

IN THE NATIONAL AND STATE HOUSES OF ASSEMBLY

ELECTION PETITION TRIBUNAL
HOLDEN AT ASABA, DELTA STATE

PETITION NO: EPT/DL/SEN/01/2023

TODAY WEDNESDAY, 6TH DAY OF SEPTEMBER, 2023

BEFORE THEIR LORDSHIPS:

HON. JUSTICE CATHERINE OGUNSANYA - (CHAIRMAN)
HON. JUSTICE MAS'UD ADEBAYO ONIYE - MEMBER I
HON. JUSTICE BABANGIDA HASSAN - MEMBER II

BETWEEN:

1. DIDEN MICHEAL PETITIONERS
2. PEOPLES DEMOCRATIC PARTY

AND

**1. INDEPENDENT NATIONAL ELECTORAL
COMMISSION (INEC)**
2. JOEL-ONOWAKPO THOMAS EWOMAZINO ... RESPONDENTS
3. ALL PROGRESSIVES CONGRESS

JUDGMENT

The 1st Petitioner, Diden Michael, on the 25th February, 2023, contested the Delta South Senatorial District Election on the platform of the 2nd Petitioner (PDP). At the conclusion of the election, the 2nd Respondent, Joel-Onowakpo Thomas Ewomazino, who was sponsored by the 3rd Respondent (APC) and who had also contested the same election was declared elected and returned as the winner of the said election of 25/2/2023.

Being dissatisfied with the outcome of the election, the Petitioners filed this Petition on 17/3/2023 challenging the outcome of

the election and the return of the 2nd Respondent as the winner of the election. The two grounds upon which the Petition is predicated as contained in Paragraph 18 of the Petition are, to wit: -

- a. The 2nd Respondent was not duly elected by majority of lawful votes cast at the election.
- b. The election of the 2nd Respondent was invalid by reason of Non-Compliance with the provisions of the Electoral Act, 2022.

Wherefore, the Petitioners claim against the Respondents jointly and severally in paragraph 51, as follows:

- a) a. A declaration that the 2nd Respondent was not duly elected or returned by the majority of lawful votes cast at the Senatorial Election into the Delta South Senatorial District held on the 25th of February, 2023;
- b) A declaration that the decision of the 1st Respondent to cancel and exclude the result of the election duly conducted in Warri South Local Government Area, being one of the eight (8) Local Government Areas making up Delta South Senatorial District, is wrongful and constitute substantial non-compliance with the mandatory provisions of the Electoral Act, 2022;
- c) A declaration that the return of the 2nd Respondent as the winner of the Senatorial Election into the Delta South Senatorial District by the 1st Respondent is void by acts which clearly violate and breach various provisions of the Electoral Act, 2022, Regulations and Guidelines as well as the Manual for Electoral Officials 2023 issued by the 1st Respondent for the conduct of the 2023 General Elections;
- d) An order of this Honourable Court collating the results of the election conducted in Warri South Local Government Area to the lawful votes recorded in favour of the parties and declare the winner of the election based on the collation;
- e) An order declaring as duly elected and returned the 1st Petitioner, Diden Michael as the Senator representing Delta

South Senatorial District having scored the majority of lawful votes cast at the said election held on 25th February, 2023;

- f) An order setting aside the Certificate of Return issued to the 2nd Respondent by the 1st Respondent in respect of the Senatorial Election into the Senate of the Federal Republic of Nigeria for Delta South Senatorial District having not been duly elected by majority of lawful votes at the said election; and
- g) An order directing the 1st Respondent to issue a Certificate of Return to the 1st Petitioner, Diden Michael as the duly elected Senator representing Delta South Senatorial District in delta State.

Or in the alternative to (a) – (g) above:

- h) That it may be determined and thus determined that the 2nd Respondent was not duly elected or returned by the majority of lawful votes cast at the election into Delta South Senatorial District of Delta State held on the 25th February, 2023 by reason of failure to conduct supplementary election in Warri South Local Government Area where the election did not hold and/or was cancelled, and that the Senatorial Election in Delta South Senatorial District was inconclusive;
- i) That it may be determined and thus determined that the election into Delta South Senatorial District of Delta State held on the 25th February, 2023, be declared inconclusive and a supplementary election be held in Warri South Local Government Area, where election did not hold and/or cancelled, in line with the provisions of the Electoral Act 2022, Regulations and Guidelines and the Manual for Electoral Officials issued by the 1st Respondent for the election; and
- j) An order setting aside the Certificate of Return issued to the 2nd Respondent by the 1st Respondent in respect of the Senatorial Election into the Senatorial District having not been duly elected by majority of lawful votes at the said election.

Upon being served with the Petition, the 1st, 2nd and 3rd Respondents respectively filed their Replies to the Petition, to each of which the Petitioners filed a Reply thereto. Hence, the followings are the live processes in this Petition –

1. Petition filed on 17/3/2023
2. 1st Respondent's Reply to the Petition filed on 6/04/2023
3. 2nd Respondent's Reply to the Petition filed on 15/4/2023
4. 3rd Respondent's Reply to the Petition filed on 6/4/2023
5. Petitioners' Reply to the 1st Respondent's Reply filed on 14/4/2023
6. Petitioners' Reply to 2nd Respondent's Reply filed on 20/4/2023
7. Petitioners' Reply to 3rd Respondent's Reply filed on 14/4/2023.

Parties having exchanged pleadings, a pre-hearing session was held at which there was a spirited engagement of all parties and issues for determination were settled as follows: -

1. *Whether on the state of the pleadings and the totality of evidence led in support of same the petition is competent and this Tribunal is vested with the jurisdiction to hear the petition and grant the reliefs sought by the Petitioners as constituted?*
2. *Whether the Election into the Senate for the Delta South Senatorial District held on 25/2/2023, the subject matter in dispute, was in substantial compliance with the provisions of the Electoral Act, particularly in relation to the facts pleaded by all the parties in every regard?*
3. *Who amongst the 1st Petitioner or 2nd Respondent scored the majority of lawful votes cast and satisfied the requirement of the Constitution of the Federal Republic of Nigeria at the said Election and is entitled to have been declared and returned as the winner of the said election of 25/2/2023?*

Thereafter, parties proceeded to state their respective cases, calling witnesses and tendering documents. At the close of trial, Learned Senior Counsels representing the parties filed their Final

Written Addresses and some further responses, which they adopted and adumbrated upon and judgment was reserved.

The case for the Petitioners as can be gleaned from the facts pleaded in support of the Petition and the totality of evidence put before the trial Tribunal can be summarized as follows: -

The 1st Respondent (INEC) was in charge of the conduct of the Delta South Senatorial District Election held on the 25/2/2023 in Delta State. The election was regulated by the provisions of the Electoral Act, 2022 and the Regulation and Guidelines for the Conduct of Elections and 1st Respondent's Manual for Election Officials 2023 which contains amongst other provisions, provisions for the collation and declaration of Senatorial District Election Results at Constituency level, some of which INEC however did not comply with. It is averred that at the end of the election, the 1st Respondent returned the 2nd Respondent as duly elected with a score of 49,955 votes, while it credited to the 1st Petitioner 47,656 votes.

The 1st, 2nd and 3rd Respondents filed various applications, some embedded in their Replies to the Petition and others filed separately. These applications and are as follows:

1. The 1st Respondent in his Reply to the Petition filed on 6/4/2023 filed therewith a Preliminary Objection seeking a dismissal or striking out of the Petition wholly or in part as appropriate, which was not moved and it is deemed abandoned in law. A replica of the Preliminary objection referred to above was filed by the 1st Respondent on 19/7/2023 with it was contained the grouse that there is non joinder of necessary parties by the petitioners.
2. The 2nd Respondent also in his Reply to the Petition filed on 15/4/2023, had raised an objection therein to the competence of the Petition and jurisdiction of the Tribunal to adjudicate thereon contending that Paragraphs 19 – 50 of the Petition are not tied to any of the two independent grounds of the Petition as contained in paragraph 18(a) and 18(b) of the Petition, in that, the facts pleaded are without reference or link to either of the grounds of the Petition

thereby setting the facts adrift without any connection to any of the grounds, as such facts are allegation of Non Compliance with the 1st Respondents' Regulations and Manual for Election which have no nexus and cannot be in substantiation of the ground that the 2nd Respondent was not duly elected by the majority of lawful votes cast and since it is not in compliance with the Regulations of INEC and its Manual for Election Officials, they cannot substantiate a ground for Non Compliance with Electoral Act 2022, rendering the ground invalid. In the alternative, it was sought that paragraphs 9, 12, 17, 19, 20, 21, 22, 28, 29 and 30 of the Petition be struck out for being vague, generic, imprecise, inexact, wrongly, speculative and nebulous.

In the 3rd Respondent's Reply to the Petition, they had vide a Notice therein raised an objection seeking a dismissal of the Petition on the ground that the 1st Petitioner at the time of filing the Petition was not qualified to contest the election and that the Petition contains incurable defects of being muddled up together and the Petitioners did not separate facts alleged in support of each of the grounds of Non Compliance and in support of majority of the votes cast and that paragraphs 28, 30, 31, 32, 35, 36 and 37 of the Petition are not sustainable under the grounds presently constituted and can only be sustained under corrupt practices, a ground not contained in the Petition.

Furthermore the supporters and agents of the 2nd and 3rd Respondents against whom allegations have been made have not been made parties in this Petition and that the non joinder of the agents and supporters of the 2nd Respondent renders the Petition incompetent as presently constituted, hence the Tribunal lacks jurisdiction to countenance the Petition.

The 3rd Respondents also filed on 10/5/2023 a motion on notice seeking from the contents of the grounds upon which the application was brought and the facts filed in support of same that the Tribunal strike out paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of the Petitioners Reply to the 3rd Respondent Reply filed on

14/4/2023 as being grossly incompetent and also that paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 of the Petitioners' witnesses statements on oath under the acronyms 'WSM' and 'LGB' be struck out also being incompetent.

The grounds upon which the application of 10/5/2023 are brought and facts in support of same is premised upon the relevant paragraphs cited above that the Petitioners have added new facts tending to amend, add to, expand and rehash the averments in the Petition which is contrary to the provisions of the Constitution which stipulates 21 days window for such amendments to be made. Furthermore the facts introduced were within the personal knowledge of the Petitioner at the time of filing the petition and the witnesses deposition on oath attached to the said Petitioners Reply "WSM" and "LGB" respectively contain the new facts not originally pleaded in the Petition and the 3rd Respondent will have no opportunity to react to the said new facts.

It was contended that the Petitioners are seeking to introduce new facts in relation to the use of BVAS more than what they alluded to in the Petition and the applicability of the Manual for Election Officers more than what is pleaded in the Petition when all that 3rd Respondent pleaded in his reply was the resistance to the use of BVAS and the margin of lead principle amongst others, including that all the votes pleaded in the wards were tainted with over voting.

The application of the 1st Respondent of 19/7/2023 and other applications also alleged the earlier paragraphs complained of are anchored on grounds not pleaded and the Petitioners failed to sue the necessary parties to the instant petition which makes it grossly incompetent.

