aware of the incident.

3 WITNESS SAKALA

This witness told the court that he tendered his vote at Mbuya Nehanda polling station but his name could not be found on the voters roll. Just then he saw the petitioner and informed him of the problem. There were, he said, about 200 people with the same problem. They

HH 11-2002

HC 8221-2000

were shouting and complaining that they had been denied the opportunity to vote. They were advised by the petitioner to proceed to the nearest polling station which was Rusununguko. Five of them went and voted there. These then returned to Mbuya Nehanda to inform the presiding officer that they had voted.

He told the court that he was not advised by the presiding officer or anyone that he should return to vote later. As far as he knew only 5 of the crowd of 200 had voted elsewhere. Not everyone who was turned away signed the protocol register as some left in a huff without signing.

That was the evidence led on behalf of the petitioner. The first respondent led the following evidence:

4 HIBU BATANI

He is attached to the first respondent's office as deputy registrar general and has been conducting elections for the past 20 years. He perused the document compiled by the petitioner's legal practitioners and commented thereon. His remarks are contained in exhibit 3. The verification exercise, he said, revealed that 225 people had not voted although their names were on the voters roll. The comment "missing pages" was inserted

HH 11-2002
HC 8221-2000

where the voter's name was listed but not found on voting day. Out of the seven polling stations verified, he said that only 250 people were wrongly turned away. He conceded that these 250 people should have voted if the presiding officer had exercised reasonable care. "We concluded that the actual pages with the names of the voters must have been missing from the voters roll."

He said that he received a report "about the opening of the poll" and that by noon of the first day "we started dispersing voters' rolls for correction".

Cross-examined by Mrs *Mtetwa*, he said that once a person enters the threshold of the polling station he did not leave without a record being made. If persons who attended were not recorded then it would be an irregularity. All candidates ought, he said, to be aware of these instructions.

The following evidence was elicited in cross-examination by Mr *Kara*. Each polling officer receives a voters roll in alphabetical series, namely, A-L, M, and N-Z, as well as a supplementary roll and an error roll. The M series was separate as there were "too many names". Exhibit 1 is what is "colloquially termed the protocol register". It contains particulars of persons denied the vote such as the name, national identity number,

HH 11-2002
HC 8221-2000

residential address, signature, the date and time at which they presented themselves for voting and the reason for the denial to them of the vote. In addition, there are columns for the signature of the presiding officer and the witnessing officer. Notwithstanding the above, no witness's signature appears on pages 42, 43 and 44 of exhibit 1 and the presiding officer did not sign on the whole of page 39 as well as in certain instances on pages 42 and 43. On pages 52-67, the presiding officer at Ruwa Rehabilitation centre polling station gave no reasons for the denial of the vote to the persons turned away at his polling station. In his view "this was an act of negligence - a failure of duty".

Regarding the voters recorded at entries 12 and 13 on the petitioner's list, there was no reason justifying a denial to them of the vote. He assumed that the page of the voters roll containing these names was missing.

He was asked to explain, if the times on exhibit 1 are recorded in sequence, why it was that page 42 for example was out of sequence. His answer was that he saw no malice in that. He was reluctant to agree that the purpose of the time column of exhibit 1 is to keep an accurate record of events at the polling station.

At pages 87-92 of the register, there is no

HH 11-2002

HC 8221-2000

indication as to the identity of the polling station nor are there signatures of the persons listed, the presiding officer or the witness. His answer to that was that he suspected these pages to have been photocopied from a book. He distanced himself from the averment made in his affidavit that some 4 272 people were denied the vote and said that the number turned away was 4 087. He agreed, however, that according to the protocol register, the majority of those turned away were turned away for not being on the voters roll.

