HC 7752/2002

MFANDAIDZA HOVE
Petitioner
versus
JORAM GUMBO

Respondent

HIGH COURT OF ZIMBABWE
HLATSHWAYO J
HARARE 3-26 July and 6 March 2002

Election Petition: Mberengwa West Constituency

S Hwacha, for the petitioner
T Hussein, for the respondent

HLATSHWAYO J: Mberengwa West Constituency lies deep in the rural recess of Zimbabwe's Midlands province, some 400 kilometers south of the capital city, Harare. It can be reached by tarred road via Gweru or Masvingo and thence to Zvishavane. From Zvishavane the tarred road briefly enters the northern part of the constituency but abruptly peters out after Mberengwa, the administrative hub of the constituency. Thereafter, webs of dusty rural roads, most of which are impassable by small vehicles, service the rest of the constituency. The Court established these details as it contemplated an inspection *in loco*of the constituency. However, this exercise was later dispensed with when no serious disputes of fact remained by the close of the case and the

prohibitive costs and logistical difficulties were adjudged to outweigh any benefits of such an exercise.

The upper half of the constituency consists of rich private and state commercial farming land while the lower half consists of crowded, tired and overgrazed communal lands – a veritable microcosm of the land imbalances in Zimbabwe. In order to reach most of the more than 40 000 registered voters (actual total: 43 949) crammed in the communal areas, one has to travel through the sparsely populated private farmlands. And as if to contain or sanctify this land imbalance, five Christian mission stations, Mnene, Don Bosco, Chegato, Masase and Wanezi, form a half-moon ring along the eastern, southern and western boundaries of the constituency.

The above is a brief geographical setting of this election petition, in which the petitioner, Mr. Mfandaedza Hove is challenging the election of the respondent, Mr. Joram Gumbo, in the 24-25 June 2000 Parliamentary election. A total of 24 691 votes were cast in this constituency where four candidates who stood for election: the petitioner representing the newly formed political party, Movement for Democratic Change (MDC), polled 3 889, the respondent who represented the ruling party, Zimbabwe African National Union – Patriotic Front (ZANU-PF), garnered 18 315 and two independents, Lyton Shumba and Edvin Nyathi got 968 and 667 votes, respectively. On 27 June 2000, the respondent was declared as the duly elected Member of Parliament for the constituency of Mberengwa West. The turnout was

56,2 %, well above the Midlands provincial average of 51,33% and the national average of 48,24%. (Calculations based on information contained in the report of the Electoral Supervisory Commission entitled *Report on the 2000 General Elections Zimbabwe: 24-25 June 2000*)

In the petition filed on 17 July 2000, the petitioner seeks the nullification of the respondent's election on the basis of alleged "irregularities, and other illegal and corrupt practices" which he contends "rendered the election neither free nor fair". However, in his closing address Mr. *Hwacha,* the petitioner, sought to widen the basis upon which the court was being urged to find for the petitioner.

He submitted that in terms of section 132 under which this petition was filed, as indeed is the requirement for all election petitions, the court may make a finding that the respondent was not duly elected on any of the reasons stipulated or implied in that section even if such grounds are not specifically pleaded in the petition. This, he suggested, is because an election petition is in fact an inquiry and that if in the process of inquiry certain irregularities are proved, the court should take the appropriate measures "to enforce electoral morality". Since this appears to be a rather unusual proposition, it bears some close examination.

Section 132 states in the relevant part as follows:

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

My reading of the above provision is that it sets out wide grounds on the basis of which and election petition may be brought. However, it stands to reason that any petitioner must indicate specifically the grounds upon which she or he requires the respondent's election to be voided. Further, the very fact that the provision is so widely framed as to include "any other cause whatsoever", though of course the ambit of this phrase must be understood in the light of the maxim, *ejusdem generis*, is additional reason to require that the petitioner should plead his case with specificity so that the respondent is put on sufficient notice concerning the case he has to answer. It is not fair for any respondent to be dragged into court without being informed of the basis upon which his election is being challenged.

Accordingly, when section 136(3) states, as it does, that at the conclusion of an election petition, the Court shall determine whether the respondent was duly elected, it is clear that such a decision must be arrived at in terms of what is specifically pleaded in the petition and not on what was revealed by chance in the course of the inquiry.

This is far from saying that irregularities exposed during the trial should be ignored. The Electoral Act itself has several provisions through which reports must be made to Parliament, to the Attorney-General and to the Registrar-General for the further consideration of matters, prosecution of individuals or rectification of administrative shortcomings. For example, in terms of section 137 if corrupt or illegal practices are proved or revealed at such a trial, then the Court is required to submit a report to the Attorney General for the proper prosecutions and to the Registrar-General for relevant administrative action. However, and this must be made abundantly clear, the reporting requirements are a completely separate exercise from the determination to be made upon the petition which to my understanding must

be done according to the grounds specifically pleaded. My brother DEVITTIE in the *Mutoko South Election Petition* HH 68/2000, emphasized this point as follows:

> "Procedure lies at the heart of the law. Its aim is to guarantee precision in order that the ends of justice may be achieved and unnecessary time and expense avoided. These ideals are placed in jeopardy where lack of precision leads to the person accused not knowing with sufficient clarity the case he has to meet. Much time and expense is wasted by the failure to set forth succinctly and according to law the charge raised and the particulars relied upon." @ P.3 of cyclostyled judgment."

In the same vein CHIEF JUSTICE CHANDRACHUD observed in the Indian case of *Charan Lal Sahu and Ors v Singh* [1985] LRC (Const.) 31 thus:

> "The importance of specific pleading in these matters can be appreciated only if it is realized that the absence of a specific plea puts the respondent at a great disadvantage. He must know what case he has to meet. He cannot be kept guessing whether the petitioner means what he says, "connivance" here, or whether the petitioner has used that expression as meaning, "consent". It is remarkable that, in their petition, the petitioners have furnished no particulars of the alleged consent, if what is meant by the use of the word connivance is consent. They cannot be allowed to keep their options open until the trial and adduce such evidence of the consent as seems convenient and comes handy. That is the importance of precision in pleadings, particularly in election petitions. Accordingly, it is impermissible to substitute the word "consent" for the word "connivance" which occurs in the pleading of the petitioners. At p.42."

Again in *Mitilesh Kumah v Venkataraman & Ors* [1989] LRC (Const.) 1, the petitioner had failed to set out in a succinct and clear narrative form all the facts necessary to enable the respondents and the court to understand the petitioner's case. There was neither an allegation that the first respondent had committed an act of undue influence nor that others had committed it with the consent of the first respondent. The petition was dismissed as disclosing no cause of action.

In both judgments, the Indian Court also took the opportunity to warn

against possible political abuse of election petitions if specificity of pleas is not insisted upon. In *Charan Lal Sahu* case the warning was that "every kind of fanciful doubt or frivolous dispute under the sun will have to be inquired into by this Court and election petitions will become a fertile ground for fighting political battles".

In *Keyser v Conroy* (1917) CPD 353 it was held that the court would not allow an amendment to an election petition, in circumstances where the amendment contains additional charges. In *Nicholson v Van Niekerk* 1915 TPD 581 it was held that where the court on application, allows an inspection of ballot papers, each party may only make use of and produce before the court the particular papers complained of by him, and is confined to the terms of the order of court allowing the inspection, and the court will not, after the inspection has taken place, allow an amendment of the petition, or the replying affidavit in order to rely upon the defective ballot papers discovered at the inspection.

By the same logic, the petitioner in this case ought to be limited to the complaints as specified in paragraph 5 of his founding affidavit thus:

> "The Respondent, and his supporters, were responsible for the irregularities and other illegal and corrupt practices which rendered the election neither free nor fair…I contend that Section 81(2) of the Electoral Act was breached and the Respondent is guilty of corrupt practices in terms of Section 105 and illegal practices in terms of section 121."

However, the "irregularities, and other illegal and corrupt practices" as set out above are further elaborated upon in the petitioner's affidavit and witness evidence adduced in court in a manner which makes the complaint imprecise, overarching and all-embracive and difficult to respond precisely to. There are numerous instances where Mr. *Hussein*, for the respondent, was obliged to point out that the allegations raised by a particular witness had not been included or even alluded to in the petitioner's founding

affidavit. The court could have taken a strict approach of simply ignoring the new allegations, but that would have seriously adversely affected and truncated the petitioner's case. Rather, I took the view that the allegations which fell under the general complaints stated in the founding affidavit should be considered, unless they raised completely new grounds of challenge, but treated cautiously bearing in mind the risk of recent invention and fabrication in such cases.