The response of the Petitioners to all of the above is that it was the Respondents who raised new facts and issues in their respective Replies to the Petition to which the Petitioners had to response to in Petitioners Replies to the Respondents Replies to the Petition and that they have sued all necessary parties.

Legal Arguments of the parties in respect of the above objections/Application

Learned Senior Counsel to the 1st Respondent in his written address filed with its motion of 19/7/2023 raised two issues for determination, to wit;

1. The 1st Respondents application being a proper application to be heard outside prehearing session; and
2. Whether this Honourable court is reposed with the requisite jurisdiction to entertain the instant application.

On issue 1, it was contended that since it is anchored on jurisdiction, it is one, which should be granted pursuant to paragraph 4(5) of the First Schedule to the Electoral Act as extreme circumstance exist.

On issue 2, it was contended that the facts in the said paragraphs 28, 30, 31, 32, 35, 36 and 37 of the petition are facts which are anchored on corrupt practices which is not pleaded as one of the grounds in the Petition. Hence, the Petition is grossly incompetent. The said paragraphs which allege the Senatorial Collation Agent received a phone call and refused thereafter to collate results despite protests borders on a criminal allegation as the allegation is tantamount to dereliction of duties, citing Section 120 and 121 of the Electoral Act 2022 which prescribes imprisonment and fines for INEC Officers who commit a breach of their duties and thus they ought to have been joined to defend themselves and the failure to join them to defend themselves renders the Petition incompetent.

It was further contended citing authorities that the facts in a Petition must be rooted on the grounds and where facts are not predicated on a relevant ground the facts are irrelevant and incompetent. Several authorities were commended to the Tribunal including **OJUKWU VS. YAR'ADUA (2009) 12 NWLR (PT 1154) 50 @ 125. IKPEAZU VS. OTTI (2016) 8 NWLR (PT. 1513) 36 @ 96-97, OSHIOMOLE V. AIRAHUABERE (2013) 7NWLR (PT.**

1353) 376 @ 396, ELOHOR V. INEC (2019) LPELR – 48806. It was then contended that the Petitioners must prove the ground of the Petition and they cannot extend the frontiers of same citing; **TORIOLA & ANOR. V. WILLIAMS (1982) LPELR-3258(SC) per ANDREWS OTUTU OBASEKI, JSC Pp. 19-20 Paras D-C.** It was again claimed that paragraphs 28, 30, 31, 32, 35, 36, 37 of the Petition do not stand on any ground as one cannot put something on nothing. It was also submitted that the Petitioners position that once INEC has been sued they will answer for their staff is erroneous as there is no vicarious liability in Criminal Law.

The submissions of the Petitioners to the Objections/ applications under scrutiny i.e primarily is that the font type and the spacing in the processes housing the 1st Respondent's motion offends paragraph 5(d) of the Election Judicial Proceedings Practice Directions 2022 and thus invalid, citing **APC & Adeleke 2023 2 NWLR Pt. 1868 Pg. 309** on the need to comply mandatorily with provisions of the above Practice Direction. Furthermore, it was contended that paragraphs 5, 6, 7, 8, 9, 10 and 11 of the affidavit in support of the application are argumentative, and are opinions and legal conclusions which offend Section 115 of the Evidence Act 2011 and thus ought to be struck out, citing **Izedominen Vs. UBN Plc 2012 6 NWLR Pt. 1295 1 at 46 paras G-H.**

It was then observed that the applications under consideration had already been moved as a preliminary objection hence the motion of 19/7/2023 is an abuse of court process and further still the motion ought to have been moved in prehearing session as provided by paragraph 47(1) of the 1st Schedule to the Electoral Act 2022 and only in extreme circumstances, the proof of which must exist before it can be granted outside prehearing session.

On the 2nd Respondent's contention that Petitioners have pleaded the same set of facts for both grounds which are not distinguishable or compartmentalized, the Petitioners responded to the position of the 1st, 2nd and 3rd Respondents in their

motion/objection that the Petition is incompetent for the reasons earlier set out as contained in the said application/objections of the 1st and 2nd and 3rd Respondents that they (Petitioners) have complied with the Provisions of Paragraph 4(1)(d) of the 1st Schedule to the Electoral Act 2022 by them stating clearly the facts in the Petition and the grounds upon which the petition is premised and reliefs sought. The decision in **Elohor Vs., INEC 2019 LPELR – 48806 (CA)** was commended to the Tribunal that Petitioners should not compartmentalize facts so as not to run the danger of pleading wrong facts in support of a ground.

It was equally contended that if the Respondents were of the opinion that the facts in the Petition were vague they ought to have taken advantage of the provisions of paragraph 17(1) of the First Schedule to the Electoral Act 2022 and filed not later than 10 days after the filing of their Reply, an application seeking for further particulars which they did not, hence they cannot be heard to now complain having slept on their right commending the decision in **Nwankwo Vs. Yar’adua 2010 12 NWLR Pt. 1209 568 at 580** in that regard to the Tribunal.

Resolution of Issues contained in 1st, 2nd and 3rd Respondents applications/objections filed on 19/7/2023, 15/4/2023 and 6/4/2023 respectively.

The Tribunal has read through and through the provisions of the Electoral Act 2022, especially Paragraph 4 (1)(a) to (d) and (2) of the First Schedule to the Electoral Act which provides:

- (1) An election petition under this Act shall –*
- (a) Specify the parties interested in the election petition;*
- (b) Specify the right of the petitioner to present the election petition;*
- (c) State the holding of the election, the scores of the candidates and the person returned as the winner of the election; and*

- (d) *State clearly the facts of the election petition and the ground or grounds on which the petition is based and the relief sought by the petitioner.*
- (2) *The election petition shall be divided into paragraphs each of which shall be confined to a distinct issue or major facts of the election petition, and every paragraph shall be numbered consecutively.*

These provisions are unequivocal and unambiguous enough to reveal that all that is required is that the facts in the Petition should be stated clearly and must contain the grounds upon which the Petition is based. Nothing else can be read into these provisions as the Respondents have sought to do.

The burden which the Electoral Act 2022 puts on a Petitioners in terms of his pleadings is that, we repeat, the facts must be clear, material facts pleaded sufficiently and precise and comprehensive enough to elicit the necessary answer from the opponent(s) – See **Mohammed Dele Belgore SAN & 2 Ors. Vs. Abdul Fatah Ahmed & 3 Ors. (2013) 8 NWLR Pt. 1355 60 at 90 SC**. The pleadings must be detailed as to eliminate any element of surprise to the opponent.

With regard to the complaint that the pleadings of the Petitioner are vague, while this Tribunal does not embrace the submissions of Learned Senior Counsels to the Petitioners that it was imperative upon the Respondents to have explored the provisions of paragraphs 17(2) and (3) of the First Schedule to the Electoral Act 2022 to seek further and better particulars and the authority cited in support, the Tribunal finds that the Respondents could not be compelled to avail themselves of that provision, in view of the decision in **PDP Vs. INEC 2012 7NWLR Pt. 1300 538** which is where the law on the matter stands today as cited by 1st Respondent's Counsel. The question may however be asked, in what areas are the pleadings in the Petition vague? Respondents Counsels have not been specific as to areas of the facts in the Petition which are unclear to them or any area found

to be grey or dark or which lack explicitness. While it is the position of the law that an Election Petition Tribunal has the powers to strike out vague and generic paragraphs of a Petition, see **PDP Vs. INEC and 3 Ors 2012 7 NWLR Pt. 1300 538 SC**, however, it is not enough to just assert that the said paragraphs are vague and generic in the regard of which such is alleged must be made crystal clear. The particulars of the vagueness, lack of precision or the indefinite nature of the pleadings and its indistinctness must be grasped and well articulated and enumerated by whoever is complaining. It is not so in this case. Hence, the Respondents themselves have been vague in the above regard.

In this Petition, parties have joined issues to the most optimum and to the tiniest details. How much clearer and distinct can the Respondents Counsels understanding of the pleadings in the Petition, if we may ask? This Tribunal sees no inch of vagueness complained of and we so hold.

On the issue of the earlier paragraphs of the Petition not being able to sustain the grounds upon which the Petition is predicated, but relating to Corrupt Practices, the Petitioner's Counsel has submitted thereon that what is being complained of is the official conduct of the INEC officials in contention, that is, their wrong doing. In no paragraph of the Petition is any sanction or criminal inquiry into the conduct of these officials of INEC mooted by the Petitioners nor any allegation of bribery or any other kindred financial indiscretion made against them. In the opinion of the Tribunal, these are not wrongdoings which amount to corrupt practices and we so hold.

On the non-joinder by the Petitioners of some parties in the Petition, it was submitted by the petitioners that by the provision of Section 133(2) and (3) of the Electoral Act, there was no need for the Petitioners to join as parties officers of INEC (ad hoc or permanent) whose conduct at the election is complained of, as long as INEC has been made a party, as they are deemed to be defending on behalf of their officers. While the Tribunal also observes that the Petitioners

have not in the Petition made specific criminal allegations against them (INEC Officials), but what is complained of is their conduct as collation and returning officers – hence, they need not be joined in view of Section 133(3) Electoral Act, 2022 referred supra.

It was also contended that the Petitioner made no allegation of corrupt practices against any of the Respondents and the said paragraphs 28, 30, 31, 32, 35, 36 and 37 of the petition referred to alleged wrongdoing against the returning and collation officers in excluding the collation of results for Warri South Local Government Area and excluding same in the final result and their failure to conduct supplementary election in areas elections were cancelled/not held before the final declaration of results, citing the case of **Eruofor Vs. Ugbhumiakow 1999 NWLR Pt. 619 460 at 465** where the Court recognized that an allegation can be only of some wrongdoing and thus, it was submitted that the allegation of wrongdoing in the petition cannot be elevated to an allegation of corrupt practice nor a crime being imputed to it. See **APC Vs. Sheriff & Ors. 2023 LPELR 59953 SC.**

In this regard, the question arises whether the Electoral and Returning Officers whom the Petitioners have grouses about their performance of their official duties are necessary parties in this case, as especially the 1st Respondent's Counsel have rigorously submitted in favour of?

The Tribunal has read all the authorities cited by the Learned Senior Counsel to the 1st Respondent. It cannot be overstated that by the provision of Section 133(3) of the Electoral Act 2022, there is no requirement any more for such Electoral officials to be sued as parties in the Election Petition as long as INEC is made a party and are not calling on the INEC Staff to defend crimes committed which in our view are separate and distinct acts of non compliance with the Electoral Act not corrupt practices.

The Petitioners on their side had also in their counter affidavit filed in response to the 2nd Respondents motion to strike out the

earlier paragraphs of the petition, contended that the paragraphs therein contain arguments, opinion and legal conclusions in contravention of Section 115 of the Evidence Act 2011 to which the 2nd Respondents in their Reply on point of Law dated 12/5/2023 submitted it is not enough for the Petitioners to aver to the above, but must show how the said paragraphs of their affidavit offend the said Section 115 of the Evidence Act 2011 being that they are facts received by the deponent which he verily believes. The Tribunal agrees with the Respondents that the Petitioners must do more than assert as they have done in the above regard. They need to show how such paragraphs are argumentative, or opinions etc. This, they have not done. The Tribunal therefore holds that the paragraphs complained of are competent.