After a counting exercise undertaken during cross-examination, he concluded that a total of 197 pages were missing from the voters roll for the 7 polling stations which were verified. On each page of the voters roll is recorded 55 names. He agreed that the 10 835 voters listed on the 197 pages, if they turned up to vote, would not have voted as their names were not on the voters roll. Although it was not known whether all the 10 835 persons listed on the voters roll did in fact turn up to vote, he agreed that that number amounted to 22.3% of the electorate for the Seke constituency and that all voters should be afforded a full and free opportunity to exercise their vote during the prescribed polling period.

When he was reminded that in his affidavit before

HH 11-2002

HC 8221-2000

the court he had averred that only 2 pages were missing from the voters roll and that from the M series, he told the court that he accepted the results of the verification, namely, that 197 pages were missing.

From his examination of the protocol register, he concluded that all the polling stations in the constituency were affected by the problem of the missing pages. By noon on the second day of polling, all stations should have had completed voters rolls. However, he accepted the evidence in the protocol register that page 189 of the M series was still missing at Rusununguko at 4.35 pm on the last day of the poll. As to the manner of rectification, he said that he would like to believe that full voters rolls were delivered to the polling stations affected. The defective rolls became part and parcel of the residue and should have been placed in the ballot box.

Despite the above, he maintained his stance that the election should stand as there was no compelling reason for setting it aside.

He told the court that there were 5 mobile polling stations in that constituency and that the voting times thereat were advertised. Once the advertised time had passed, the mobiles moved to the next advertised site and

HH 11-2002

HC 8221-2000

did not return but people were free to follow them to the next advertised place. Voters at the mobile stations would not have been told to return had they been affected by the problem of the missing pages.

It will be seen later in this judgment that this witness, later in the hearing, departed from his evidence as given above in material particulars.

5 NANCY FAITH CHIBAYA

She was the presiding officer at Kandava polling station on the days in question. The polling station opened at 7 am and closed at 7 pm. At about 9 am on 24 June she became aware that there were problems with the M series of the voters roll in that "a part of the roll was missing". She alerted the command post who instructed her to tell the people to return "when they had supplied the missing pages". That was about 10 am. She conveyed those instructions to all those who were turned away after her communication with command post. Those who were turned away before were not told to return. In some instances, if she was satisfied that the voter had inspected the voters roll, she allowed that person to vote and recorded the names of such voters on a sheet of paper which would have been sealed as part of the ballot papers. She was unable to tell the number of

HH 11-2002

HC 8221-2000

this group of voters. Their names were not entered in the protocol register. The problem of the missing pages was rectified at her station by 11 am the following day when she received pages (the number of which she was unable to recall) which she inserted where the pages were missing. She was of the view that the result of the election would have been affected as the figures would have been different.

In cross-examination, she maintained her evidence that only a part of the M series was missing and that she communicated this fact to the constituency registrar. She denied that only two pages were missing from the roll and was adamant that the missing pages and not a complete voters roll was delivered to her for rectification of the defective roll. On receipt of the missing pages they removed the covers binding the roll and inserted the pages.

This witness gave her evidence in a truthful and straightforward manner. She impressed me as being a reliable witness.

6 JASPER TICHAVA MATESA

He was the presiding officer at Dzumbunu polling station. He also faced the problem that the M series of the voters roll was incomplete. He contacted the command

HH 11-2002

HC 8221-2000

post at 8.10 am on the first day of the poll and the problem was rectified by about 2 pm on the same day. About 10 pages were missing from his copy of the M series. He was given a complete M series by the command post with which he replaced the defective one. He advised all those turned away to return to vote in the afternoon of the same day.

In cross-examination the following evidence was elicited. The defective M series was placed in an envelope and sealed. It was sealed with the ballot papers. Although there were persons turned away for not being on the N-Z series of the voters roll, no corrective rolls for that series were received. It was his evidence that only the M series contained missing pages. Although he was instructed to cancel on the protocol register the names of the persons who had returned to vote, he did not do so. He could therefore not tell how many, if any, of those people in fact returned and cast their vote.