The imprecision in the formulation of the complaints cannot of course escape an appropriate order as to costs. In future, though, it should not come as a surprise to petitioners if the court adopted a stricter approach and based its decision only on allegations specifically stated in the petitioner's founding affidavit and no other. I shall now proceed to discuss the case under the headings of irregularities, illegal and corrupt practices.

Illegal Practices

Only one form of illegal practice is relied upon in the petition, i.e., obstruction of voters as set out in section 121 which says that "[a] ny person who, at an election, willfully obstructs a voter, either at the polling station or on his way thereto or there from, shall be guilty of an illegal practice".

In paragraph 9.5, the petitioner claims that at Nyondoro Polling Station, his polling agent, Ernest Sigola, was denied entry into the polling station on the first day of polling. The petitioner further alleges that the Mberengwe District Chairman of the Zimbabwe National War Veterans Association, Mr. Wilson Kufa, also known as Biggie Chitoro, (hereinafter referred to as "Chitoro") and six supporters had set up a roadblock not far from the polling station and vetted all people intending to vote turning away MDC supporters and all those unable to produce ZANU-PF cards.

Now, the petitioner did not call Sigola or any other witness to testify about the alleged obstruction, nor is it clear from the affidavit whether Sigola intended to vote or was proceeding on polling agent business. Having failed to make out a case in his affidavit and evidence in chief in this regard, it was not open for the petitioner to try and do so in the cross examination of the respondent's witnesses. However, it bears noting that in cross-examination, Chitoro denied ever setting up any roadblocks before or during the election.

The Constituency Registrar, Mr. Lemon Sigauke Shumba, gave credible and convincing evidence that just before and during the election and in his

official capacity as constituency registrar, he traveled extensively in the constituency, but did not come across any roadblocks nor were any reported to him by his other officials. The petitioner's election agent, Lewellin Sibanda, did not make any complaints to the constituency registrar in this or other regard. The petitioner himself who passed through the counting center on the second day of voting and met with the constituency registrar did not raise this complaint.

The only matter that the petitioner raised then was a relatively minor one of two girls who had come to the counting center riding on the back of an open truck. These girls were donning Zimbabwe cricket team caps featuring the Zimbabwe flag (produced in Court as Exhibit 13), which it was argued are similar to the ZANU-PF insignia.

The girls were already moving away on the instructions of the registrar when the petitioner came to complain. Had the respondent had any other serious complaints like the alleged obstruction, he would have raised them then. Finally, no reports were made to the police about this alleged roadblock.

Irregularities

Some of the irregularities mentioned in the petition were either specifically abandoned or were not persisted in and shall be deemed to have been abandoned while others were not proved at all.

By the close of his case, the petitioner had not led any evidence in connection with the allegation contained in paragraph 9.3 of the founding affidavit; viz., that the ballot box from Choruvabvu Secondary School was tampered with in the absence of his polling agent who, "due to transport and security constraints…was unable to travel with the ballot boxes." Nevertheless, the constituency registrar gave clear evidence, which the petitioner did not challenge in cross-examination, that nothing of the sort occurred, that the procedures of confirming that the seals on the boxes were intact and of reconciling the ballot papers were strictly adhered to.

Other complaints by the petitioner pertaining to alleged irregularities were as follows:

a) That at Mobile 3 and Gaururo polling stations, the posters placed on polling booths for illustrating how to vote used the actual names of political parties and candidates and that the 'X' mark was placed

against the ZANU-PF party and the respondent's name, thus disadvantaging the petitioner and unduly influencing the voters. Once again, the constituency registrar's uncontroverted evidence that the posters in question were voter education material which did not have the 'X' against any particular candidate's name, but that the 'X' was placed above the names, and that at any rate if any of the posters had for one reason or another been defaced or tampered with, the presiding officers were under strict instructions to immediately change them and had piles of replacement posters for the purpose. The officers did not receive any such complaints from the petitioner or his agents.

b) That out of the 800 or so spoiled ballot papers, about 100 of them had some form of graffiti on them and that of these "nearly 70 were marked with the name Chitoro on them", thus showing the pervasiveness of Chitoro's alleged intimidatory influence. To this the respondent replied: "I am not aware of the 70 spoilt papers wherein people "voted" for Chitoro. No supporting affidavit of those who "voted" for him are attached or an explanation of why they did so. If indeed they "voted" for him, this could only show that Chitoro was acting on his own and was pursuing his own agenda". The petitioner's election agent, Lewellin Sibanda, testified that during counting he had seen ballot papers written "Chitoro" and that they were taken as spoilt ballots, but he couldn't give an estimate of the number. The constituency registrar could only confirm that some of the spoiled ballot papers had a variety of graffiti but that he did not personally notice nor was his attention drawn to any "Chitoro" one(s).

Strictly speaking, this is not an irregularity at all for there is no law stipulating the kind of graffiti that is or is not permissible on a ballot paper. It is a matter probably with some bearing on Chitoro's alleged

influence, which is assessed below.

c) That at Mawani School polling station, the deployment of MDC polling agents was interfered with by alleged ZANU-PF supporters a day before the polling commenced. The petitioner did not call any witness to testify to this incident. Nevertheless, the explanation given by the constituency registrar appears to be more probable; viz., that according to reports from his officials, an MDC driver had dropped off the polling agents and driven away, leaving the youths behind and that the election officials had demanded that the agents should leave as they were not allowed inside the polling station before polling opened.

d) That he (the petitioner) missed the vote-counting on June 26 because he had been advised by the officer in charge of Mberengwa Police station that "the security situation was still volatile" and concludes: "I further contend that this was a further irregularity which clearly affected my rights in the electoral process and that Respondent and his supporters were solely responsible for this further irregularity". However, the petitioner's own election agent did attend the counting and testified that the atmosphere during the actual voting and counting was calm and peaceful. Only the previous day, June 25, the petitioner himself had passed through the counting center, not accompanied by any security personnel, and had held conversation with the constituency registrar. No explanation is given as to why the very next day it suddenly became too risky for the petitioner to go to the counting center.

Consequently, there are no irregularities that have been proved, which the respondent or anyone for that matter can be held answerable for.

Undue influence and general violence

The real basis of the petitioner's case appears to be allegations of undue influence and general violence. These are contained in the petitioner's affidavit and testimony, a brief summary of which follows immediately below.

The petitioner gave evidence first. He said that he is a senior lecturer in accounting, Department of Accountancy, University of Zimbabwe. His candidature for the MDC party was approved in March 2000, but the party had already begun campaigning by January 2000 through a constituency coordinating committee of eight people and several local committees.

He managed to hold seven rallies at which the attendance averaged 500 and regarded such a showing as "quite good for a new political party". After every rally, party structures were formed in the areas concerned. The local committees, who would then invite him to address them, organized these rallies. He himself operated from Harare, some 400 km away. He testified that it was the strategy of his party to leave the mobilization of supporters to local structures while keeping the candidates out of the actual campaigning. The last rally organized by his party was held at Mwembe business center on April 23. Thereafter, he claims that his party was not able to campaign openly for the two-months period leading to the June 24-25 election because of intimidation by supporters of respondent's party and war veterans.

The petitioner alleged that road blockades were mounted by war veterans and ZANU-PF youths on all roads leading into the constituency making it too risky to venture in and campaign. However, he never personally witnessed any roadblocks as he had been warned by his supporters, friends and relatives to stay out of the constituency. Later on, he moved his base from Harare and established his "command post" just outside the constituency in the town of Zvishavane, which was "quite safe". Some members of his campaign team fled from the constituency and took refuge in Bulawayo or joined him in Zvishavane. His party then resorted to nighttime campaigns, painting messages on rocks and roads and an airplane distribution of leaflets was conducted a few days before polling.

Under cross examination, the petitioner agreed that he was indeed related to both the respondent and to Chitoro and was on talking terms with both before the election campaign started, but that he had refrained from discussing the violence with either of them, preferring to report to his own party leadership. He had not lodged any formal complaint with the police

either, nor had he petitioned the President to stop the elections in the constituency on account of the violence he perceived as he had left all that to the legal team of the MDC party.

The petitioner stated that he believed that the respondent was responsible for the violence and intimidation because he (the respondent) had, in a memorandum, listed Chitoro and war veterans in the district and constituency campaign team structures. This communication was addressed by the respondent in his capacity as ZANU-PF provincial secretary for administration to one M E Hove, and was produced as Exhibit 1.

Using a computer-assisted presentation, the petitioner then went on to indicate the key areas, occurrences and evidence that he intended to adduce through fifteen witnesses. All in all, the petitioner's allegations and evidence presented may be summed up under the following categories:

1) Abduction, kidnapping and torture of MDC members by the supporters and sympathizers of respondent and his party; the destruction of their property, robbery, assaults, rapes, including the murder of one MDC supporter;
2) Intimidation and threats directed at MDC officials, supporters and members of their families, which made campaigning impossible in the constituency;
3) Approval and ratification by respondent of campaign methods used by Chitoro, war veterans and the ZANU-PF youths;
4) That the respondent himself participated in, or issued threats of, violence or condoned the same, and
5) That an atmosphere of general violence prevailed, thereby negating freedom of choice.