Now to the applications filed by the 3rd Respondent, i.e filed on 10/5/2023 contending that paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 of Petitioners Reply to the 3rd Respondent's Reply to Petition and the witnesses statements on oath for witnesses "WSM" and "LGB" filed therewith contain new facts tending to amend, add and expand and rehash the averments in the Petition.

In reply, the Petitioners vide their Petitioner's Counter affidavit to the 3rd Respondents motion filed on 15/4/2022 contended that the 3rd Respondent's application ought to be thrown out sinve Petitioners have only in their Reply to 3rd Respondents Reply to Petition only replied to new issues of facts raised in the 3rd Respondent's Reply.

Legal arguments were canvassed in respect of the motions respectively filed by 2nd and 3rd Respondents respectively dated 28/4/2023 and 10/5/2023.

A combined reading of Learned Counsels to the 2nd and 3rd Respondents' submissions have raised the issue that the paragraphs of the Petitioners Reply to 2nd and 3rd Respondents' Replies to the Petition they were grieved about, amount to new facts being introduced to the petition, citing the provisions of paragraphs 16 of the 1st Schedule to the Electoral Act 2022 which forbids same. The

decision in **PDP & Anor. Vs. INEC & Ors. 2019 LPELR – 48101 CA pages 4 – 43 paragraphs C – C** in the above regard was commended to the Tribunal. It was contended that the Petitioner by repeating the words, “the 3rd Respondent raised new issues of facts.....” is a ploy to introduce new facts. See **APC Vs. PDP & Ors 2015 15 NWLR Pt. 14811 at 80-81.**

It was then contended that the statements on oath of the two witnesses filed with the Petitioners Reply to the 2nd and 3rd Respondents Reply to Petition show vividly the Petitioners intend to put in new facts to amend or add to their petition i.e vide paragraphs 3 to 16 of the said depositions of the said witnesses. Several other authorities were commended to the Tribunal including **ADEPOJU V. AWODUYILEMI (1999) 5 NWLR (PT. 603) 364 AT 383** in the same regard

The Petitioners’ response on this issue was to submit that the Petitioners’ Reply to the 3rd Respondent’s Reply is governed by paragraph 16 of the First Schedule to the Electoral Act 2022 which entitles a Petitioner to file a Reply to a Respondents Reply where the Respondents’ answer to the Petition raises new issues of fact. It was the argument of Learned Senior Counsel to the Petitioners that it was the 3rd Respondent who in their Reply raised fresh issues of fact in paragraphs 34 and 36 of their Reply, that the 1st Petitioner is disqualified from contesting the election because of an alteration of a material part of the certificate presented to INEC and/or presentation of forged certificate by the 1st Petitioner to the 1st Respondent (INEC). Similarly, they raised new issues that the said election in question was characterized by incidence of resistance to the use of BVAS, by pass of BVAS for accreditation which led to over voting in Bowen Ward 6 and most of the wards and polling units in Warri South Local Government, being the reason the returning officer refused to collate the results for Warri South Local Government Area. Other new issues raised by the 3rd Respondent was the fact that only the Electoral Act 2022 governs the Election and not the Guidelines or Manual issued by

INEC (1st Respondent), hence, the Margin of Lead principle would not apply and that over voting was caused by the resistance to use of BVAS, citing the decision in **Dingyadi Vs. Wamako 2008 17 NWLR Pt. 1116 395 at 442 paras E-F** where it was contended that the Petitioners were entitled to file a Reply where the Respondent's Reply to the Petition raised new issues of fact and in that case the Respondents attached certain documents to the Reply which were capable of completely knocking off the very foundation of the Petitioners' claim if not responded to. It was then contended that on the authority of **Ngige Vs. Akunyili 2012 15 NWLR Pt. 1323 345 at 385**, the Tribunal if it agrees that the Petitioners are only responding to the new facts put in by the 3rd Respondent ought to allow the proposed statements on oath of the Petitioners witnesses against the back drop of the Reply.

Resolution of the Issues argued as to the grant or refusal of motions of the 2nd and 3rd Respondent filed on 28/4/2023 and 10/5/2023 respectively above.

Clearly, the contents of both applications bring to focus what a Petitioners' Reply to the Respondent's Reply to a Petition must contain statutorily. Paragraph 16(a) and (h) of the First Schedule to Electoral Act 2022 provides: –

- (1)** If a person in his reply to the election petition raises new issues of facts in defence of his case which the petition has not dealt with, the petitioner shall be entitled to file in the registry, within five days from the receipt of the respondent's reply, a petitioner's reply in answer to the new issues of fact, so that –
 - (a)** the petitioner shall not at this stage be entitled to bring in new facts, grounds or prayers tending to amend or add to the contents of the petition filed by him, and
 - (b)** the petitioner's reply does not run counter to the provisions of paragraph 14(1).

In line with the above provisions, it has been held that the right of a Petitioner to file a Petitioners Reply to a Respondents Reply is not at large and can only be exercised where the scenario envisaged in the said paragraph 16(1)(a) and (h) supra exist i.e. it cannot be used to bring in new facts which a Petitioner ought to have pleaded but omitted to plead . See **Mark Vs. Chukwu Emeka & Ors. 2015 LPELR – 40708 CA** and **APC Vs. PDP & Ors. 2016 LPELR – 24587 SC**. In the case of **Ogboru Vs. Okowa 2020 11 NWLR Pt. 152284 at 113 – 114 paragraph G – E**, the Court most distinctly stated to the effect that Petitioners in their Reply to Respondent’s Reply are not to introduce “new facts outside or inconsistent with their Petition and it must not depart or contradict their Petition” and where it does the Tribunal on an application will be right, as it were, to strike it out.

In **APC Vs. PDP (supra)**, the Supreme Court had stated thus:
"The appellant did not have the leeway to aver new facts which ought to be in the original petition..."

However, it has been held that where a party fails to file a Reply in denial or rebuttal of new facts or issues raised in the Respondent’s Reply the Petitioner would have been deemed to have admitted the new issues raised by the Respondent. See **Michael Vs. Yuosuo 2004 15 NWLR Pt. 89596**.

Thus, it becomes in the opinion of this Tribunal a delicate dance and balance for a Petitioner to engage in where he finds it necessary to respond to new facts which have been raised in the Respondent’s Reply to the Petition.

In the present Petition, vide paras 21(1) to (xv) the Petitioner had pleaded certain paragraphs of the Guidelines and Manual which contain the duties of the Senatorial District Collation/Returning officer on the conduct of a Senatorial election and at paragraph 22 of the said petition averring that the said INEC officials did not comply with the said Guidelines and Manuals. Now, it was the 2nd and 3rd Respondents in their respective Replies to the Petition that introduced

the issue of the incidence of willful obstruction/resistance to the distribution of electoral material and or resistance to the use of BVAS which led to recording of zero votes for all the polling units in Warri South Local Government Area which no doubt in our view was a new element introduced by the said Respondents as their Defence to paragraphs 21 and 22 of the Petition. No doubt these were new issues introduced by the 2nd and 3rd Respondents for the first time which could not have been envisaged by the Petitioner when the Petition was being filed. These pieces of new facts above introduced by the 2nd and 3rd Respondents go beyond, in the mind of the Tribunal, just joining issues with the Petitioners. Hence, they needed to be rebutted. The Tribunal reiterates the above facts was a defence put up by 2nd and 3rd Respondents as to why the margin of lead principle would not apply, which needed, we say again, to be rebutted.

The issue of the qualification of the 1st Petitioner to contest the election in question was not an issue of fact in the Petition and which again came up for the first time in the 2nd and 3rd Respondents Replies. Other issues brought up by the Respondents are issues of over voting, resisting accreditation, etc. All the paragraphs the 2nd and 3rd Respondent seeks the Tribunal to strike out the Petitioner's Replies to their Replies to the Petition are facts responding to facts raised for the first time in the said Respondents Replies to the Petition which form the crux of the Defence of the said Respondents to the Petition. The 2nd and 3rd Respondents by introducing these new facts opened the gates for the Petitioner to respond to same. They, the Respondent's having brought them up for the first time, we reiterate, not responding to same would have amounted in law to an acquiescence of the truth of the said facts by the Petitioners. Therefore, the Tribunal holds that the Paragraphs in the Petitioners' Replies under consideration, and the Replies themselves are competent.

However, on the authority of **APC Vs. Marafa (2020) 6 NWLR Pt. 17210; Hon. Kawuwa Shehu Kamina & Anor Vs. Hon. Garuwa Adamu (2019) LPELR 48404 (CA); Ndah & Anr. Vs. INEC & Ors. (2019) LPELR 48920 (CA), PDP V. Okuwo 2019 LPELR 48987 CA at Pgs 11-28**, any witness statement on oath not filed with the Petition will be discountenanced being a nullity, in view of paragraph 4(5)(a) (b)&(c) of the First Schedule to the Electoral Act. Hence, the said statements of oath of “WSM” and “LGB” are nullities.

The Tribunal resolves the said issues in favour of the Petitioners and both applications just considered are hereby dismissed, save the order nullifying the said additional witness statements on oath.

Learned Senior Counsel to the Petitioners had severally submitted on the fact that the font and spacing required by the Guidelines and Practice Directions prescribed for the preparation of parties processes were not followed. The Tribunal invoke the paragraph 53(1) of the First Schedule to the Electoral Act and find them as mere irregularities which do not vitiate any of the processes or proceedings.

Having disposed of all the applications argued, the Tribunal returns to the facts in this Petition. A breakdown of the scores of the candidates who contested the election on the platform of their parties including the Petitioners and the 2nd and 3rd Respondents is pleaded at pages 8 – 9 of the Petition. It was upon the above basis that a final declaration of result was issued by the 1st Respondent.

The main grouse of the Petitioners from their pleadings and evidence adduced at trial, can be narrowed down to the complaint against the conduct of the 1st Respondent and its officials during the said election in Warri South Local Government Area of Delta State, one of the eight Local Government areas that constitute Delta South Senatorial District. From the case of the Petitioners, Warri South Local Government Area consists of twelve (12) wards, two (2) out of which are: Pessu (ward 7) and Bowen (ward 6).

According to the Petitioners, apart from Pessu ward 7 and a few other polling units, elections were peacefully held in 11 of the said 12 wards of Warri South Local Government Areas and the results of the Local Government Area election were entered in the polling unit Result Sheets Form EC8A(1) by the Presiding Officers manning the various polling units, which results were immediately uploaded into the INEC IReV Portal by those Presiding Officers in-charge of the polling units, in line with the Electoral Act 2022 and other enabling Directions of INEC. At the trial, the certified true copies of Form EC8A (1) which are polling unit results for Warri South Local Government Area Senatorial Election of 25/2/2023 for wards 1, 2, 3, 4, 5, 6, 8, 9, 10, 11 and 12 with the Certificates of Certification were admitted as Exhibits 13 - 24 which were identified in evidence by PW1, one Ama Ibam Agu, a staff of INEC (1st Respondent) who produced them on subpoena to produce same and which forms had been downloaded and printed out from the 1st Respondent's IREV portal and which were put in evidence by PW2, one Godspower Etih Oritsegbugbemi, an aide to the 1st Petitioner and Exhibits 13 - 24 and other exhibits were identified by this witness.