7 RACHEL MUGIJIMA

She was the presiding officer at mobile 2 polling station. At 7 am on 24 June, they opened the polling station at Bharabhara. They also encountered problems with the M series part of which was found to be missing

HH 11-2002
HC 8221-2000

at about 8 am. The voters were told to return to vote the following day when the problem was rectified. As far as she knew there was no transport to enable them to get to Caroline if they wished to return to vote. The roll was rectified at about midday the following day by which time the station had moved to Caroline, a distance of about 10 kilometres.

According to her, not the entire M series but sheets (definitely more than two) thereof were delivered to her station. The sheets were inserted in the M series, thus completing the series.

8 HENRY RUZIVE

He was the presiding officer at Rusununguko School polling station. He had a complete roll. Indeed some 5 people whose names were not found on the voters roll at other polling stations came and voted at Rusununguko.

The station was not a busy one. The queue started from the main entrance gate to the school. He remembered that a certain councillor came to him in the company of police details as well as the person alleged to have assaulted him. They were led by the police officer and wanted to use the telephone to summon transport to convey the alleged assailant (presumably to the police station). He said "I only heard of violence when the police officer

HH 11-2002

HC 8221-2000

and the councillor approached me. I did not receive reports of such assault". However, he said he would have seen if the fracas had occurred within 100 metres of the polling station. He did not see whether any persons had left the queue without voting.

It was put to this witness in cross-examination that it had been established in the verification exercise that pages were missing from the voters roll at Rusununguko. He acknowledged that but maintained that he had no problem with his roll. He could not explain why the voter recorded at entry number 235 on page 7 of exhibit 3 was denied the vote when in fact his name was found during the verification exercise at page 189 of the M series. He refrained from commenting on the evidence of Batani that this indicated that the page in question was missing from the M series.

A would be voter, Dilani Rozario, was recorded in the protocol register as having been denied the vote because his name was missing from the voters roll. This man's name was found, during the verification exercise, to be at page 171 of the roll in the A-L series. Again he did not agree with Batani that that page was missing from the voters roll. He said it was a mistake possibly because the names were in the wrong order. However it

HH 11-2002
HC 8221-2000

seems to me that such a mistake is not easily made since the voter presented his national identification document and it would have been a simple matter to check for his names in the two relevant series of the voters roll.

9 WILLIAM PARADZA

He was the presiding officer at Marirangwe Hall polling station. He adamantly maintained that he encountered no problems with the voters roll and that there were no pages missing from his copy of the voters roll. As will be seen from exhibit 3, which is the document drawn up by Batani, as well as pages 172-189 of exhibit 1, the protocol register maintained by the witness, a number of people who were found, at the verification exercise, to be on the voters roll, were denied the vote at Marirangwe Hall polling station. The witness sought to explain this difficulty by saying that the voters roll used in the verification exercise was different from the one used by him on the polling days. In the light of the clear findings at the verification exercise as set out by Batani in exhibit 3, this witness' evidence is unreliable.

10 LOVEMORE DZIWA

He was the presiding officer at Arcturus primary school polling station. He also encountered no problems

HH 11-2002
HC 8221-2000

with the voters roll. He also could not explain why persons found at the verification exercise to be on the voters roll were denied the vote for not being on the voters roll. He would not be drawn on whether or not he agreed with the registrar that there were pages missing from his copy of the voters roll. As in the case of the last witness the evidence of this witness is unreliable. No reasonable explanation was advanced by him for the denial of the vote to persons whose names were on the voters roll and were entitled to exercise their right to vote. The only reasonable explanation which is before the court is that these pages were missing from the voters roll.

11 CLARAH MUZENDA

She was the constituency registrar for the Seke constituency. She was seated in court throughout the proceedings and this must be borne in mind when assessing her evidence. Her duties included, among others, keeping custody of the ballot papers as well as all residue, and rectifying problems which arose in the various polling stations in that constituency.