Now, in terms of section 105 of the Electoral Act, undue influence is committed by 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."

Thus, in terms of the above definition, the violence and intimidation that is punishable under the Act is that which is directed at affecting the vote. In other words, "the act alleged as constituting undue influence must be in the nature of pressure or tyranny on the mind of the candidate or the voter" (*Charan Lal Sahu and Ors v Singh, supra*.) qua voter and in connection with an election.

Abductions and assaults

The petitioner's first witness, Mr. Robson Gambiza (PW1), was the Deputy Chairman of the Constituency Coordinating Committee of the MDC in Mberengwa West. He has known the petitioner since childhood, went to school, lived in the same area and ventured into politics together with him. He testified that after holding a number of meetings and rallies, the party had its last rally on April 23 at Mwembe. On April 30 a group of 11 youths prevailed upon him to accompany them to Texas Ranch, a farm that was occupied by war veterans and landless peasants. He said that on arrival one of the youths announced to a war veteran called Ncube who appeared to be in charge, thus: "We have come with their Bass boy (leader)!"

Gambiza testified that a number of charges were levelled against him among which were that he was "selling out the country", that he was not sending his children to occupy farms and that he had in his possession MDC party cards

and T-shirts. He denied the allegations and pointed out that his own children were lazy and did not know how to till the land. This seems to have infuriated the occupiers.

He was then made to climb up a tree facing downwards and was ordered to cry like a baboon while doing so. Him and another young man, Langston Dube, were assaulted, ordered to fight each other and subjected to other forms of torture and humiliation. He described how from Ncube's group, he was handed over to a group of women land occupiers who further quizzed him on his attitude towards land occupations, thus: "Where do you want your own children to live? Where do you want them to plough if you do not want the land?"

The following day they were sent to the fields to dig out tree stumps in Ncube's allocated field and he says that they became a laughing stock to passersby who ridiculed them as sellouts and puppets of white people. Later in the day they were taken to meet Biggie Chitoro whom he recognized as his neighbour. Mr. Chitoro was surprised to see him too and ordered that he should be released immediately together with the young man, Dube. The witness claims that the condition for his release was that he should surrender MDC material such as party cards and T-shirts by the end of that week.

Upon arrival back home he found the police waiting for him having responded to reports of his disappearance. Gambiza stated that he told the police that it would be difficult for them to arrest his "abductors" and "torturers" because he did not know them. After this incident, he says that he took his MDC party card and other materials to Chitoro's home and then ran away to Ngezi some 45km away, later proceeding to Bulawayo where he stayed until after the election.

I have set out Gambiza's testimony in some detail because his experience does shed some light into the activities on the occupied farms in general and at Texas Ranch in particular. The farm occupiers appear to have consisted of a diverse group of people: war veterans, youths, ordinary villagers, men and women.

They came to be allocated farms or were in charge of the exercise and proceeded to work on the allocated fields, stumping and preparing the land for plowing. They lived partly on the farms and partly in their homes and traveled frequently between the farms and their homes and interacted with the surrounding communities. They were passionate about land and dismissive of, derisive and potentially aggressive towards anyone who did not share their views on or approve their actions of occupying land.

The evidence of **Inspector Ngonidzashe Zvinauya**, the officer in charge of crime in Mberengwa at the time is perfectly in line with Gambiza's

experience, and bears quoting in great detail:

> "There were farm occupiers in the commercial farms, who had occupied the land by the end of January and the beginning of February 2000. The farm occupiers continue to occupy farms to this day. The farms that were occupied included CSC Farm, Rafters Farm, Gwamasanga Farm, Texas Ranch (Brocklands Farm), Kuduvale, Mount Mberengwa Farm and Damperton Farm. These farms were occupied by war veterans and villagers. They would go in and set up camps. They would stay in deserted farm buildings. In some instances, they made makeshift structures. Each farm had its own appointed leader. For example, Neta Farm had Comrade Mabika, Texas farm had Comrade Makoni. The farm occupiers according to our information would go into villages lobbying and recruiting people to enter the farms. This was done by ex-combatants and villagers. This exercise does not appear from our information, to have been spearheaded or coordinated by a political party. Generally, the process was peaceful.
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> The process obviously resulted in some isolated criminal activities such as poaching, snaring of animals and some assaults. There were also a few cases of people who reported that they were taken to some farms against their will.
>
> Although we did not move to remove the farm occupiers we did attend to any breach of the criminal law on the farms. We arrested poachers and arrested those who assaulted or kidnapped people. We also made it clear to persons on the farms that we would act against any person who broke the law.
>
> Farm occupiers were made up of very diverse characters. Mostly, law-abiding. However, with any diverse group, there were a few deviant elements that we eventually had to deal with. I visited a number of the farms and I did not see any signs of political activities on the farms. In fact, when situations arose and we needed to resolve matters, we would engage the War Veterans leadership. I never at any time liaised with the leadership of a political party on issues that took place on the farms. There was no political campaigning by any political party on the occupied farms prior to or during the elections."

Inspector Zvinawauya gave his evidence eloquently, was unshaken in cross examination and impressed the court as an officer who is proud of his 15 years of service in the force and executed his duties to the best of his abilities under very difficult circumstances. He testified that Gambiza's case had been referred to Buchwa under Mataga as the area of policing fell under ZRP Mataga. However, Gambiza later tendered a withdrawal statement,

which was referred to ZRP Buchwa.

There are other features of Gambiza's testimony which need highlighting: his alleged torture does not appear in the petitioner's summary although he maintained that he had informed the petitioner of the same. This fact, taken together with the subsequent withdrawal of the complaint, tends to suggest that the alleged ill treatment was regarded as a relatively minor, though humiliating, experience. The quick reaction of the police is also a noteworthy feature of this and other similar incidents in this case. Finally, Gambiza stated that Chitoro actually rescued him.

The aspect of Gambiza's evidence pertaining to his questioning and answers to land issues does ring true. However, the facet of his being required by Chitoro to come back to Texas Ranch and surrender his MDC card and materials as a condition of his release seems to be contrived. Why would Chitoro who knew Gambiza very well as a neighbour and in all probability his political affiliation too, not have simply asked Gambiza to do what he himself claims he eventually did, viz., surrender the cards at Chitoro's home? At any rate, no similar conditions seem to have been imposed on Langston Dube who was released together with Gambiza.

Clearly, given his close association with the petitioner, Gambiza would be expected to attempt to stretch the truth a little in order to advance the petitioner's case. For example, when asked whether he knew the respondent, at first he denied outright but later admitted that he had known him back at school. And asked whether from his knowledge of him the respondent was of a violent disposition, Gambiza became evasive saying that it was difficult to know as people change with time.

All things considered, Gambiza's experience does not satisfy the requirements of section 105. The "pressure or tyranny" he suffered seems to have been applied on him in his capacity of a peasant farmer who together with his children had refused to participate in the occupation of farms, and not that of a voter deemed likely to vote for the opposition.

Lewellin Sibanda (PW2) was the constituency coordinator and election agent for the petitioner. He testified that an attempt was made by alleged ZANU-PF supporters to kidnap him and take him to Chitoro at Texas Ranch,

accusing him of being the person "campaigning for the MDC". He had just boarded a bus after a meeting with the constituency registrar and the police officers when a group of people demanded that he should disembark. He refused and a struggle ensued with the youths trying to drag him by force out of the bus. Eventually, it was agreed that the bus should be driven to a police station some 300 meters away. The officer in charge, a Mr. Mapurisa, ordered that all the youths who had detained him should be arrested and Sibanda was escorted by police car to the petitioner's "command post" in Zvishavane. Again, taken on its own, this incident falls far short of the requirements of section 105.

Mr. Fani Gedson Hove (PW3), an MDC member and relative of the petitioner, testified that he was assaulted by a group of 32 youths on May 31, 2000. Before the assault, he asserted that he had met Chitoro in a bus, and the latter had threatened "to sort me out in seven days' time". On the seventh day some people came to his home while he was away, threatened his wife for "hiding an MDC supporter" meaning himself, confiscated their identity cards and left a message for him to follow them to Texas Ranch. After about a week, some youths came at night and surrounded his home. They assaulted him and his wife with sticks and axes. He claims that he sustained injuries on the right leg, head, upper lip and a fractured left shin and left forearm and produced a medical report dated July 12, 2000 (Exhibit 3), which confirmed that the injuries were consistent with the application of severe force.