It is PW2's testimony that it was in their presence during the process of collation of the said results at the collation center that the Warri South Local Government Area Collation Officer received a phone call and he went outside to pick the call and upon his return, he drew a line across the result which was already collated from Ward 6 (Bowen), saying that he was instructed to cancel the result from that ward which had already been entered in Form EC8C(1) and all attempts by the PW2's party to correct the wrong decision of the said collation officer failed as he said he was acting on orders from above.

Through PW2, the Certified True Copies of Voters Registers for wards 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12 and the receipt for certification for same were put in evidence as Exhibits 25 – 35. PW2 having identified all the said documents, also put in evidence Exhibits 1 and 2 being documents of identification of his person, i.e a Letter of

Appointment and PDP Party membership card. Exhibits 36 – 37 are the total number of registered voters and persons who collected permanent voters cards and certification of same Exhibits 38 – 49 being INEC Forms EC8B(I) for the Warri South Local Government Area, for wards 1, 2, 3, 4, 5, 6, 8, 9, 10, 11 and 12, were also put in evidence.

Also put in evidence was INEC Forms EC8C(I), EC8D(I), EC8E(I) and the receipts for certification. Exhibits 50-53 were admitted as part of the Petitioners case. The Agent's copy of Form EC8C(I) being the copy of the collated result for the said Warri South Local Government Area election held for the Presidential election was Exhibit 54 while the INEC's Manual for Election Officials, 2023 and the receipt for certification were Exhibits 55 and 56. This witness i.e PW2 identified all the above documents as those employed in conduct of the election at hand.

Under cross-examination, PW2 gave evidence that he voted at the election upon due accreditation by BVAS Machines and Voters' Register and that polling units results were transmitted to the INEC IREV Portal after votes were duly cast and counted and results announced at the polling units and in the wards in the said Local Government which information he received from personally going round the units and wards as it is his duty to monitor the election.

PW3, Chief Takeme also testified that he voted on the day of the election after accreditation by BVAS and Voters Register and put in evidence Exhibits 59 - 70 being the Certified True Copy of Forms EC8A(I) - all polling unit results for Wards 1, 2, 3, 4, 5, 6, 8, 9, 10, 11 and 12 for Warri South Local Government Areas and the receipt for their certification and 17 bundles of Certified True Copies of Voters Register and receipt of certification of same for Ward 06 Bowen which are Exhibits 71 – 88. PW3's party membership card and PVC are Exhibits 89 and 90 respectively. PW3 identified all the documents. He corroborated the evidence of PW2 to the extent that the Delta South INEC Collation Official upon receiving a phone call during collation of

results drew a line across the already recorded results in the collation sheet form EC8C(I) for Bowen Ward 6.

He claimed there was no dispute at Warri South Local Government Collation Center and no incidence of violence, and that the entry of zero votes for all parties on Form EC8D(1) by the 1st Respondent's official was an afterthought, when the result had already been uploaded to IREV Portal.

The totality of the evidence of the Petitioners is that the election took place in Warri South Local Government Area in respect of the Delta South Senatorial seat and that there was no disturbance which could have required the BVAS to be bypassed or election disrupted. The petitioners' evidence is that the result of the whole Warri South LGA was not collated, but cancelled by the collation officer.

The Petitioners averred at paragraph 34 of their Petition and in their witnesses' statement on oath that the senatorial election under consideration in Warri South Local Government was held simultaneously with the Presidential and House of Representatives elections conducted by the 1st Respondent on 25/2/2023, with one process of accreditation for the three elections, and voting, sorting and counting of ballot papers and announcements of results at polling units in Warri South Local Government Area in all the three elections being done contemporaneously, at the same venue and time and results were announced in all three elections i.e. Presidential, Senatorial and House of Representatives.

The 1st & 2nd Respondents did not call any witness in support of their pleadings, but only put in evidence from the bar by tendering Exhibits 91(1) – (29) which represent 29 copies of INEC Form EC40G, Report of Delta South Senatorial District Election issued by the Returning Officer dated 28/2/2023 which is an Extract from Police Crime Diary of the Nigeria Police Force, Oleh Police Division, Delta State dated 3/3/2023, marked as Exhibit 93. Exhibit 92 is a report of the Senatorial Collation/Returning Officer for Delta South Senatorial Constituency.

In proof of the 2nd Respondent's pleadings in the 2nd Respondent's Reply to the Petition, the 2nd Respondent called one witness, i.e. RW1, Kelvin Oyherekeno, a Local Government Area Collation agent for Isoko South Local Government Area. This witness led evidence in line with the 2nd Respondents pleadings. He is the Delta South Senatorial District Collation Agent for the 3rd Respondent (APC). He stated that the results for Warri South Local Government Area at the said election were not supported by accreditation, giving evidence of resistance to BVAS in the polling units, which led to zero vote being entered for all the parties.

Under cross-examination, the witness testified that he voted in his unit after accreditation with BVAS and Voters Register. This witness, RW1, was not present at the polling units in Warri South Local Government Area. It is his pleading and evidence that the use of BVAS machines for accreditation was resisted substantially in all the polling units in Bowen ward 06 and entirely in Obodo 1, Omadino ward 1 Unit II, Okere ward 8 Unit 13 and Okumagba 1 ward 11, unit 18 in Warri South Local Government Area. He stated that it was because of this, in accordance with the 1st Respondent's Manual for Election, that zero vote were credited to the political parties in the affected wards. This witness contended that the 2nd Respondent was lawfully returned as duly elected, being the candidate who scored the majority of the votes cast in the election of 25/2/2023 in the Delta South Senatorial District election and was rightly and validly declared the winner.

It was stated by RW1 that the BVAS Report revealed that the number of accredited voters in Bowen ward 6 were far less than the total number of persons who voted i.e. accreditation was 813 persons, while votes for PDP was 6,653. This was also so in the earlier wards and polling units enumerated where votes cast there were not supported by accreditation in the BVAS. Hence, the Warri South Collation Officer acted in accordance with the provisions of the Electoral Act, 2022 when he cancelled the elections in Warri South

Local Government Area after there were protests from agents of APC that the results in Warri South were a product of resistance to or and bypass of BVAS for accreditation. RW1 identified Exhibits 91(1) - (29) as Form EC40G. Exhibits 91(1) - (29) are forms in respect of polling units cancelled results because of bypass of BVAS and obstruction to BVAS, which made zero vote to be recorded for all parties by the Returning Officer. RW1 also identified Exhibits 92 and 93 being the Extract of Crime Diary and Senatorial Returning Officers report.

RW1 under further cross-examination agreed that on Exhibit 13, i.e Form EC8A(I) for ward 1 and Exhibit 59 i.e Certified True Copy of the same Form EC8A(I) for ward 1; that in both documents, PDP has the same score. He equally said that in some polling units in Exhibit 13, the Presiding Officer uploaded no results. He confirmed that Exhibit 54 is the collated result for the Presidential Election held on the same day simultaneously with the Delta South Senatorial District election and he agrees it is only the Presiding Officer who has access to IREV Portal for uploading such results.

All of the above represent the totality of the evidence before the Tribunal in this case and applications already determined by the Tribunal.

The Issues for determination settled at the Pre-hearing session will in due course be considered together with sub-issues, which learned Senior Counsels to the Petitioners formulated in the Petitioners. Those formulated at the Pre-hearing session are as follows: -

- 1. Whether on the state of the pleadings and the totality of evidence led in support of same, the petition is competent and this Tribunal is vested with the jurisdiction to hear the petition and grant the reliefs sought by the Petitioners as constituted?*
- 2. Whether the election into the Senate for the Delta South Senatorial District held on 25/2/2023, the subject matter in dispute, was in substantial compliance with the provisions of the*

Electoral Act, particularly in relation to the facts pleaded by all the parties in every regard?

3. *Who amongst the 1st Petitioner or 2nd Respondent scored the majority of lawful votes cast and satisfied the requirement of the Constitution of the Federal Republic of Nigeria at the said election and is entitled to have been declared and returned as the winner of the said election of 25/2/2023?*

The Tribunal will state the legal arguments of the parties in the above regard. The argument of the 1st Respondent that the non-joinder of parties whom the Petitioners alleged committed crimes; i.e these persons having not been made Respondents in the Petition, the Petition is incompetent.

Resolution of Issue 1

The Tribunal adopts in its entirety its consideration, findings and conclusions in respect of the arguments of the 1st, 2nd and 3rd Respondents in the Applications/Objections on the competence of the Petition, filed with their respective Replies to the Petition. The Tribunal reiterates for all the reasons earlier given that the Petition is competent and the Tribunal has the jurisdiction to entertain same. This Tribunal adopts in the above regard its consideration of this issue which was part of the grouses in the motion on notice of 19/7/2023. The Tribunal equally adopts its findings and conclusions in the same regard disagreeing with the 1st Respondent's position that the non-joinder in question affects the competence of the Petition. This Petition, we reiterate, is competent. Issue 1 is thus resolved in favour of the Petitioners.

Legal Arguments of the Parties on issues 2 and 3

2nd Respondent contended that the Principle of margin of lead is provided for in the Manual for Election Officers and hence the ground of non compliance cannot be sustained as such ground must relate to the Electoral Act 2022 not the Manual for Election Officers 2023. The decisions **in OGBORU V OKOWA (2016)11 NWLR (PT. 1522) 84 at 141** and **EMERHOR V. OKOUA (2016) 11 NWLR (PT. 15221)**

at 30 where the Supreme Court in that regard citing the provision of Section 134(1)(b) of the Electoral Act was commended to the Tribunal.

The minds of the 1st and 2nd Respondents seem to be in sync in their written addresses of 19/7/2023 and 18/7/2023 respectively as both submitted that it behooves on the Petitioners in proving non-compliance with the Electoral Act as a ground upon which the Petition is founded to cross the hurdle of proving that there was lawful accreditation in the affected polling units in the affected wards before votes were cast. Also that the refusal of the Collation Officer of the 1st Respondent to collate the votes and enter the results of the parties in the result sheets and the eventual cancellation of the result of Bowen ward 6 of Warri South Local Government Area by the returning officer after a phone call and failure to apply the margin of lead principle which was applicable and not refraining from declaring the results until re-run election was conducted in the affected polling units were all unlawful.

Learned Senior Counsel to the 1st Respondent had submitted that the burden of proof lies on the Petitioner in the above regard. The issue of Accreditation was given its pride of place by Learned Senior Counsels to the 1st, 2nd, and 3rd Respondents, as a combined reading of their submissions citing the provisions of Section 47(1) and Section 64(4)(a) and (b) of the Electoral Act, 2022 together with paragraph 14(a) and (b), 18(a), 19(a)(b) and (d), 20, 42, 43, 48(a), 50 iv and v, 69, 70 and 100 of the Manual on Regulation and Guidelines for Conduct of Elections 2022 on the procedure of accreditation which a person intending to vote must satisfy. Also a Collation or Returning Officer must before collating and announcing results must first verify and confirm such results in the regard of number of votes stated on the collated result being correct and consistent with the number of votes recorded and transmitted directly from the polling unit under Section 47(2) and 60(4) respectively of the Electoral Act 2022.