She told the court that about 10 am on the first day of the poll, she became aware of problems experienced with the voters roll by 4 polling stations, namely,

HH 11-2002
HC 8221-2000
Mbuya Nehanda, Kandava, Dzumbunu, and Bharabhara.

She related further that between 9-10 am on the first day she took a copy of the roll which she had at the command centre to Dzumbunu who were the first to report to the command centre. The other stations were given complete voters rolls by the next morning. In some cases the missing pages were extracted from the complete rolls and inserted into the defective rolls. In others they were given complete voters rolls. All rectification was done before noon on the second polling day.

She gratuitously volunteered the evidence that the petitioner only complained when the results of the election were out. Yet in the next breath she told the court that the petitioner had telephoned her from Mbuya Nehanda polling station to complain about the missing pages.

Apart from the stations mentioned she received no further reports from other stations.

She said that the verification process did not establish that there were missing pages, only that the names were found on certain pages. This was in contradiction of the evidence of Batani who told the court that the only explanation which could be advanced

HH 11-2002

HC 8221-2000

for the failure of the presiding officer to find the names in question on the voters roll was that the relevant pages were missing from the roll. The witness however later agreed that there were missing pages although not as many as 197. She was reluctant to be drawn on the actual number of missing pages.

She denied that there were pages missing from other stations. In particular she denied that there were missing pages from the voters roll used at Arcturus or at Bharabhara but insisted that her evidence did not conflict with that of Batani.

It appeared to me that the intention of the witness was to remedy the perceived defects in the evidence of Batani and the presiding officers. Not only did her evidence contradict the evidence given by Batani but it must be borne in mind that she was seated in court throughout the evidence of all the witnesses and would have known the weaknesses of the first respondent's case.

THE SECOND RESPONDENT'S EVIDENCE

12 BEN TUMBARE MUTASA

He is the second respondent in this matter. He supported Muzenda, the last witness, in her averment that the petitioner only complained when the results were out. Muzenda's own evidence, as I have observed above,

HH 11-2002
HC 8221-2000

contradicts this allegation. He denied the allegations by the petitioner that there was violence at the polling station at Rusununguko and said that the purpose of the verification exercise was not to determine whether or not there were missing pages from the voters roll.

He accused the petitioner of having bribed the election officials involved in the counting of the votes and said that although the matter was reported, no arrest or prosecution followed - a veiled suggestion that the petitioner also brought pressure to bear on the police not to pursue the matter. However the evidence which he gave when examined by his legal practitioner was:

"when the petitioner saw the piles going up he was pulling people to the corners of the hall. I spoke to Chimunukoro who advised me to talk to Goredema who is the officer in charge. The officer in charge directed the latter policeman to take a report. I was never approached by a Police officer to give a statement ...".

This is not surprising. The evidence of the second respondent discloses no criminal offence. So why would the police have been involved?

In cross-examination, he conceded that he did not witness the bribery but was told about it by someone whom he met at the police station and he had then asked the police to investigate. He alleged further that even the constituency registrar, when he discussed the matter with

HH 11-2002
HC 8221-2000

her after the elections, had told him that she was aware of the allegation as she had received a similar report.

13 PETER GANDIDZANWA

This witness told the court that he was walking towards the gate at Rusununguko polling station where he intended to cast his vote. He called out to his friend to hurry and was then approached and accused by 7 people who were at the gate of "making noise". One of these persons was Asan Seremani. The group further accused him of being an MDC member. Seremani then "got hold of me and as I tried to shrug him off I came into contact with him with my right shoulder. During the process one of his sleeves was torn and he reported to the police that I was assaulting him".

When the "scuffle" was over the witness went to cast his vote and after he had done so he was arrested by the police as he left the polling room. He was taken to the police station where he signed an admission of guilt for assault because the police advised him that if he was defending himself, as he has explained to the court, then that was an offence.