He says that he recognized two of his assailants: a Simbarashe Manenje, who lives at Svita, outside the constituency, but close to Texas farm, and Kazima Chipara. The latter was later sent to collect a torch the youths had dropped on the day of the assault and to invite him to collect his identity particulars. He refused and instead went to Chitoro's home but could not find him. The witness said Chitoro later brought his identity documents and a letter saying that he should not be assaulted again, but the witness no longer had the letter. The police arrested some of the youths within three

days of the assault.

The witness was understandably very bitter concerning the brutal assault he suffered. Under cross-examination he said that he blamed the respondent for the assault and that he would like to see the respondent punished and his election set aside. Although there is no doubt that the witness was viciously assaulted as alleged, he should not have allowed his justifiable bitterness to so cloud his testimony to the extent of attempting to link the respondent to the assault at all costs. His evidence in this regard, discussed later on, has to be treated with caution. Chitoro denied ever meeting or threatening the witness as alleged but admits that the witness "did come to my house when he was selling cooking sticks, saying he had been beaten. I asked him who beat him, and he said he did not know who his assailants were. I then said I cannot help you if you cannot tell me who they are."

Obey Siwela (PW4), is related to the petitioner and is his follower, "because I like the petitioner but I am not a member of his party". He used to travel around with the petitioner attending meetings and rallies in the course of which he says ZANU-PF supporters noticed him. In his testimony, he claims to have been assaulted by ten youths for failing to attend a ZANU-PF rally and for being a supporter of the petitioner and the MDC. Among his assailants, he says he recognized Nhamo Chitoro, the son of Biggie Chitoro, Zephanat Shoko, Usheunesu Hove and Madzima. However, he never reported the alleged assault to the police nor did he seek medical treatment. It would appear that the assault perhaps amounted to no more than being roughed up.

Siwela testified that he had initially fled the constituency to Mataga after Gambiza's abduction because Gambiza had told him and other MDC supporters that he had seen a list of their names at Texas Ranch – a matter neither Gambiza nor any other witness alludes to. Siwela's father had then followed him to Mataga and prevailed upon him to come back because "ZANU-PF had held a meeting and said that nobody was to be assaulted". His assault occurred after and despite the assurances by ZANU-PF to the contrary – a factor which respondent's lawyer put it to him was an indication that the assaults were perpetrated by elements not answerable to ZANU-PF.

Perhaps the most serious and tragic occurrence in this case pertains to the experience of the Zhou brothers: James and Fainos. On June 4 2000,

James Zhou (PW5) and his brother Fainos were abducted and force-marched to Texas Ranch by a group of young men who addressed each other as "comrades, corporals, lieutenants and majors". The two brothers were assaulted and handcuffed together.

Along the way they were ordered to point out one Obediah Nemanga's home, which they reluctantly did. Their captors wanted Nemanga because he had a gun and had shot and wounded a war veteran during a clash between some war veterans and MDC supporters. Part of the group remained guarding the brothers while the rest of the group went in. As they did so, Nemanga allegedly shot one of them, injuring him so seriously he had to be carried in a wheelbarrow. The two brothers were further assaulted, and it would appear, more viciously after this shooting incident and whenever the party came across any new group of farm occupiers.

They got to Texas farm on June 5 and were subjected to further beatings in the afternoon and in the evening. On June 6 they were told that they would be taken to Chitoro. Their captors prepared some porridge for them but they could not eat it because they were sore all over. They were also ordered to bath and have their sores compressed. One of the occupiers gave them a shirt and a jersey to wear.
It appears that their assailants went out of their way to conceal their captives' injuries before they were presented to Chitoro. On seeing them Chitoro asked whether they had come to be allocated pieces of land. When they answered in the negative, Chitoro then accused them of being puppets of white people and of supporting (MDC leader Morgan) Tsvangirai "so that the whites would take over the country". "You want to give our land to Tsvangirai?" Chitoro reportedly asked, and the brothers answered, "We only support the MDC". Chitoro is then alleged to have kicked, once on the chest, Fainos who remained prostrate on the ground. However, James testified that he himself was not assaulted by Chitoro. After making some more accusations and threats, Chitoro allegedly left the farm, instructing the remaining occupiers to release the captive brothers whenever they saw fit.

The following day (June 7) two men were delegated to accompany them and show them their way back home. They got to former MP and petitioner's late brother Byron Hove's place and spent the night there. Fainos, who was complaining of chest pains could not walk anymore, so James left him and proceeded home alone the next day (June 8) and reported Fainos' condition to the rest of the family. On June 9 the witness heard that Fainos had passed away that same day (June 8), although the death certificate (Exhibit 4) indicates the date of death as June 7. The cause of death is stated as a combination of "asphyxia, aspiration of gastric content and assault".

James sustained very serious injuries on the buttocks, the photographs of which were taken at White Hospital in Mberengwa and produced as Exhibits 5 & 6. He testified that being beaten repeatedly by sticks on the buttocks caused his injuries (and similarly those of his late brother). This is confirmed by the description of James' injuries in the medical report (Exhibit 7) as "traumatic ulceration of both buttocks and upper thigh". The poor medical treatment he received earlier on, including the hot compresses, seem to have worsened his injuries. He said the local clinic he went to on June 9 did not give him any medication and their bandaging of his wounds only caused him more pain and discomfort.

By the time he went to hospital, the skin had become swollen and came off with the removal of bandages. The doctor had to cut off and clean the wounds leading to the injuries appearing like those caused by sitting on a hot stove plate.

Although the petitioner says in his founding affidavit that the late Fainos was abducted and tortured for having signed his nomination paper, none of the captors seems to have been aware of this. Even James testified that he himself did not know that his brother had signed the petitioner's nomination paper. The final paradox to this tragedy is that Fainos does not seem to have been registered to vote in the constituency as an "X" was placed against his name among the maximum 14 nominators of the petitioner, indicating that he was not a qualified nominator, although, of course the petitioner still managed to get at least the minimum ten valid nominations (Exhibit 8).

Chitoro's own testimony in this regard is that the abduction and assault of the Zhou brothers seems to have been linked to a clash between some war veterans and MDC supporters on a farm leading to the shooting of one Nhamoinesu Nzira by an MDC member known as Nemasanga. The group of youths and war veterans that abducted the Zhou brothers was apparently on a mission to find out about this earlier shooting incident when they came to Nemasanga's home where one of their number was also shot and seriously injured. He states in his affidavit that four days after this incident he had gone to Texas ranch to check on matters on the farm in his capacity as district chairman of the war veterans:

> "I was surprised to see James and Fainos Zhou there. I asked them why they were there. When I heard that they had been taken because they had assaulted war veterans, I became very angry with the war veterans in charge, saying I did not want to see people being forcibly

> brought onto farms but only wanted to see those who wanted to plough. I ordered that they immediately release Fainos and James Zhou…I strongly deny that I had anything to do with their kidnapping, or that I assaulted them. Simply because I was coordinating farm occupations and they were brought to one of the said farms, I now stand accused of killing Fainos Zhou.
>
> "In terms of the Chiremba (Tribe) tradition, the Zhou brothers are my relatives. Why would I harm them? After this incident, I went around to all the farms warning occupiers not to force people onto farms or to assault people. I warned them that such people were compromising our legitimate demonstration for land."

I found James Zhou to be a truthful and reliable witness who refrained from exaggerating or manipulating his evidence even where he had ample opportunity to do so. Chitoro too was an impressive witness and his evidence does corroborate that of James except for the sharp difference on the allegation that he did kick Fainos on the chest, which Chitoro denies. Whether or not he did, the court in which he now stands charged with the murder of Fainos is in a better position to answer that question. For the purpose of these proceedings, it appears that the circumstances surrounding the abduction and assault of the Zhou brothers were linked to an earlier clash on a farm between some war veterans and MDC youths in which one Nzira was shot and seriously injured by an MDC member named Nemasanga. In the process of following up this shooting some youths and war veterans rounded up the Zhou brothers who seem to have known about the earlier clash and of Nemasanga's whereabouts.

The court did not receive much evidence pertaining to the earlier incident, but the detailed horrendous experience of the Zhous, as shown above, does not seem to have had anything to do with compelling anybody to vote or to refrain from voting.

The evidence of Mavis Tapera (PW6), the widow of Fainos, confirms the kidnap and assault of the Zhous. She too claims to have been assaulted and her property and money stolen. However, she struck me as a suggestible and an unreliable witness prone to exaggeration. For example, she alleges that the kidnappers stripped her naked, pushed an iron bar into her vagina and ordered her to make the kind of coital motions that she would assume with her husband. Part of this ordeal is supposed to have happened in front of her husband and James who were by then tied together, but in his evidence James does not mention or allude to it at all when the spectacle of her sister-in-law stripped completely naked and being assaulted and humiliated is a matter that he should naturally have made reference to in his detailed narration of the events of that night.