It was submitted that the terms “verification and verify” had been judicially interpreted to mean “an act of checking that thing that it is true by lawful examination, investigation” and “to prove to be true, to confirm or establish the truth or truthfulness, to authenticate”, in the case of **UGWU V. ARAMINE (2007)12 NWLR (pt. 1048) 365.**

It was submitted that in this case, the Petitioners did not plead accreditation of voters whose votes they credited to themselves i.e. using of the BVAS machines and the ticking of the voters register, and that the collation officer followed the procedure laid down in Section 64(6) of the Electoral Act, 2022 to verify the results to be collated in view of the dispute which arose i.e. by obtaining accreditation data directly from the technological device for accreditation and the data of accreditation recorded and transmitted directly from each polling unit where the election is disputed under Section 47(2) and 60(4) of the Act. It was submitted that it was upon the observance of the above verification and Form EC40G that the 1st Respondent’s Returning Officer entered zero votes for all the parties in Warri South Local Government Area.

The decision in **LAWAN MOHAMED NEKA V. JOSEPH ALBASU Kinni & ORS. (2015) LPELR-26032 (CA)** on the issue that without accreditation, no election can lawfully proceed and it goes to the root of election validity was cited. Several other authorities were cited in the same regard. It was submitted therefore that where there is voters’ resistance to use of BVAS as in this case, the Collation Officer for the Local Government Area and his Senatorial District counterpart will fill Form EC40G and in such a situation zero votes shall be credited to the parties and the margin of lead principle shall not apply.

Now on the Exhibits put in evidence by the Petitioners, Learned Senior Counsels to the Respondents in their respective addresses raised in essence the following objections in each regard of categories of Exhibits to wit: - (1) Exhibit 13 – 23 purported polling unit results

for affected units were faint and blurred and showed “no result” for the Senate elections on them. Learned Senior Counsel to the 2nd Respondent further submitted that the said Exhibits together with Exhibit 1 – 88 were not certified true copies being public documents and there is no evidence that fees for certification were paid for them except Form EC8E(1) with Exhibit 53 as proof of certification of it and Exhibit 35, proof of payment for certification of voters register and not for all the documents. Neither were all the Petitioners’ documents tendered by their makers and the documents were dumped on the Tribunal. The makers of all the documents which were tendered including exhibits 59 – 69, 71 – 87 and - 88 were not called as witnesses and Petitioners witnesses had no contact with all the polling unit results of which most of the documents are in respect of. The decision in **TABIK INVESTMENT LTD. V. GTB (2011) LPELR – 3131 SC, UDOM V. UMANA (NO.1) (2016) 12 NWLR (Pt. 1526) 179 at 234 – 235, OSIGWELEM V. INEC (2010) LPELR – 4657 CA, ABUBAKAR VS. INEC (2020) 12 NWLR (PT. 1737)** amongst others were cited, urging the Tribunal to expunge the said documents.

On Exhibit 57, it was brought to the Tribunal’s attention that the BVAS accreditation report of voters for Bowen ward 6 captures that 813 voters were accredited, but 6,653 voters were recorded for PDP which shows the fraud perpetrated in Bowen ward and that Exhibits 91(1) – (29) is conclusive proof that election was not held or was cancelled due to willful obstruction or resistance to the distribution of election material and resistance to use of BVAS in the affected polling units and Exhibits 92 and 93 reveal further proof of cancellation of results. The 1st Respondent’s officers it was submitted were right then to credit the parties with zero votes in all affected wards of Warri South Local Government Areas. It was contended that the evidence of the only witness for the Respondents was not challenged that the votes in Bown Ward 06 Unit 11 of Obodo/Omudeno ward 1 Unit 23, of ward 8 Okere Unit 18, of Okumagba ward of Warri South Local

Government were not supported by accreditation figure, hence his evidence is deemed unchallenged and must be accepted.

It was contended that those who signed the polling unit results or INEC who made them were not called to tender the documents hence PW2 and PW3 gave hearsay evidence. The Petitioners thus did not give evidence which could activate the margin of lead principle as provided for in the Manual for Election Officers 2023.

While 3rd Respondents Counsel agreed it was the 3rd Respondents who introduced the issue of over voting in the Petition, the Petitioners cannot be availed by Section 51(2) of the Electoral Act 2022, having not pleaded it in respect of accredited voters in Bowen Ward 6 and the entire Warri South Local Government Area, as Petitioner did not lead evidence of BVAS or Voters register to establish accreditation as being a legislative seat of the Federal Constituency is determined by simple majority citing **Uzamere Vs. Urho &hide 2021 All FWLR Pt. 558 839 at 875**. It was also contended that the 1st Respondent have pleaded and led evidence that it was the willful obstruction or resistance to the distribution of electoral materials and resistance to BVAS that caused the cancellation of the polling units in 11 wards of the Warri South Local Government Area, hence the 1st Respondent officials are on firm footing in apportioning zero votes to the parties and the application of margin of lead does not apply.

With regard to issue 3, the 1st Respondent contended that Exhibits 51 which are CTCs of Forms EC8D(I) and Exhibit 62 which is Form EC8E(I) which they put in evidence represent the total lawful and valid votes scored by the parties for the Delta South Senatorial District election of 25/2/2023 with PDP scoring 47,656 and APC 49,955 and the above results enjoy the presumption of regularity which the Petitioners have not rebutted by evidence and the Petitioners have not discharged the burden put on them in law, citing **Nyesom Vs, Peterside 2016 7 NWLR Pt. 1572 452 at 532-533**.

It was also the contention of the 1st and 2nd Respondents that there is a presumption in law that the result declared were regular

and the election in question was conducted in substantial compliance with the principle of the Act and any non compliance did not affect the result of the election, citing **PDP Vs. INEC 2014 4 LPELR 23808 SC**. Also, the decision in **Chabo & Anor Vs. Achir & Ors. 2019 LPELR – 48757 (CA)** was relied heavily upon by 3rd Respondents.

It was equally contended that even if the margin of lead principle were to apply, the Petitioners had failed to relate their documents to this principle of margin of lead, as although documents speak for themselves, the party seeking to rely on same must adduce credible oral evidence speaking to the documents by one who participated in making it and demonstrate the documents in special areas and not dump same, citing **Ladiya Vs, Ajimbi (2016) LPELR 40658 (SC) Pp. 48 - 41** and **Maku Vs. Al Makura (2016) 5 NWLR (Pt. 1805) 201 at page 228** to the effect that it is not the duty of the Court to sort out documents and relate same. It was submitted that even if the INEC officials whose conduct is being complained applied the margin of lead principle, but Petitioners have not led evidence of the adverse factors that were created, on the authority of **OYETOLA & ORS. V. INEC & ORS. SC/CV/508/2013 at 915/2013** only the BVAS machine is credible.

It was contended that the Petitioners having not established the validity of the votes counted in Bowen ward 6 which accreditation of 813 voters could not have produced the 6,652 the Petitioners are claiming they scored there, the Tribunal should accept the result declared by the 1st Respondent i.e that the 2nd Respondent scored 49,955 votes and 1st Petitioner scored 47,656 votes with a margin of 2,299. It was submitted that even if the 813 accredited votes for Bowen Ward 6 are put in the 1st Petitioner column and other units where over voting occurred were excluded, the Petitioners' score will be 51,205 and 2nd and 3rd Respondents will score 52,898 which will leave a margin in favour of the 2nd and 3rd Respondents of 1693 votes.

Learned Senior Counsel to the Petitioners submitted that the Petitioners recognize that in law the burden is on them to prove that election took place in Warri South Local Government Area during the Delta State Senatorial District election and to prove their entitlement to the declaratory reliefs and alternative reliefs for the conduct of supplement election in the unlikely event of the Tribunal finding that the result in the Warri South Local Government Area was rightly cancelled, proof which is on the strength of their case and not weakness of the Respondents' case and on the preponderance of evidence according to Section 134 Evidence Act, 2011. See **Uzodinma Vs. Ihedioha (2020) 5 NWLR (Pt. 1718) 529 at 578.**

The Petitioners however contended that it is the Respondents who must discharge the said burden of proof as they will fail if no evidence of irregularities and non-compliance is not given citing section 131, 132 and 133 of the Evidence Act, 2011 in line with the decision in **OYETOLA & ANOR. V. INEC & ORS.** It was submitted that on proof of non accreditation and over voting, the BVAS machines for each polling unit are vital so as to compare the accredited voters therein with the accredited voters on Form EC8A to verify whether there was over voting. Exhibit 57 was put in issue as a CTC of BVAS Report printed out from INEC backend server which is of the same nature rejected in **Oyetola's** case not being the BVAS machine and which BVAS machine the PW2 had led evidence most of the polling officers had no credit to sent result from BVAS to INEC server and some do not know how to operate the machine hence a lot of zero voters were recorded by the polling officers. Petitioners have taken the position that it is the Respondents who carry the burden to prove non compliance as they are so alleging.

It was submitted that the Respondents have not led credible evidence in proof of non accreditation or over voting in any polling unit in Warri South Local Government Area, so the exclusion of the Warri South Local Government Area election results therein have not been justified. It was the Petitioners further position that no allegation

of violence, thumb printing of ballots or forgery in the same Local Government Area has been proved as alleged by the Respondents and Exhibit 93 which is a CTC of an Extract of Police Report from the Divisional Police in Isoko South Local Government Area is of no probative value as no one was called to give evidence and answer questions thereon under cross examination. More over the contents of Exhibit 92 do not throw any light as to what transpired in various polling units in Warri South Local Government Area, as from the evidence of RW1 in Exhibit 93 was procured not in a Divisional Police Station Warri South Local Government, but in Isoko Local Government Police formation. The Respondents it was contended have failed to establish non-compliance and over voting in the election.

On issue 3 as to who scored the majority of the votes cast in the election under consideration, it was submitted that the Petitioners have established that the election in question took place without hitches in majority of the polling units in Warri South Local Government Area into the said Senatorial Constituency and the Respondents failed to prove the various allegations of non-compliance and over voting. It was submitted that there is no pleading or evidence before the Tribunal that there was any dispute during the collation of the Warri South Local Government Area results nor pleading or evidence that the Collation or Returning Officer examined the record of accreditation in the BVAS machines or electronically transmitted results from the various levels of all collation in Warri South Local Government Area before cancelling the result from Bowen Ward 6 or the Returning Officer refusing to collate the results from Warri South Local Government Area which the PW2 an PW3 testified under cross examination, though no facts pleaded by the 2nd Respondent. It was reiterated that the collation officer has no right to cancel results under Section 64(6) of the Electoral Act and the case of **Ikpeazu Otti (2016) 8 NWLR (Pt. 1873) Pg. 38 at 84.**

It was also observed that out of the 350 polling units in the Warri South Local Government Area which the Petitioners' evidence

has revealed exist, only 29 Forms EC4OG were tendered in Exhibit 91(1) – (29), which is an insignificant number, drawing the conclusion that there was no resistance to distribution of electoral materials and bypass of BVAS machines in over 320 polling units in Warri South Local Government Area, hence Exhibits 91(1) to (29), it is doubtful were made in line with the provision of Section 43 of the Electoral Act 2022. The provision of paragraph 46(4) of First Schedule to the Electoral Act 2022 was commended to the Tribunal with regard to the said documents of the Petitioners.