This witness made a poor impression on the court. He did not fare well in cross-examination and his evidence did not ring true. He claimed that he had shoved

HH 11-2002
HC 8221-2000

Seremani with his head and not bumped his shoulder. He did not explain how Seremani's shirt got ripped. In any event, he told the court that he was drunk at the time as he had taken opaque beer "as we were going to cast our vote". Accordingly no reliance can be placed on his evidence where it conflicts with that of Seremani.

14 NICHOLAS PAUL GAMBIER

He is Gandidzanwa's employer and an MDC supporter. His evidence takes the matter no further as he did not witness the assault on Seremani. If anything, he sought to show that Gandidzanwa was merely defending himself. He is the only witness who mentioned that Gandidzanwa had his shirt off. He did not mention Seremani's torn shirt although, according to Gandidzanwa, he came onto the scene after the shirt was ripped. Although he was of the view that the incident was a trivial one, he deemed it necessary to summon a security company to the scene to deal with the matter. He did not remember seeing any police at the polling station. This fact suggests to me that he did not enter the school where Gandidzanwa alleged that the police were, for he would have known they were there and his normal reaction would have been to report to them rather than to summon a security company.

HH 11-2002
HC 8221-2000

That was the evidence led in this matter. At the end thereof I was of the view that a further verification exercise was necessary since the parties did not agree that the result of the earlier verification exercise was representative of the situation which prevailed in all the polling stations. Accordingly the following order was issued: -

- "1. A further verification exercise shall be conducted in respect of the remaining 37 polling stations not verified during the last exercise.
2. The Registrar General shall make available all the ballot boxes, voters rolls and relevant data and material relating to the said polling stations.
3. At the end of the verification exercise a document setting out in respect of each polling station -
 1. The persons denied the vote by reason of not being on the voters roll;
 2. The reasons why their names were not found on the voters roll;
 3. Whether and when the voters roll was rectified in respect of the relevant polling station;
 4. Whether any of the persons turned away did at a later state cast their vote;
 5. The number of pages, if any, determined to be missing from the voters roll at each of the said polling station;shall be drawn upon by the Registrar General and signed by the parties.
4. In the event of disagreement between the parties as to the contents of the document referred to above, the party or parties disagreeing shall in a separate document set

HH 11-2002
HC 8221-2000

out the specific areas of disagreement.

5. Once the verification is complete, it shall be decided whether or not further evidence is necessary for the determination of this matter.

6. Costs shall be determined at the end of the hearing."

At the end of the exercise, the first respondent produced a document which did not comply with the terms of paragraph 3 of the order. Extraneous matters were included in the document while the matters specified in 3.3, 3.4 and 3.5 of the order were excluded. In the result, the court was no wiser at the end of the second verification exercise.

In terms of paragraph 4 of the order, the parties were to record, in writing, their disagreement, if any, with the contents of that document and the court would decide what further evidence, if any, was necessary for the determination of the matter.

On 12 September 2001, the parties appeared before me and it was conceded by the first respondent that no protocol register was available at the verification in respect of Entre Rios polling station and that at Mobile 3 polling station, the A-L series was missing from the voters roll. He advised that rectification of the problem was effected by 1 pm the first day of the poll.

HH 11-2002
HC 8221-2000

In compliance with paragraph 4 of the order, the petitioner filed his objection to the document referred to above alleging that the first respondent in compiling the document had not complied with the terms of the order. The second respondent filed no objection and the court heard further evidence from the Hibu Batani in clarification of his report.

This witness reneged on his earlier evidence that there were indeed pages missing from the voters roll. In his report he divided the voters into categories not required by the terms of the order. These categories were shown in cross-examination by Mr *Kara* to be seriously flawed as persons were described as not registered when they were in fact on the voters roll. It also emerged from his evidence that persons were denied the vote on the premise that they were not registered when in fact their names were on the voters roll.