The relevant portion of Tapera's evidence is as follows:

> "*Tapera*: They had this piece of metal which this man inserted into my vagina. They ordered me to imitate the coital motions that I would assume with my husband. I started crying because the iron bar was causing pain but I was told to keep quiet. At that time my brother-in-law, James Zhou, arrived and he was tied up with my husband. They removed the iron bar. I was then tied with a short rope and taken to where my husband was. They started assaulting me again…"

She never reported her assault to the police nor did she produce any medical evidence of her injuries, claiming that her medical records had been accidentally destroyed. Her description of the injuries her late husband had sustained is also tinged with embellishment probably suggested by the newspaper appearances of the pictures of James' injuries: "His body had wounds all over", she said, adding, "as if he had been hit with a hot iron bar which would take out the flesh on impact. When I turned him over I saw wounds as if caused by sitting on a hot iron plate".

She later claimed that she did not vote because "when we went to the polling station, we were told by some people at the entrance that if we were going to cast our vote for the open palm (the MDC symbol) they were going to detect that easily. We then went back." The constituency registrar's view was that she was turned back probably because she was not registered for that constituency, an explanation which the court finds all the more probable because of the evidence of her late husband not having been properly registered for that constutuency, or that her hands had been contaminated with the voting ink. She had voted in previous elections, but was evasive when asked whether it was easy for anybody to tell what choices any voter would have made. She agreed though that no one had ever told how she had voted in earlier elections.

Elizabeth Tati (PW7)("Tati") and Barbara Mavhundure (PW8)("Barbara") testified that on June 2, 2000 they were abducted together with some villagers by alleged ZANU-PF youths and war veterans and assaulted on the way to Texas farm where they were both raped by one Francis Ncube. There are some significant features of this episode, which need to be pointed out:

i. Barbara's husband, William, was released and left behind allegedly after he had surrendered an MDC party card and T-shirt and because he was ill. However, under cross-examination Barbara opined that someone in the group already had designs to rape her afterwards and ensured that her husband was conveniently left behind.

ii. Both Tati and Barbara who incidentally shared the same marital surname "Ngwenya" as their husbands are related, testified that Francis Ncube had told them that the people who were assaulting and harassing them most "had had a nasty experience with the MDC", an allusion which in the totality of the evidence seems to be a reference to the shooting incident noted in the case of the

Zhou brothers.

iii. Francis Ncube then started to fondle the two women and to make suggestions that upon arrival the three should sleep together, with him in the middle. Tate says that at some point he accused her of attempting to derail the arrangement to which Barbara had allegedly agreed and ordered the women to walk separately from each other.

iv. At the farm Ncube took charge of the sleeping arrangements, declaring, "enemies should not sleep at one place". He took Tati to sleep with another woman who had come for a piece of land, but allegedly threatened and raped her once on the way. He reportedly got some bedding and forced Barbara to sleep with him and raped her once as well. After that, a Makoni came too, wanting to have sexual intercourse with her, but Barbara refused, saying that she could not "sleep with several men given the pain that I have been through". Makoni then went away.

v. Upon their arrival on the farm, the youths had been ordered to "prepare food for the enemies" who had been brought. The following day Ncube is alleged by Barbara to have remarked to the captured group: "You MDC people, can you not see that we have food in abundance here? Our MP is kind and is giving us food unlike your MDC". After that they were allowed to go, but both women claim that Ncube specifically warned them never to report the rape to anyone otherwise he would come back for them and cause them harm.

It is clear that the alleged rapes occurred not as a common purpose of punishment and humiliation shared by the captors, but as a separate deviant and immoral conduct of Ncube, which he was determined to carry through by subterfuge and deception. This is borne out by the fact that Makoni who was

apparently in charge of the farm in question, calmly accepted Barbara's refusal.

Again the police reacted very swiftly to this incident, arresting the alleged abductors and interviewing the victims paying particular attention to the two women since theirs was the first reported case in the district of women taken to the farms against their will. Both women testified that they had been assaulted but despite being specifically and repeatedly asked by the police they denied that they had been raped. They never reported the alleged rape to any of their relatives or friends (Tate apparently did not mentioned the rape even to Barbara, although Barbara claims that they shared their experiences and jointly decided to keep quiet about the matter) nor to their husbands, neither did they seek any medical help regarding the rapes, although they both appreciated the medical risks of the rapes and did seek treatment for their other injuries. The two women only reported the alleged rapes to Ms. Beatrice Mtetwa, the instructing lawyer for the petitioner in July 2000. But right up to the time of their testifying in this petition, more than a year later, they still had not made any reports to the police nor had the petitioner's lawyers advised them accordingly.

Two issues arise from their evidence pertaining to the allegation of rape. Firstly, because the two women had given statements to the police under oath denying the rape, their contrary testimony now before the court exposed them to a possible charge of perjury. Further, in terms of section 138(2) of the Act, the giving of false evidence lays witnesses open to a charge attracting a two-year prison term or four thousand dollars fine or both such imprisonment and fine.

At the conclusion of Tate's testimony, and cognizant of the danger in which she stood, I took it upon myself to question her closely, drawing her attention to those aspects of her evidence which the Court found difficult to believe. I did so because the witness' attention had not been drawn to the provisions of section 138, and where it appears that a witness risks a charge under this section, such a witness should be given an opportunity to explain, modify or even retract her statement. Also, the telling of a deliberate and palpable lie amounts to contempt *in facie curiae*, which though the court in question should not, for obvious reasons, prosecute, it should all the same draw the witness' attention to the unsatisfactory evidence and allow the witness a proper opportunity to explain.

The second issue is that lawyers as officers of the court have a duty to advise witnesses of their basic rights pertaining to their testimonies. In this case the two witnesses should have been properly advised about the risk of giving conflicting statements under oath. They should also have been told about their rights and duties to report the alleged rapes to the police and also advised about the need to seek medical and counseling help for their own sake and for the sake of their partners. It is an abuse for legal practitioners to be merely concerned with building up their cases while paying scant or no regard to the rights and welfare of the witnesses.

But one is still left with a nagging question, why these people were forcibly brought to the farm in the first instance. On the way they are assaulted and humiliated by being dipped into the water and ordered to chant gabbled slogans like: "MDC is bad, because it wants to bring white people. ZANU-PF kills!" But upon arrival, they are banqueted and treated to the best feast that could be scrounged from an occupied farm. The following morning there is more feasting, after which the captives are allowed to go. There is no political re-education at their destination. Instead, the two women become victims of the exploits of a depraved sex maniac. If one combines this picture with the petty thefts which accompanied most of the abduction incidents described in this court, one gains the impression that these were activities of miscreant elements with limited or confused political orientations or outright criminals taking advantage of the farm occupations and the political campaigns.

There is nowhere in which any of those assaulted are being warned to vote for ZANU-PF or for the respondent or to refrain from voting in the then forthcoming election. Even the so-called "baptisms back to ZANU-PF" seem to have been focused more on changing the victims' attitudes towards land occupations than on increasing support for the ruling party.

Other assaults testified to in this court were those allegedly perpetrated on Tofara Hove (PW 9) and Simbarashe Muchemwa (PW 16). These two assaults appear to have been linked to events emanating from outside the constituency. While this might go to show the pervasiveness of political intimidation, it presented the court with difficulties assessing how events occurring outside the constituency, especially where there are so different in their manner of occurrence and execution, could have affected

the voting in that constituency.

Tofara Hove, a retired police officer, claims to have been assaulted, for being an MDC official, at Mataga bus terminus, which is outside the constituency, by a group of youths wearing Zanu-PF T-shirts. His version of events was very confused.
He claimed that the leader of the attacking youths, one Kennedy, had struck him with a stick on the shoulder and he had retaliated and felled him with a fist, whereupon the rest of the youths fell upon both Kennedy and himself and assaulted them severely. He says other Zanu-PF youths came along and rescued him from the assailants. Contrary to the petitioner's assertion that the last rally he had held was on 23 April, Tofara Hove stated in his evidence in chief that the last rally was on 28 May at Sandawana and was addressed by the petitioner, among other party officials. In re-examination, he said the rally was held "somewhere in mid-May, going up". Nowhere in his evidence does he implicate the respondent or Chitoro in the alleged assaults.