Resolution of Issues 2 and 3

The Tribunal will consider Issues 2 and 3 together, as they both deal with the proof of the grounds upon which the petition is premised vis-à-vis the reliefs being sought.

The two grounds upon which this Petition is founded as disclosed in paragraph 18(a) and (b) of the Petition are –

- (a) the 2nd Respondent was not duly elected by majority of lawful votes cast at the election and
- (b) The election of the 2nd Respondent was invalid by reason of Non compliance with the provisions of the Electoral Act 2022

The above grounds are recognizable as part of the grounds upon which an election may be questioned under Section 134(1)(b) and (c) of the Electoral Act, 2022.

A convenient approach for the Tribunal to adopt is to determine whether the evidence adduced by the Petitioners in establishing the facts in their pleadings match up in sustaining the grounds upon which the Petition is premised and the reliefs being sought. The best evidence required in proof that an election did take place is to tender in evidence all the relevant INEC forms and documents employed in the conduct of the election. In this case the Petitioners put in evidence the following documents:-

- (1) Exhibit 13 – 24 being Forms EC8A(I), i.e the polling units results for Warri South Local Government Area Senatorial Election

- downloaded from INEC IReV portal for wards 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12 and proof of certification of same;
- (2) CTC of voters Registers for the above wards 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12 in Warri South Local Government Area with receipt for Certification of same – i.e Exhibits 25 – 35;
 - (3) CTC of Total number of Registered voters and those who collected PVCS with certificate of certification – i.e Exhibits 36 – 38;
 - (4) INEC Form EC8B(I) for Warri South Local Government Area Wards 1, 2, 3, 4, 5, 6, 8, 9, 10, 11 and 12 being Exhibits 39 – 49;
 - (5) INEC Form EC8C(I), EC8D(I), EC8E(I) and the receipt for their certification all for Warri South Local Government Area, marked as Exhibits 50 – 53;
 - (6) Agent copy of Collated Result at the Local Government level, i.e Form EC8C(I) in Warri South Local Government Area in respect of the Presidential Election conducted the same day and time as the said Senatorial election, as Exhibit 54;
 - (7) CTC of Forms EC8A(I) for the said wards 1, 2, 3, 4, 5, 6, 8, 9, 10, 11 and 12, as Exhibits 55 – 70; and
 - (8) 17 bundles of voters registers and receipt for certification of same marked as Exhibits 71 – 88.

All of the above documents according to the Petitioners represent the documents employed in the conduct of the election at every level i.e polling units, till the declaration of result in the Senatorial Election for the Delta South Senatorial District. The Voters registers for Warri South Local Government Area is also a key document with respect to the accreditation process. See **Nwobasi Vs. Ogbaa & Ors. 2015 LPELR 40669 CA.**

Voters Registers for Bowen Ward 06 are Exhibits 71 – 88. The evidence of PW2 and PW3 is that each of them was accredited with BVAS Machines and Voters Register in their wards before they voted on the day of election. These witnesses gave un-impeached evidence

of their accreditation and that such accreditation took place almost in all of Warri South Local Government Area under peaceful circumstances. Certain facts and their implication need to be brought to the fore at this stage with regard to the documents put in evidence by the Petitioners.

1. Exhibits 13 - 88 came from custody of INEC via PW1 an INEC Official who produced them on subpoena.
2. Exhibits 13 – 23 (Forms EC8A(1) being polling unit results uploaded to and transmitted into INEC IReV by polling unit officers whom evidence even RW1 have shown were the only ones with the pass code to so transmitted the results into the IReV.
3. The polling units results Exhibit 13 – 23 enjoy the presumption of regularity in law. See the case of **Emmanuel Vs. Umana & Ors. (2016) LPELR – 40037 (SC), Nyesom Vs. Peterside & Ors. (2016) LPELR 40036 (SC)**.
4. Exhibits 13 – 23 and Exhibit 55 – 70 are the same Forms EC8A(1) polling unit results in respect of the said units in Warri South Local Government Area.
5. Both Exhibits 13 - 23 and Exhibit 55 - 70 show written in ball pen “No Results” which are not electronically written. A look at them reveal as the only Respondents witness observed most of the entries legible therein show the same results declared for PDP in the units in Exhibits 13 – 23 which were consistent with the figures in Exhibits 55 – 70.
6. The Respondents have not contested that Exhibits 13 – 23 and Exhibits 55 - 69 are not INEC Results.

Having said that, there exists a twist in this Petition in that, it is the Respondents, especially the 1st respondent, that are alleging that no lawful accreditation took place before votes were cast in this election, while the Petitioner is saying there was accreditation and lawful election. (underlines ours) Usually in Election Petition matters,

it is the Petitioners who usually cry foul that there was no accreditation and bear the burden of proof.

The importance of accreditation in an election cannot be over emphasized. See **Martins & Anor. Vs. Nicholas & Ors. (2015) LPELR – 52102 (CA), Ajadi Vs. Ajibola (2004) 16 NWLR (Pt. 8981) at 182 – 183.**

The question now thus arises to wit; “On whom then does the onus lie of proving no accreditation in this Petition, given that it is the Respondents that are shouting, as it were, from the high heavens that there was no lawful accreditation of voters before votes were cast in the Warri South Local Government Area in respect of”.

In the case of **Martins & Anor. Vs. Nicholas & Ors. (2015) LPELR – 52102 (CA)**, the court Per Elechi JCA at pages 13-14 paragraph F-A had the following to say on this issue:

“The onus of proving that there was no accreditation of voters is on the party complaining”

Certain holdings of their lordships in **Martin’s case (supra)** do shed more light on the understanding of how the burden of proof of no accreditation is discharged. The court held that –

“... I do not seem to agree with the Appellant in their allegation that there was no accreditation. First is that there was elections conducted in the polling units and results declared in the units alleged. No voters have come up to complain that he voted with not being accredited. What is of note also is that the Appellant has not shown the number of votes attracted by the alleged non accreditation or improper accreditation.....”

The burden of proof of accreditation thus in this instant Petition unequivocally is on the Respondents, especially 1st Respondent whom, we repeat was the ones who conducted the elections, but its saying there was no accreditation. Unfortunately, the Respondents in this

Petition it would appear did not avert their minds to the fact that the burden of proof of no accreditation rests on them.

The learned senior counsels to the Respondents individually set out in their respective final addresses on behalf of their clients the relevant laws and Regulations in the Electoral Act, and Manual for Election Officers and Regulation and Guidelines for Conduct of Elections 2022 on all the various steps in accrediting a voter before a vote is cast. Several authorities were cited on the essence of accreditation before a vote cast is deemed lawful. But not an iota of these steps were pleaded in any of the Replies of the 1st, 2nd and 3rd Respondents to the Petition. Addresses of Counsels however beautiful can never become evidence or take it place. See **OKOYE VS TOBECHUKWU (2016) LPELR – 4150 (CA), NWANNO SIKE & ANOR. VS. UDENZE & ANOR (2016) LPELR 40505 (CA).**

The case of **Oyetola Vs. Adeleke** at the hierarchy of the Court of Appeal set out most explicitly the evidence required to prove non accreditation or improper accreditation in relation to the several stages a voter must pass through before it can be said to have cast a lawful vote. Section 47(1) and (2) and 5(2) of the Electoral Act 2022, Regulation 14, 18, 19b (i-iv), (e)(i) – (iii) and 48 (a) of the INEC Regulations and Guidelines for the conduct of Elections 2022 were referred to in the above regard.

In this Petition, it must be stressed that none of the procedure set forth in all the above provisions as to steps to be taken in proof of accreditation, we repeat, were pleaded by the Respondents in their pleadings as having not been followed in the said election to buttress their position of no accreditation as the reason why INEC Polling Unit results, Exhibits 13 – 24 and Exhibits 55 – 70 produced by INEC should be jettisoned as votes cast and results collated therefrom are results and votes without accreditation.

In line with the position in *martin's* case, no witness came before the tribunal from the respondents' side to say he/she was never accredited. It is also ironic that RW1, the only witness for the 2nd

Respondent who was the only Respondent who called a witness under cross Examination admitted that he voted after accreditation on the day of the Election. The Tribunal cannot but ask why a witness for the Respondents who are saying there was no accreditation should be the one who testified that he was accredited. This issue was paramount in **Martin's** case where the court observed that no witness of the parties stating there was no accreditation came to court to say he was not accredited.

It is further curious that this only witness for the Respondent (RW1) did not even vote in Warri South Local Government Area which is under contention in relation to the conduct of elections into the said Senatorial seat. The Tribunal also cannot phantom the premise under which this witness could have been the right party to identify the Exhibits put in evidence by all the Respondents in relation to the Election in question when there was no synergy between him and the exhibits. He never executed or signed any of them. He is not a polling unit agent, so cannot give evidence as to the alleged bypass of BVAS and resistance to the use of electoral materials, which can only occur at the polling unit.

The RW1 however under Cross Examination identified exhibit 13 and 59 as the INEC IReV Printout of polling unit results and identified some parts of Exhibits 13 and 59 as containing consistent entries as to votes PDP scored on the day of the election. Much more revealing is that under cross examination by Senior Counsel to the Petitioners this witness stated that: "*the process of accreditation and voting for Presidential, Senatorial and House of Representative occurred simultaneously*". The Respondents seemed to put all the burden on the Petitioners to prove accreditation which would have been the lawful thing to do if it was the Petitioners who were taking the position of no accreditation of voters in this Petition, but it is the Respondents saying no accreditation has lawfully occurred.

It must be stressed that the documents the Petitioners put before the Tribunal are CTCs of INEC (1st Respondent's) documents

and were produced by a staff of INEC on subpoena, thus any doubt as to them coming from proper custody or who the maker does not arise. The Petitioners also called two witnesses to buttress their assertion that elections were actually held peacefully and the two witnesses, we repeat, led evidence they were accredited and they identified the documents (Exhibits 13 – 18) and they were accredited with BVAS and Voters Register.

The pleadings of the Respondents were agog with conflicting and diametrically different state of affairs, which they claim plagued the said election and justified why officials of the 1st Respondents took the decision, should we say “to cancel” or “to enter zero” votes in respect of the said Warri South Local Government election.

Paragraph 7, 9, 11 of the 1st Respondent’s Reply to the petition filed on 6/4/2023 contains the following averments –

7. The Respondent denies paragraph 26 of the petition and avers that in all the polling units of the wards in Warri South Local Government, there was willful obstruction/resistance to the distribution of electoral materials and/or resistance to the use of the BVAS. All the polling units were credited with zero votes during collation. The 1st Respondent hereby pleads and shall rely on reports, form EC40 series including but not limited to Forms EC40G(I) and EC40G(II) and Form EC25 series.
9. The Respondent denies paragraph 27 of the petition and avers that all the polling units of the wards in Warri South Local Government were credited with zero votes during collation.
11. The 1st Respondent avers that the reason for non-collation of ward 06 Bowen result by the Local Government Returning Officer, was as a result of a report of bypass of BVA and the instances of resistance of use of BVAS in the accreditation of Voters. The 1st Respondent hereby pleads and shall rely on Form EC40 series including but not limited to Forms EC40G(I).