I formed the impression that this witness was endeavouring to alter the effect of his earlier evidence before this court. The evidence of Clara Muzenda contradicting that of Batani on the question of the missing pages was reminiscent of the biblical kingdom divided against itself, which could not stand.

HH 11-2002
HC 8221-2000

The further evidence of the second respondent at the insistence of Mrs *Mtetwa* did not shed any further light on the matter.

This dispute is essentially between the petitioner and the first respondent as the second respondent was not involved in the conduct of the elections which is the function of the first respondent. In effect, the second respondent abandoned all but one of the allegations of corrupt practice levelled against the petitioner in his opposing affidavit and this allegation I have already found to be unsubstantiated. I have also found to be without substance the allegation by the petitioner that the assault, proved to have occurred at Rusununguko polling station, was perpetrated at the instance of, or with the knowledge of, the second respondent. I therefore dismiss the allegation that either the petitioner or the second respondent was guilty of corrupt practices as described in the Act.

The sole issue to be decided, therefore, is whether the non-compliance with the terms of the Act was such as to justify the setting aside of the election as Mr *Kara* for the petitioner urged upon this court.

Section 149 of the Electoral Act [*Chapter 2:01*] provides as follows:

HH 11-2002
HC 8221-2000

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

(a) the election was not conducted in accordance with the principles laid down in this Act; and

(b) such mistake or non-compliance did affect the result of the election."

One of the principles of the Act is that every person should be afforded a fair opportunity to cast his vote for the candidate of his choice. Thus section 56 of the Act provides that:

"every voter registered on the voters roll for the constituency shall be entitled to vote."

The petitioner averred in his petition that the election in the Seke constituency was not conducted in compliance with the provisions of the Act and that such non-compliance had affected the result of the election.

The main ground on which this averment is based is that there were pages missing from the voters roll in that constituency and that as a result registered voters were denied an opportunity to cast their votes. [Other irregularities established were that at one polling station the protocol register, a document in which the presiding officer is duty bound to record the particulars of every voter who tendered his vote at that polling

HH 11-2002

HC 8221-2000

station and was denied the vote as well as the reason for such denial, was missing at one polling station. Thus there is no record in Exhibit 2 of the proceedings at that polling station; One presiding officer allowed to vote, persons whose names were not on the voters roll but who satisfied him that they either knew the headmaster of the school where they went to inspect the voters roll or could identify the classroom where they inspected the voters roll; Many voters were turned away because the presiding officer regarded the names "Betty" and "Elizabeth" as surnames and wrongly concluded that their names were not on the roll. Indeed it was the opinion of the deputy registrar general that some of the presiding officers ought to have been prosecuted for their misdeeds in connection with the election].

It is necessary to recall here that the evidence given by Hibu Batani establishes that in respect of 7 polling stations verified at the beginning of the trial, the voters roll was incomplete in that 197 pages were determined to be missing therefrom and close on 11 000 people would have been affected by this mistake. Indeed, the evidence revealed that some 3 000 voters were wrongly turned away for not being on the voters roll. In addition, one can only speculate how many registered voters were dissuaded from going to cast their votes by

HH 11-2002

HC 8221-2000

those who had been wrongfully denied the vote by reason of the missing pages.

As was said in the election petition of the *Borough of Hackney*, (1874 -5) 31 L.T.R. 69 at page 70:

"it is utterly impossible for any person to guess what number of voters were prevented from voting ... because in order to ascertain that, it would be necessary to know the business times, the occupations, and the necessities of each voter. It would be necessary also to know what information was given by voters who found that they could not vote, or by other persons to voters who might be anxious to vote, and in consequence of which information, and in reliance upon which information, persons who might otherwise have voted did not go and tender their votes."

It was proved at the trial that not all who were turned away by reason of this mistake returned to cast their votes when rectification was effected. It was not established that all the voters turned away were told that there was likely to be a rectification and that they should return at a stated time to cast their vote. The evidence established that rectification in some cases did not take place until the afternoon of the second day of the poll and that in one case a registered voter was wrongly turned away as late as 4.35 pm on the second day by reason of his/her name not appearing on the voters roll.