Simbarashe Muchemwa's experience was diametrically different from that of the other petitioner witnesses. He is a Harare-based member of the MDC and was listed as a witness for the Mberengwa East constituency petition. He left Harare with the Mberengwa East MDC candidate, Mrs. Sekai Holland, in order to assist her with the completion of her nomination papers. Their route took them through Mberengwa West. On his way from Mberengwa East, the car in which he was traveling with his colleagues had a breakdown in Mberengwa West. He said that "people carrying axes and arrows" who ordered them to "surrender" later surrounded them and took them to an occupied farm where they were beaten up with sticks and tortured with burning plastics. He showed the court the injuries he had sustained on his stomach, along his spine on the legs. Inspector Zvinawauya, in his affidavit and testimony did shed some light on this incident. According to his investigations, MDC youths in Mataga, outside Mberengwa West constituency, had attacked one war veteran and left him for dead and escaped in a Toyota Hilux. When the pursuing group of war veterans found axes and grenades in the car the witness and his group was traveling in, they took them to be part of the youths who had attacked their

colleague. Inspector Zvinawauya produced the recovered axes, teargas canisters and grenades as exhibits and testified that the witness's colleagues had accepted that they had been given the weapons for their own protection.

Once again, there is nothing in this horrific incident that implicates the respondent or his agents in the attack. The witness and his colleagues are pursued by war veterans on suspicion of having brutally attacked a war veteran outside the constituency, caught and taken to an occupied farm in the constituency and are there beaten up and tortured. It cannot be said that the respondent had knowledge of or approved this apparently spontaneous attack and counter attack. Without delving into the goings-on in Mataga, all that the court could make of this incident was that both incidents were horrific criminal acts engendered or exacerbated by political polarization and the misguided carrying of dangerous weapons.

Allegations against Biggie Chitoro

The petitioner alleges that Biggie Chitoro terrorized his actual and potential supporters through assaults as outlined above and through threats allegedly issued at Zanu-PF rallies coupled with his intimidating habit of moving in public armed with two large knives. He then maintains that the respondent included Chitoro in his campaign team (Exhibit 1), was seen in the company of Chitoro during the campaign and that Chitoro addressed some of his rallies and concludes that the respondent must be taken to have approved and adopted Chitoro's campaign methods. The respondent denies appointing or adopting Chitoro as his agent, and insists that Chitoro was named in his campaign line-up only in his representative capacity as a war veterans chairman in the constituency.

The approach I took regarding this allegation was to examine first if Chitoro's alleged campaign methods could be impugned, before looking at whether they could be ascribed to the respondent.

I have already noted that as far as the alleged assaults are concerned, most of them took place in closer connection with the exercise of farm occupations

than with the election campaign as such.
However, even in this regard some of the petitioner's own witnesses exculpated Chitoro from any wrongdoing by saying that he was genuinely surprised to see them at the farms, 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 invariable ordered the immediate release of the detained persons (e.g., Robson Gambiza PW1) or their evidence shows that he had absolutely nothing to do with their plight (e.g., Barbara Mavhundure PW9, Elizabeth Tati PW8, Tofara Hove PW10). 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 farms against their will could be taken as a genuine commitment on his part to stamp out any unlawful activities.

Chitoro gave credible evidence on his role concerning farm occupations and struck the court as a person who is genuinely passionate about the resolution of the land issue in the country so that, in his own words, he was prepared to "take advantage of any gathering, be it church, funeral, political party or people at a dip-tank to preach the gospel of land repossession". In his affidavit, which he adhered to in his testimony, Chitoro states his case as follows:

> "I am 61 years of age, married with children. I participated in this country's war of liberation as a member of ZANLA as a general staff member between 1974 and 1980. I operated in my home area of Mberengwa. Accordingly, people to this day know me as a war veteran in the area. As a war veteran, I can confirm that we fought primarily to re-take our land, which was taken away from us by white settlers. I am Chairman of Mberengwa East and West of the Zimbabwe National Liberation War Veterans Association (ZNLWVA). The ZNLWVA is an independent association, which has its own policies and command structures. Whilst the organization is historically sympathetic to Zanu-PF, we have clashed with the government and Zanu-PF on a number of occasions such as on the issue of gratuities and the land issue. The latter, the war veterans felt the government was delaying to process.
>
> "In February 2000, our organization took the decision to complete the fight we had started prior to independence, that is, to re-take our land. We could not wait for the government or Zanu-PF to negotiate with the farmers or the British. We mobilized war veterans and villagers to the farms en masse. 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 desist 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 mobilize 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 onto 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, etc."

Chitoro goes on to state that in Mberengwa West and East, "there were about twenty farms that were occupied by over ten thousand people" and he was in overall charge of the whole exercise – "a massive task which required my full time and energies". Thus, Chitoro is convincing when he states in his affidavit as follows:

> "I am the Chairman of the War Veterans in Mberengwa. My association was approached by Zanu-PF, asking us to vote for them. I never sat in any Zanu-PF campaign committees. Although I am a Zanu-PF supporter, I do not hold any post or portfolio in Zanu-PF, even at the lowest levels. I have no decision-making role in Zanu-PF. I have looked at Exhibit One for the first time. I was not in any way involved Zanu-PF campaign structures as I was busy on the farms."

Similarly, it would stand to reason that at the respondent's rallies, Chitoro would talk about land. There is a difference of opinion pertaining to the number of rallies jointly addressed by the respondent and Chitoro. Chitoro says there were only two while the respondent estimates them at six. The discrepancy could, as suggested by Mr. *Hussein*, have been due to the holding of double rallies, which Chitoro could have regarded as just one rally. It is also significant that Chitoro does not seem to have taken any active role in the organization of the respondent's rallies, being either included in the programme or joining in when the rallies were already in progress and then given a platform to talk about land. But nothing really turns on the actually number of rallies attended. Chitoro freely admitted addressing the respondent's rallies and even declared that he would have addressed any willing gathering he could have happened upon on the topic of land.

The real issue here is whether he did threaten people at any one of the rallies as alleged by the petitioner, and testified to by Gedson Hove. I have already indicated that Gedson Hove's evidence must be treated cautiously because of his bitterness and desire to get the respondent punished for the assaults that he suffered. But this allegation does not even pass the test of basic logic and common sense: why would Chitoro or the respondent threaten their own supporters who had by most witness accounts enthusiastically turned up for the rallies? Accordingly, I did not find merit in these allegations.

On the issue of carrying knives in public, Chitoro stated that he is a muRemba and that as part of the tradition of VaRemba he carried knives for the purpose of slaughtering any animal for food in the special VaRemba way similar to the Moslem halaal manner. For this purpose, he said he carried two knives, one 20 cm in length and another about 10cm long in leather pouches strapped around his waist.

Frank Chitonga Ndhlovu, also a MuRemba, testified that the vaRemba are regarded as "Black Jews" and are not supposed to eat meat that is not slaughtered according to tradition. He himself produced a knife that he carries around, an Okapi retractable knife, 15 cm in length when opened. The petitioner himself, who is related to Chitoro, gave evidence that he had always known the carrying of "bayonets" to be Chitoro's particular idiosyncrasy. In other words, Chitoro did not arm himself with the knives for the purpose of scarring voters towards the 2000 Parliamentary election, but it has always been a know eccentricity of Chitoro to carry knives around his waist according to the VaRemba tradition. Whether his manner of doing so was unusual and potentially intimidating, it does not seem to have been done with the view to influencing the election.

In the light of the above, it is not necessary to go into the question of whether the respondent did adopt or ratify Chitoro's actions, for none have been shown to violate the provisions of the Electoral Act. The allegations relating to the assault on Mrs. Ngwenya will be dealt with separately below.

Allegations leveled personally against the respondent

The allegations leveled personally against the respondent are that he incited his supporters to beat up opposition members, that he threatened to inflict injury by supernatural means on those who did not vote for him by announcing that Zanu-PF had invisible 'goblins' and that he ordered Mrs. Josephine Ngwenya to be assaulted at a rally in Shauro. The respondent denies all these allegations, and I shall examine each one of them below.

The first two allegations of incitement and threats of supernatural harm are contained in the testimonies of Gedsen Hove PW4, Obey Siwela PW5 and Dean Jama PW13. According to Siwela, the following is what happened at a rally in Rengwe addressed by the respondent:

> "Mr. Chitoro talked about a very good thing that people were supposed to go to the farms. After that he said he knew who MDC people were and that if they lost the election they would monitor us. After his address I saw him sharpening his knife and heard him saying that he was a soldier and could kill people…Mr. Gumbo then stood up. I only remember a few things. He said we had surprised him to attend in such large numbers. He said it was because of fear of Chitoro. I we are going to continue supporting MDC they will give more power to Chitoro because a donkey will not get to the grinding mill unless beaten…He then said Zanu-PF has goblins that we can't see."