Paragraphs 5, 7, 15, 16 and 33 of the 2nd Respondent Reply to the Petition filed on 15/4/2023 contains the following averments: -

7. Save that the 3rd Respondent did not commit itself as alleged by the Petitioners that “electronic real-time transmission/transfer of polling unit results are the only basis to be used for accreditation of voters at the said elections. “the 2nd Respondent admits the other statements contained in paragraph 12 of the Petition.
15. Contrary to paragraph 22 of the petition, the 2nd Respondent avers that the Senatorial District Collation/Returning Officer for Delta South Senatorial Election complied with the provisions of the Electoral Act 2022, Guidelines and Manuals issued by the 1st Respondent in the collation and declaration of the final result of the Delta South Senatorial District, Delta State.
16. In answer to paragraph 24 of the petition, the 2nd Respondent avers that the use of the BVAS device for accreditation was resisted substantially in all the polling units of Bowen Ward – 06 and entirely in Obodo/Omadino Ward 1, Unit 11, Okere Ward 8 Unit 23, and Okumagba I Ward II Unit 18 in Warri South Local Government and in accordance with the 1st Respondent’s Manual for the management of the margin of lead principle the polling units shall be credited with zero votes and shall not count in application of the margin of lead principles.
33. That the Returning Officer for the Delta South Senatorial District also wrote a report to the Resident Electoral Commissioner confirming the Senatorial results of the Warri South Local Government were cancelled due to widespread violence, mutilation of results and collation of results by a person who had earlier served as SPO and Ward Collation Officer in the same Local Government at the same election. The 2nd Respondent pleads and shall rely on the Report of the Delta South Senatorial District Returning Officer to the Delta State Resident Electoral Commission.

The 3rd Respondent vide the 3rd Respondent’s Reply to petition dated 6/4/2023 at paragraph 33 thereof averred thusly: -

33. The 3rd Respondent further denies paragraphs 34 and 35 of the petition and the Petitioners are put to the strictest proof thereof. In response, the 3rd Respondent states that the election in Warri South Local Government Area as it specifically and peculiarly relates to the Delta South Senatorial District election was fraught with obstruction and resistance to deployment of election materials and voters' resistance to the use of BVAS by Petitioners' agents and supporters (some of whom are also voters). Most of these polling units' results in respect of Delta South Senatorial District in Warri South Local Government Area were also mutilated.

A combined reading of all of the above pleadings of the Respondents reveal that the respondents are singing discordant incoherent tunes as to why the 1st Respondent's Collation Official took his decision to cancel the election/enter zero votes in many unit and finally cancelled the whole Local Government election in Warri South Local Government.

To the 1st Respondent, it was entry of zero votes for all the parties in the entire Local Government Area when the alleged complain is with respect to identified polling units in certain wards of the Local Government. Still to the other Respondents it was "cancellation".

Also, the 1st respondent posited at paragraphs 5, 7, 15, 16 and 21 of it Reply that the votes were zerorized, sticking to the position that there was no lawful accreditation of voters as there was willful obstruction/resistance to the distribution of Electoral materials and or resistance to the use of the BVAS on election day which is also the 3rd Respondent's position, who also added mutilation of result. However, the 2nd Respondent introduced other reasons in addition to the above at paragraphs 3, 5, 7, 15 and 16 including widespread violence, mutilation of results and a particular Collation Officer had acted in another capacity earlier and was now compromising.

Certain questions can be raised from the above pleadings of all the Respondents:

- i. What was the exact and real state of affairs in every polling unit where zero vote was entered for the parties and also what exactly occurred where election were cancelled e.g what happened in Obodo/Omandino ward 1 unit 11, Okere Ward 8 Unit 23, and Okumagba 1 Ward 11 unit 18 where 2nd Respondent had, vide paragraph 37 of his pleadings, agreed the polling unit results were cancelled.
- ii. In which of the polling units of the said Local Government were there bypass of BVAS?
- iii. In which of the polling units of the said Local Government were election materials not allowed to be distributed?
- iv. In which of the polling units of the said Local Government were there wide spread violence as even the 1st Respondent and 3rd Respondent gave varying facts in their pleadings as to what caused zero scores to be entered for some polling units?

The respondents erroneously believed that by just pleading the magic words: "*obstruction of the use of BVAS, willful obstruction/ resistance to the distribution of Electoral Materials*" they have discharged the burden of establishing there was no accreditation without stating the exact state of affairs encountered? That will not fly! There must be the particulars of the events that occurred in each polling unit which adverse event necessitated each decision taken for the zero votes entered.

Cancellation of results or entry of zero vote in each polling unit in question must be accounted for by the 1st respondent, as to each peculiar circumstances that necessitated same. All units cannot be tarred with the same brush. To disenfranchise voters is not a tea party. A right guaranteed under the Constitution must not be taken away lightly just like that.

Now, If accreditation could not take place in some of the units in the said Senatorial election in Warri South Local Government Area

how come there are election results for Presidential and House of Representatives elections held simultaneously in that same Local Government the same day and time? The evidence before the Tribunal is that the three elections took place on the same accreditation and voting, sorting of votes, counting and announcement of results took place in each of the polling unit, simultaneously for the three elections in this Delta South Senatorial constituency? If in deed mayhem was the order of the day that day as claimed, though it remained unsubstantiated by the Respondents, why then did the non accreditation not affect the results of other elections held contemporaneously with the Senatorial election in the said Local Government that day, especially the Presidential election result tendered in Exhibit 54?

Exhibit 54 looms large in this petition, being an agent copy of the result in the presidential election on the same day, time and in the same Warri South Local Government.

Paragraph 34 of the 2nd Respondents Reply to the Petition makes no sense at all where it was averred that the accreditation, voting, sorting, and counting of ballot papers were done contemporaneously with Presidential election but votes allocated to the Petitioners at the polling unit for the senatorial election was difference and had no nexus with the BVAS accreditation. What does this even mean Exhibit 54, the Agents copy's of the result for the Warri South Local Government Area Presidential Election, we repeat, held at the same time with the Senatorial Election for the same Delta South Local Government Area is an albatross which the Respondents especially, 1st Respondent which conducted the election, must carry until they explain, having conducted three elections contemporaneously on a single 3-in-1 accreditation, and one result was cancelled or zerorized and the other collated and result declared. A look at Exhibit 54 (Presidential election result for the said Local Government) reveals it was signed by the same Returning Officer, one Mr. Omoosekejimi Ademola Ferdinand, who also was the same person

claimed to have lodged a complaint to the Police in Exhibit 53 that violence took place at the Senatorial Election in Delta South Senatorial District with mutilated sheet, but he was silent on the Presidential Election which he also supervised which accreditation, voting, sorting, counting of votes etc was at the same time and place, which produced Exhibit 54 that he signed.

The 1st Respondents in their Reply to the Petitioner were silent on this issue of the Presidential election held simultaneously with the Senatorial Election under focus. In fact, the 1st Respondent's silence about Exhibit 54 and the Petitioner's pleadings on the issue at paragraph 34 of the Petition is a silence that is most deafening. One can almost hear crickets due to the silence of the 1st Respondent on the issue that two elections; one Presidential, the other Senatorial, held on the same accreditation, voting, sorting, counting of votes, and would turn out so differently?

The 1st Respondent avoided completely like a plague to give any explanation why the Presidential, Senatorial and House of Representative elections in Warri South Local Government Area held on the same accreditation on 25/2/2023, and the result of one of the elections was declared void for the single accreditation. If the Respondents cannot say there was no accreditation in respect of the Presidential and House of Representatives Elections, they lack credibility and would be a travesty of justice for them to say there was no accreditation in the Senatorial election in same Local Government.

It is pertinent to state that there was not one adverse submission on the authenticity of exhibit 54. Not one question was asked from any of the petitioners witnesses. Exhibit 54 like all results declared by INEC enjoys in law the presumption of genuineness and regularity. Exhibit 54 therefore has knocked the bottom out of any case the Respondents can ever make that Elections did not hold for the Senate in Warri South Senatorial Local Government due to no accreditation or any other reason at all. The matter becomes a matter

of *Res Ipsa loquitur* i.e the thing speaks for itself and the Petitioners almost have to say no more in that regard.

The Petitioners with all the evidence they have put before the Tribunal earlier enumerated and considered have established that Senatorial election took place in Warri South Local Government and was unlawfully cancelled. The Respondents cannot hide behind a generic term, we repeat, “by pass of the use of BVAS”, etc without giving particulars of what happened in reality at each unit where results were cancelled or zero vote entered.

The Learned Counsel to the 2nd Respondent’s submission about Exhibits 13 – 24 (the Forms EC8A(I) results of some polling units) being blurred is of no moment. The same forms are in Exhibits 59 – 70. May be the INEC who produced the results in the first place, need to answer the questions about their visibility quality. The Petitioners cannot be held responsible for this and this Tribunal cannot on that score ignore them. As much of it that is legible, the Tribunal has examined and found out therefrom that elections actually held and results imputed in the forms at the polling units, which had been uploaded to the 1st respondent’s portal.

This Tribunal by virtue of paragraph 46(4) of the First Schedule to the Electoral Act can look at these documents scrutinize it and make findings on it as to its probative value, for as much of it that is legible. That is why, again, the Presiding Officers at the polling units were able to upload and transmit the results to the INEC IReV. We ask that from where were Exhibits 13 – 23 downloaded if there was no election when there is the evidence that they came from INEC IReV?

The Tribunal therefore believes the Petitioners that indeed there were lawful Senatorial elections in the Warri South Local Government and they have been able to prove same on the state of their pleadings and the totality of the evidence, the Tribunal so holds.

A few words needs to be said about Exhibits 91(1) – (29), i.e INEC Forms EC40G, put in by the 1st Respondent (INEC) and the

probative value the Tribunal ought to attach to it. What is Form EC40G and when does it come into play?

Clause 43 of the Regulations and Guidelines for the Conduct of Election, 2022 Provides:-

"For a Polling Unit where election is not held or is cancelled, or poll is declared null and void in accordance with these Regulations and Guidelines, the Presiding Officer shall report same in writing to the RA/Ward Collation Officer explaining the nature of the problem and the Collation Officer shall fill Form EC40G as applicable".

In this petition and as contained in the above provision, there is no proof that the INEC Presiding Officers who manned the polling units for which Exhibits 91(1) to (29) were produced made any report in writing or even verbally to their Ward Collation Officers before the said Forms EC40G were filed as 1st respondent called no witness. Much more curious as Learned Senior Counsel to Petitioners has pointed out, Exhibits 91(1) to (29), Forms EC40G were made in respect of purported cancelled results, the same polling results which Exhibits 13 - 23 and Exhibits 55 - 70 represented and which the same polling Presiding Officers had transmitted into the INEC IReV Portal. When then were the results cancelled? Was it before or after the same Presiding Official had uploaded them to the INEC IReV? The Tribunal sees no expediency to give any probative value to Exhibit 9(1) to (29).