It is immaterial, in my view, whether it was an

HH 11-2002
HC 8221-2000

entire series or a number of pages from the relevant series which was missing. The reality of the matter is that a large portion of the electorate of the Seke constituency was not afforded the opportunity to cast their votes because of the fact that their names were not recorded on the voters roll at the polling stations at which they tendered their vote. It is no answer to say, as the respondents did, that it was incumbent on the voter who was wrongly denied the opportunity to vote at one polling station to walk some 5-7 kilometres to the nearest polling station in the hope that he might find his name recorded on the roll there. It seems to me, upon a reading of the Act, that one of the intentions of the legislature in enacting the Electoral Act was that the polling station should be brought to the people and that every effort should be made to ensure that every registered voter is afforded the opportunity to cast his vote for the candidate of his choice.

As it was put in *Mtoba & Ors v Sebe & Ors* 1975 (4) SA 413, at p 421, by KOTZE J, when referring to the Election Proclamation R.194, which contains similar provisions to our Electoral Act:

“the entire scheme of the Election Proclamation is to take the polling station to the voter and not to expect the voter to travel unnecessarily in search of polling stations”.

HH 11-2002
HC 8221-2000

I do not agree with the submission, made on behalf of the respondents, that the irregularity or non-compliance was not such as to justify the setting aside of the election. Once the irregularity was proved, the *onus* was on the first respondent to establish that the non-compliance was trivial. This *onus* the first respondent has failed to discharge. 197 pages missing from the voters roll, with rectification not being effected until the afternoon of the second day and in some cases not at all, cannot be said to be a trivial matter; nor can the fact that persons were denied the vote because the presiding officer did not exercise the requisite care in searching for their names on the roll. I have therefore come to the conclusion that the election held in the Seke constituency was not conducted in accordance with the provisions of the Act.

In terms of section 149 of the Act, I am obliged to set the election aside if, in addition to the above, it appears to this court that the mistake or non-compliance did affect the result of the election. I do not consider the words "affect the result of the election" to mean that the court must be satisfied that but for the mistake or non-compliance, another candidate, say the petitioner, would have been elected. To put this construction on the

HH 11-2002

HC 8221-2000

that section would be tantamount to attributing to the court prophetic powers which would enable it to know whether the 10 835 affected persons would all have voted and how they would have voted. Rather, I respectfully agree with the reasoning of GROVE J in the *Borough of Hackney* case at page 72 where he said:

"I am very strongly inclined to think that the expression 'the result of the election' does not in this Act necessarily mean the result to another candidate having been elected at the poll. The result may be of various kinds. The result of the election would, in my judgment be affected, if, instead of a majority of 500, there was a majority of only 10 or even 100... . Does not the word 'affect' mean substantially 'bear upon the result?'".

In the instant case, although it is not possible for this court to say what the result might have been had the affected voters been afforded the opportunity to cast their votes, it appears to me that the result would have been different. In the result I am satisfied that the mistake or non-compliance did affect the result of the election. It follows that the election must be set aside.

On the question of costs, Mr Kara submitted that the costs of the petitioner and the second respondent should be paid out of the Consolidated Revenue Fund. It seems to me that this would be the proper course to adopt, firstly because it was the non-compliance by the

HH 11-2002

HC 8221-2000

first respondent with the provisions of the Act which necessitated this petition and secondly, there was no suggestion of *mala fides* on the part of the first respondent.

In the result it is ordered as follows:

1. The election for the Seke constituency be and is hereby set aside;
2. The costs of the petitioner and the second respondent shall be paid out of the Consolidated Revenue Fund.

By copy of this judgment the Speaker is notified that the seat of the second respondent has become vacant.

Hussein Ranchod & Co, 1st respondent's legal practitioners