Dean Jama's version of what took place at the same or similar rally is slightly different, thus:

> "While I sat close to the respondent, he did not talk to me. He said to the rally that we should stay together peacefully in our area. He then said that those who did not live well with others should be treated like cows which refuse to get into a dip tank – beaten up."

The respondent maintained that he always preached peace at his rallies – a fact that a number of witnesses for the petitioner acknowledged and that the witnesses must have misunderstood his reference to cows and donkeys. According to the respondent his message, which he communicated at most of his rallies was: "Don't beat up people like you beat up cattle to jump into the dip tank because you cannot make a donkey drink water by beating it up!" There is, ofcourse, a well known English expression that you can take a horse to water, but you cannot make it drink, but how this could have been rendered in the Shona language to idiomatically convey the same meaning is difficult to imagine. On the face of it, the more usual example, in the experience of peasant farmers, would be of beating up animals, which refuse to get into the dip tank. However, in the light of the accepted fact that the respondent did preach peaceful co-existence in the constituency, the worst that can be said is that the message that he conveyed was of two diametrically opposed assertions and that he must have confused his audience. There is no evidence of unequivocal incitement to violence.

The allegation of threatening harm through supernatural forces like "goblins" or "hidden cameras" is the weakest of them all. Our society has participated in several regular national and local government elections since independence in 1980 and given the generally high level of literacy, one of the highest in the world, such threats do not have any impact at all in

negating voters' freedom of choice. In this case it is difficult tp imagine how, for example, an ex-police officer like Siwela or an intelligence officer like Jama both with more than four years of secondary education could have been affected by a childish threat of goblins and hidden cameras. The provisions of s. 105 (b) were meant to prevent the threat of use of supernatural, religious and spiritual powers to influence the voting. This was done in recognition of the immense power and influence that religious organizations and spiritual leaders wield over common folk.

The Kenyan case of *Joseph Maloba Elima v Charles Ohare and Musikari Kombo* High Court of Kenya at Nairobi, Election Petition No. 64 of 1993 is probably a good example of the kind of resort to dark supernatural forces that the statutory provision aimed to forbid. Elima challenged Kombo's election on the basis that Kombo had organized and administered a traditional oath, called "Khulia Silulu" on voters, thereby causing fear amongst those voters that may not have wished to vote for him. The "oathing ceremony" involved the slaughter of a black ram and the mixing of the ram's skin, intestines, intestinal refuse and blood with special herbs, the bathing of the preferred candidate with the mixture and the incantation of oaths by both the candidate and members of the community before consuming the meat. Kombo allegedly plucked a piece of meat and swore: "I Musikari Kombo swear that from now on I shall continue Masinde Muliro's journey without fear until President Moi is removed from power." Members of the community then came forward and in turn plucked pieces of meat and swore: "I swear that I shall vote for Musikari Kombo in the coming elections. If I do not, may I die", and then ate the meat. The court found that respondent had indeed participated in the ceremony with a view to binding voters to vote for him and thus guilty of the offence of undue influence and nullified his election.

The more serious allegation is that the respondent ordered Mrs. Josephine Ngwenya (PW 14) to be assaulted at a rally in Shauro. The first difficulty with this allegation is the date on which the alleged assault occurred. Mrs. Ngwenya said that she went to Shauro on 9 June 2000 was assaulted on that day, was forced to stay in Shauro for three days and reported the matter to

the police upon her release which would be in line with the date of 13 June 2000 in the police report. The respondent, on the other hand, produced his schedule of rallies showing that the Shauro rally was held on 19 June 2000, and that his rallies commenced on 14 June. However, since the respondent admits coming across a distressed Mrs. Ngwenya during his rally at Shauro, the disparities pertaining to the exact date need not detain us here.

Mrs. Ngwenya's story is that she had left her home in Mavorombondo at 4 am and traveled, first by bus and then by lift in a private car, right across the whole constituency to Shauro in order to fulfill an longstanding church visit; that she and the owners of the private car came across a Zanu-PF rally; that after she had been dropped at the church she was taken together with the owners of the car by Zanu-PF supporters to where the respondent was addressing the rally, and she testified:

> "I went to (the respondent) who was with Biggie Chitoro and informed him that I had been arrested by the people, but he did not help. One of the youths asked (the respondent) what they should do with us, and he replied that they should "sort us out"".

She then described how they were assaulted with Biggie Chitoro taking the lead. The police report records that she suffered "internal injuries on the back" while a medical report compiled two months later (Exhibit 10) confirms the injuries sustained as consistent with the beating described. However, according to the respondent, Mrs. Ngwenya came to him to inform him that she was in trouble with the Zanu-PF youths because they had apprehended her putting up posters for an independent candidate, Lyton Shumba, and he replied that she must not be molested and should be allowed to put up the posters as he did not take seriously the challenge from Shumba.

In her testimony, Mrs. Ngwenya denied that she was campaigning for Shumba, yet her association with Shumba was confirmed not only by the respondent but by two other witnesses, Phanias Fichani Dube who said that Mrs. Ngwenya and two young men were putting up posters of L. Shumba and that this provoked the people at the rally and Alson Janasi, Shumba's campaign manager in the constituency, testified that Mrs. Ngwenya was given money and posters in June to go to Shauro to carry out a door-to-door campaign as she was well-known among the church goers in the area and that she was a polling agent for Shumba at Marirazhombe Primary School and a register of polling agents with her particulars and signature was produced as Exhibit 15.

Under the circumstances the court agreed with the respondent that Mrs. Ngwenya had deliberately lied about the purpose of her visit to Shauro and her support for Shumba in order to implicate the respondent and Biggie

Chitoro. The unreliability of her evidence also became clear when she feigned ignorance of the locality in order to avoid the court's questions relating to her observations as she traveled across the constituency.

Similarly, the evidence of Melvin Sibanda, the motorist who gave a lift to Mrs. Ngwenya, on this incident is not reliable and appears to have been contrived to implicate the respondent and Biggie Chitoro. There are also contradictions between his version of events and that of Mrs. Ngwenya. Sibanda says that they dropped off Mrs. Ngwenya at Village 5 and proceeded to Marirazhombe some 20 km away to collect an engine and returned after nearly two hours and were then apprehended and beaten up together with Mrs. Ngwenya. Mrs. Ngwenya, on the other hand testified that she was dropped off at the church, that the car then made a U-turn but its occupants and herself were immediately apprehended and taken to the respondent's rally. Sibanda claims that they were all accused of being MDC members, but Ngwenya says that noone at Shauro knew that she was MDC as she had kept that a closely guarded secret; Sibanda said that they were handcuffed together with Mrs. Ngwenya, which Ngwenya never said that ever happened. Finally, Sibanda himself gives a flimsy reason for his failure to report the matter to the police, claiming that a junior officer chased him away from the police station.

The fact that Mrs. Ngwenya was assaulted cannot be disputed but it does not appear that this was done by or at the instance of the petitioner or Biggie Chitoro. According to the evidence of Inspector Zvinawauya, Mrs. Ngwenya reported a case of common assault and that her assailant was a Mr. Tekere. When Tekere was called to the police station, Mrs. Ngwenya failed to identify him and the matter was referred to CID for further investigation. Accordingly, there is no credible evidence to hold either the respondent or Chitoro guilty of undue influence on this score.

General violence

In the Electoral Act, there are no provisions focused on punishing general violence. Alive to this *lacuna*, DEVITTIE J, in the *Hurungwe East*

Election Petition, HH 66/2001 *supra*, said:

> "Although the Electoral Act does not provide for general intimidation as a ground of challenge I entertain no doubt at all that at the heart of the Act, lies the principle of freedom of election. Accordingly, where the evidence establishes that due to intimidation and other corrupt practices, freedom of election ceases to exist, the court is bound to declare such election as a nullity even though the candidate or his agent may have had nothing to do with the intimidation." @ p.4 of the cyclostyled judgment.

However, there is equally strong opinion tending against reading too much into the electoral legislation of certain common law rights:

> "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 question whether an election can be set aside on any alleged ground, the courts have to consult the provisions of the law governing the particular election. They have to function within the framework of that law and cannot travel beyond it." Per CHANDRACHUD, CJ in *Charan Lal Sahu and Ors v Singh*, *supra*. @ p. 39.

I am of the respectful view that DEVITTIE J's view above goes too far in implying certain common law rights without attempting to base them on specific provisions of the Act. The danger with such an approach is that the implied right then tends to assume a life of its own and significance far greater than what was intended by the legislature. In my view, general intimidation as understood at common law is imported into the statute by the wording of section 132, which allows an election to be challenged on stated particular grounds including "any other cause whatsoever". Even if one were to adopt a strict interpretation of the section, "general intimidation" would easily be found to be *ejusdem generis* specified corrupt practices mentioned in the section.