Exhibits 92 and 93, i.e the Report of the Delta South Senatorial Collation Officer and the Extract of Police Diary respectively also can have no probative value as the veracity of their contents cannot be determined as 1st Respondent also brought no witness to speak to the truth or otherwise of the contents of both documents. They remain pieces of paper with no useful purpose to serve.

Now, the conduct of the INEC officers who cancelled the election results for the whole of Warri South Local Government Area

ought to be brought under the periscope. The justification or otherwise for the entry of zero votes by the INEC officials or was it cancellation of votes in some units should also be brought under scrutiny as to the propriety of such conducts in view of the provision of the Electoral Act 2022 and the Manual for Election Officials 2022 and Regulations and Guidelines for Conduct of Election 2022.

The Tribunal adopts its earlier consideration that the 1st Respondent and other Respondents have not established by evidence that there was any bypass of use of BVAS for accreditation or widespread violence in view of Exhibit 54 which is a product of the same process of accreditation voting, sorting etc and which produced a result in Exhibit 54 for the Presidential Election held contemporaneously with the said Senatorial Elections in every regard.

The 1st Respondent having not pleaded or led evidence as to why the election results in Warri South Local Government in the Presidential Election was not cancelled and a Result in Exhibit 54 produced which none of the Respondents challenged its authenticity or presumption of its regularity, there is no justification under the sun for cancellation of results in the whole Warri South Local Government Area.

It is also imperative that the Tribunal critically examines the conduct of the Senatorial Collation Officer for Delta South Local Government Area in this case who refused to collate the Warri South Local Government Area result. It is important to stress that he was the one who signed Exhibit 93, and made a report to the Police at Oleh in Isoko South Local Government Area, Police Divisional Police Headquarters of an election, which took place in Warri South Local Government Area. Some fair weather has been made by the 2nd Respondent and indeed other Respondents as to the applicability of Section 64(4) of the Electoral Act 2022 in a bid to justify the actions of this Returning/Collation Officer for Delta South Senatorial District in the conduct of the said Election. The said Section 64(4),(5) and (6) of the Electoral Act 2022 provide:-

4. *A collation officer or returning officer at an election shall collate and announce the result of an election, subject to his or her verification and confirmation that the –*
 - A. *number of accredited voters stated on the collated result are correct and consistent with the number of accredited voters recorded and transmitted directly from polling units under section 47(2) of this Act;*
 - b. *the votes stated on the collated result are correct and consistent with the votes or results recorded and transmitted directly from polling units under section 60(4) of this Act.*
5. *subject to subsection (1), a collation officer or returning officer shall use the number of accredited voters recorded and transmitted directly from polling units under section 47(2) of this Act and the votes or results recorded and transmitted directly from polling units under section 60(4) of this Act to collate and announce the result of an election if a collated result at his or a lower level of collation is not correct.*
6. *where during collation of results, there is a dispute regarding a collated result or the result of an election from any polling unit, the collation officer or returning officer shall use the following to determine the correctness of the disputed result –*
 - a. *the original of the disputed collated result for each polling unit where the election is disputed;*
 - b. *the smart card reader or other technology device used for accreditation of voters in each polling unit where the election is disputed for the purpose of obtaining accreditation data directly from the smart card reader or technology device;*
 - c. *date of accreditation recorded and transmitted directly from each polling unit where the election is disputed as prescribed under section 47(2) of this Act; and*
 - d. *the votes and result of the election recorded and transmitted directly from each polling unit where the election is disputed, as prescribed under section 60 (4) of this Act.*

See also Clause 48(a) of Regulations and Guidelines for the Conduct of Election Officers 2022.

The pleadings of each of the Respondents do not contain an iota of issue of fact that the said Returning/Collation Officer followed any of the steps provided for above, at least, in respect of the Warri South Local Government Area Election Results cancelled in this Petition. It must be stated with un-ambiguity that there is no provision of Section 64 that authorizes a Returning or Collation Officer to cancel a result. That also is the position of the law in several authorities. In **Adeleke Vs. INEC (2020) 11 NWLR (Pt. 1734) 1444** the Supreme Court per Galinje JSC put it to rest that cancellation of results can be done only by the Supervising Polling Unit Officer. See also **Ikpeazu Vs. Alex Otti & Ors 2016, LPELR – 40055 (SC)**. Learned Senior Counsels to the Respondents, especially to 2nd Respondent, had seemed to suggest and commend to the Tribunal some powers which the aforementioned Section 64(4) of the Electoral Act 2022 seems to vest in Returning Officers to verify election Results. But with respect, the purport of the need for verification and confirmation can be gleaned from the wording in Section 64(5) of the same Act which is “to determine the corrections of the disputed result.” Nothing more or nothing less. That, in the opinion of this Tribunal, is the extent of their power. They also have no right to refuse to collate result of the whole Warri South Local Government Area.

No doubt the Returning/Collation officer for Delta South Senatorial District is culpable for non compliance with the provisions of the Electoral Act for not following the procedure stipulated in Section 64(5) of the Electoral Act and entering zero votes to polling units and not collating the results for Warri South Local Government Area thereby cancelling the election results of a whole Local Government Area.

It is erroneous to say that all the non compliance the Petitioners are complaining of about the conduct of the Returning Officer are in

the Manual for Election Officers only. Section 64 above of the Electoral Act was not equally complied with. The response of the Petitioners in respect of the applicability of the margin of lead principle in a nutshell is that it will apply as the scenario envisaged for its operation is what has occurred in this case i.e the declared results showed only a margin of 2,299 votes between the votes credited to 2nd Respondent and that of 1st Petitioner hence the principle of margin of lead should have been applied by the said Returning Officer.

This Tribunal adopts its earlier consideration that the 1st Respondent and other Respondents have not been able to establish the bypass of BVAS and obstruction of the use of BVAS and resistance to the distribution of electoral material as creating an emergency situation as provided in paragraph 67 of the Manual. Hence, it was wrong and unlawful to have credited zero votes for the parties as the INEC officials in question did, hence the principle of the margin of lead ought to have been applied. The INEC official Mr. Ademola no doubt created an anomalous situation of non compliance with the Electoral Act 2022 and the said Manual in respect of the Delta South Senatorial Election.

Now, to the relevance of the principle of margin of lead in this petition, with regard to the fact that it is provided for in the regulations and Guideline for the conduct of the election, 2022 severally learned senior Counsels to the Respondent had contended being a principle which is provided for in the Regulation and Guidelines for the Conduct of Election 2022 and hence it cannot be the basis for establishment of non compliance with the provision of the Electoral Act. Several authorities were commended to the Tribunal in this regard. The tribunal holds that the guideline receives life in law from the Electoral Act, which in turn receives life from the Constitution. It is lawful to rely on it being part and passu of the Electoral Act.

The Tribunal has in line with Paragraph 46(4) of the First Schedule to the Electoral Act looked at the documentary evidence put

before it in relation to who amongst the 1st Petitioner and 2nd Respondent ought to have been declared as the winner of the said Election. Exhibits 25 – 34 contain the copies of the voters register for wards 1, 2, 3, 4, 5, 8, 9, 10, 11 and 12. Exhibit 36 reveals the total number of Registered voters and permanent voters card collected for Warri South Local Government Area. PW2 led evidence at trial that the total number of registered voters are 187,140 and those who collected PVCs are 162,082, thus speaking to this documents. Exhibits 71 – 87 are 17 bundles of CTC of voters register for Ward 06 Bowen. Furthermore, the Petitioners position uncontradicted is that the number of persons who collect PVC from Bowen Ward 06 alone is 16,704.5 not counting even all the other polling units where erroneously zero votes were entered and the cancellation/lack of collation of all the votes in Warri South Local Government Area in the said election, all of which the Tribunal finds enormously much more than the 2,299 margin votes declared between the 1st Petitioner and the 2nd Respondent. See **Gidado & Anor. Vs. Mohammed & Others (2015) LPELR – 40356 (CA)**.

The Tribunal re-emphasizes that the Margin of Lead Principle ought to have been applied and supplementary/re-run elections ought to have been held in all the polling units where zero votes were erroneously entered for the parties and/or elections cancelled before the declaration of the results for the said Senatorial seat. The result of the said Election should have been declared inconclusive until those rerun/supplementary elections were held.

In the light of the above, the Tribunal finds that the 2nd Respondent was not elected by the majority of lawful votes cast at the election of 25/2/2023 into the Delta South Senatorial seat of the Delta State, the results of the Election in Warri South Local Government Area having wrongfully been cancelled/not collated. The Petitioners have called upon the Tribunal to grant the reliefs sought in Paragraph 51(a) – (g) of the Petition and to re-collate the votes in the

cancelled Local Government and declare the 1st Petitioner as the winner.

This Tribunal having found that the votes of the whole of Warri South Local Government was excluded will not enter into the venture of re-collating votes without the voice of the good people of Warri South Local Government Area of Delta State being heard in the said election, by allowing them to exercise their franchise and for the franchise to count in the choice of who they wish should represent them in the red-chamber. The Tribunal therefore cannot therefore grant the main reliefs in the petition, but the alternative reliefs. We reiterate, that the margin of lead principle is applicable.

Having said that, the Tribunal from all its consideration of the state of the pleadings and totality of the evidence adduced in this Petition finds that the Petitioners have established the grounds upon which the petition is founded and their entitlement to the alternate reliefs they seek vide Paragraph 51(h),(i) and (j) of the Petition.

Issues 2 and 3 for determination are thus resolved in favour of the Petitioners and against the respondents.

In the light of the foregoing, this Tribunal hereby –

1. grants the Petitioners' reliefs 51(h),(i) and (J) of their petition against all the Respondents jointly and severally;
2. declares that the 2nd Respondent was not duly elected or returned by the majority of lawful votes cast at the election into Delta South Senatorial District of Delta State held on 25th February, 2023;
3. declares that the election into Delta South Senatorial District of Delta State held on 25th February, 2023 was inconclusive and a supplementary/rerun election be held in Warri South Local Government Area;
4. sets aside the Certificate of Return issued to the 2nd Respondent by the 1st Respondent in respect of the Senatorial Election into the Senate of the Federal Republic of Nigeria for Delta South

Senatorial District having not been duly elected by majority of lawful votes at the said election;

5. orders the 1st Respondent, pursuant to section 136(1) of the Electoral Act 2022, to not later than 90 days from today conduct a supplementary/re-run election in Warri South Local Government Area and declare whoever eventually win and issue certificate of return.

Hon. Justice Catherine Ogunsanya

(Chairman)

06/09/2023

Hon. Justice Mas’ud Adebayo Oniye Hon. Justice Babangida Hassan

Member I

06/09/2023

Member II

06/09/2023

APPEARANCES

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Lukman O. Fagbemi SAN with him S. K. Ayo Esq. for the 1st Respondent.

Robert Emukpoeruo SAN with him Oluwaseun O. Olusiyi Esq. and Ifeoluwa Ojediran Esq. for the 2nd Respondent.

C. I. Okpoko SAN with him Habeeb Lawal Esq. A. A. Eluaka (Miss), Modester Oti (Mrs.) and N. C. Ahmadi Esq. for the 3rd Respondent.