Furthermore, in terms of section 83 of the Act, it is acknowledged that general violence might affect the electoral outcome and provision is made for the abrogation of elections by the President, after consultation with the Electoral Supervisory Commission, where he has reason to believe that, by reason of actual or threatened intimidation or violence or any other cause, it

is unlikely that a free and fair election can be held in a given constituency.

Accordingly, even though certain complaints discussed above may not have met the requirements of section 105, they still can be considered under the rubric of general intimidation. In fact, the petitioner's presentation was focused on illustrating that incidents of violence and intimidation covered the whole constituency. The respondent, on the other hand, argued that the violence and intimidation complained of related more to the occupation of farms than to the election itself, that the violence was limited to the Mwembe-Don Bosco corner of the constituency, which is not the area of the greatest concentration of the population. The petitioner maintained that this was where most of the electors are resident and that at any rate other areas were affected as well.

Undue influence at common law will render an election void only if it is "spread over such an extent of ground, it must permeate the community to such an extent, that freedom of election has ceased to exist" KEOGH, J., in *Drogheda (1869), 1 O'M. & H. 259*

In the *North Durham Case* (1874), 31 L.T. 383; 20 Digest 69, 481, a committee room was wrecked, the police station was stormed, and the prisoners liberated; the vicar's house and other houses were assailed, a conveyance was flung over the cliff, and several persons were ill-treated by the mob. BRAMWELL, B., in delivering judgment in the case said:

> "First of all there is statutory intimidation – the intimidation contemplated by the statute which avoids the seat in cases in which a candidate or his agent is guilty of it. But besides that there is a common law intimidation, and it applies to a case where the intimidation is of such a character, so general and extensive in its operation, that it cannot be said that the polling was a fair representation of the opinion of the constituency. An election will not be set aside if the intimidation be local and partial, and does not affect the result of the election. But where it is of that general character which I have described, so that the result *may have been affected*, in my judgment it is not part of the duty of a judge to enter into a kind of scrutiny to see whether possibly, or probably even, or as a matter of conclusion upon the evidence if that intimidation had not existed, the result would have been different. What he has to do in that case is to say that the burden of proof is cast upon the constituency incriminated, and unless it can be shown that the gross amount of intimidation could not possibly have affected the result of the election, it ought to be declared void."

In the *Salford Case* (1869) 20 L.T. 120, Martin, B., said:

> "It is not because riots, and violence, and assaults and beatings take place that that is to avoid an election, except it be of such a character as to render those persons who are to exercise the franchise reasonably unable or reasonably unwilling to exercise their right."

DEVITTIE J, in *Hurungwe East Election Petition* HH 66/2001, also quoted the above English cases with approval and teased out the following requirements for an election to be set aside on the basis of general intimidation:

a) The evidence must show that the intimidation is of a general character, permeates the whole community and is not restricted to a small locality;
b) Where the intimidation is of the general character stated, the court is not required to inquire whether the result has been affected as a consequence…All that the court has to determine is whether the result may have been affected and in so deciding the court should have regard to whether the nature and extent of the intimidation may have affected "men of ordinary nerve and courage", and
c) Where the court finds that the result may have been affected then the burden of proof is cast upon the respondent to show that the amount of intimidation could not possibly have affected the result of the election, and unless he can show that, the election ought to be declared void.

Following the above scheme, the first question to ask therefore is whether the violence alleged was of a general character and permeated the whole community. It has already been pointed out that the violence alleged pertained more to the land occupations than to the election itself as such. If in Britain there has been a race riot towards an election in one or more of the constituencies, say Bristol and Liverpool, and such incidents have been recorded, it cannot and has never been suggested that such riots could form a basis for voiding the election in the affected areas even though the race issue may have constituted a key platform for the contesting political parties.

Similarly, the land demonstrations and occupations can be regarded as an issue apart from the actual conduct and assessment of the validity of elections. However, there are other grounds upon which the petition sought to convince the court that there was general violence in the constituency, viz., the alleged mounting of unofficial roadblocks and the prevention of its supporters from campaigning.

On the allegation that supporters of the respondent had mounted illegal roadblocks throughout the constituency making it impossible for the petitioner and his supporters to campaign, the evidence of the constituency registrar has already shown that in his travels throughout the constituency both before and during the election, no such roadblocks were encountered. Neither the petitioner nor his supporters ever reported the alleged irregular roadblocks to the police or the election officials. The court also received the evidence of the campaign manager for an independent candidate, Lyton Shumba, Alson Janasi, who testified that him and his team traveled extensively throughout the constituency during the campaign period and held rallies and door to door canvassing in such places as Mutwaidzi, Mavorovondo, Chingezi, Mwanezi, Keyara, Marirazhombe, Shauro, Mwembe, Mberengwa and Bare but never encountered any hindrance or intimidation. (*See* Exhibit 16).

The incidents of hindering the activities of the petitioner's campaign as related by his witnesses at best paint a mixed picture, but at times actually support the respondent's contention that the election was peaceful. Lynett Dewa (PW11), was part of the petitioner's constituency campaign team. She told the court of the one rally her party held barely 100 metres away from a Zanu-PF rally. They were not molested by anyone except some drunkards who passed by. Later she says some Zanu-PF supporters walked past her home singing a song denouncing "sell-outs", and since some friends had told her that Zanu-PF supporters were monitoring her, she went to Bulawayo, leaving behind other members of her party's constituency campaign team, who she claims never did any canvassing for her party after that. It is difficult to assess whether this alleged abandonment of the campaign was due to any real or perceived intimidation or lack of resources, for her team did not have any campaign plan, it had no vehicle, they were not provided with any bus fares, they had no posters, no manifestos or any party material for distribution. The same impression is evident from the

testimony of Stand Ncube (PW12) and Dean Jama (PW13).

Dean Jama also ran away allegedly after hearing Zanu-PF youths singing threateningly near his home, but he never made any reports to the police of any of his claimed ordeals including alleged threats that he would be killed if he continued to support the MDC supposedly uttered in the presence of the respondent. Stand Ncube claimed that he was approached by war veterans at his carpentry shop and warned not to campaign for the MDC and to close his shop. When he reported the matter to the police, they came immediately and ensured that the shop was reopened there and then.

The petitioner himself chose to conduct his campaign from the comfort of the University offices in Harare, some 400 km from the constituency and when he finally saw it fit to come closer to the constituency, he still, for no other apparent reason than comfort and convenience, based himself in nearby town of Zvishavane, still outside the constituency.

If some members of his poorly-supported campaign team then saw it fit to join him in Zvishavane, it cannot be said with certainty that this was solely due to real or perceived intimidation as it could well have been a move dictated by the comfort and convenience of the petitioner's preferred "command center".

All in all, therefore, the petitioner failed to prove that there was any general intimidation, which permeated the whole constituency. He only managed to show isolated cases of real or imagined intimidation of his supporters and unfortunate or even tragic incidents involving some of his supporters but linked more to land occupations than the election campaign itself. In the circumstances, it is not necessary to examine the second and the third criteria stipulated above, viz., to place the burden on the respondent to prove that the alleged violence did not affect the outcome of the election. But even if the court were to do so, out of excess of caution, the following factors would weigh heavily in favour of the respondent:

a) The margin of the petitioner's defeat by 3 889 to 18 315 votes in a turnout of 56,2 %, well above the Midlands provincial average of 51,33% and the national average of 48,24%, indicates not only overwhelming support for the respondent but that most of the voters

did exercise their right to vote.

b) The detailed and systematic campaign strategy of the respondent contrasts sharply to the petitioner's arm's length, haphazard and poorly resourced campaign.

c) The allegations of violence and intimidation have been shown to have been localized in the northeastern corner of the constituency and particularized on activities connected more with land occupations than with the election itself.

Conclusion

From the foregoing, it can be seen that not a singly one of the grounds upon which the election was impugned has been sustained. In terms of section 144 of the Act I have discretion to depart from the normal rule that costs follow the outcome. However, as I indicated earlier in the judgment, I do not consider that the case for the petitioner was pleaded with precision and therefore see no need for departing from the normal rule.

Accordingly, I hereby order as follows:

a) The petition is dismissed with the petitioner paying the costs.

b) It be and is hereby declared that the respondent was duly elected for the Mberengwa West Constituency in the June 2000 Parliamentary election.

c) It be and is hereby declared that no corrupt practice or illegal practice has been proved to have been committed by or with the knowledge and consent of the respondent or by or with the knowledge and consent of his agents.

d) It be and is hereby declared that there is no reason to believe that corrupt practices or illegal practices prevailed in the Mberengwa West Constituency June 2000 election.

Kantor & Immerman, petitioner's legal practitioners.
Hussein Ranchod & Co., respondent's legal practitioners