REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
04 SEP 2026
PRINCIPAL REGISTRY 7
P.O. BOX 50067, LUSAKA.

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

2026/HP/EP/029

IN THE MATTER OF:	ARTICLES 1 (2), (3) AND 8 (c), (d) (e) OF THE CONSTITUTION OF ZAMBIA, CHAPTER ONE OF THE LAWS OF ZAMBIA
IN THE MATTER OF:	REGULATION 47 OF THE ELECTORAL PROCESS (GENERAL) REGULATIONS, 2016.
IN THE MATTER OF:	ARTICLES 45 (1)(a), (2)(b)(b)(c), (3) 73(1) OF THE CONSTITUTION OF ZAMBIA, CHAPTER ONE OF THE LAWS OF ZAMBIA AS READ TOGETHER WITH SECTION 64, 69, 70,96, 97,98 AND 99 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016
IN THE MATTER OF:	SECTION 81 (1)(a) ,83 (1) (a) (d), (2) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016.
IN THE MATTER OF:	PART III OF THE HIGH COURT (ELECTION PETITION) RULES, 2026
IN THE MATTER OF:	AN ELECTION PETITION RELATING TO KASENENGWA CONSTITUENCY PARLIAMENTARY ELECTIONS HELD ON THE 13TH DAY OF AUGUST 2026

BETWEEN:

ZIWA LEVISON	PETITIONER
AND	
TWASA PHILIMON	1ST RESPONDENT
THE ELECTORAL COMMISSION OF ZAMBIA	2ND RESPONDENT

1ST RESPONDENT'S ANSWER TO 1ST RESPONDENT'S SKELETON ARGUMENTS IN OPPOSITION TO ELECTION PETITION

1. LIST OF AUTHORITIES

1.1 Legislation:

1.1.1 The Electoral Process Act No. 35 of 2016;

1.1.2 The High Court (Election Petition) Rules, 2026.

1.2 Case Law:

1.2.1 Anderson Kambela Mazoka & Others v Mwanawasa & 2 Others (SCZ EP 1 of 2002; SCZ EP 2 of 2002) [2018] ZMSC 391;

1.2.2 Jere And Others -V- Zulu - CCZ/A 28 of 2021) (2022);

1.2.3 Mwanakatwe -V- Scott And Another - Selected Judgment No. 50 Of 2018

1.2.4 Nkandu Luo & Another v Mwamba & Another (Appeal 10 of 2016) [2018] ZMCC 254 (16 November 2018);

2. BRIEF SUMMARY OF FACTS

2.1. The 1st Respondent was a candidate in the Parliamentary Election for Kasenengwa Constituency held on 13th August 2026. Following the counting and verification of votes, the 1st Respondent obtained 14,582 votes, while the Petitioner obtained 13,339 votes, and the 1st Respondent was duly declared elected Member of Parliament for Kasenengwa Constituency.

2.2. The 1st Respondent maintains that the election was conducted by the 2nd Respondent in accordance with the Constitution and applicable electoral laws, and that the electoral processes were conducted in the presence and view of Polling Agents representing the respective candidates.

2.3. The 1st Respondent denies the allegations of intimidation, violence, corrupt practices, vote inducement, unlawful assistance of voters and other electoral misconduct attributed to him, his agents, supporters or persons acting on his behalf.

2.4. The Petitioner alleges material irregularities in the sorting, counting and announcement of results and that rejected ballots were unlawfully added to the votes recorded in his favour. 1st Respondent maintains that the votes attributed to him were duly counted and verified in accordance with the applicable electoral procedures.

2.5. The 1st Respondent further denies the allegations concerning objections, written complaints and requests for recounts and puts the Petitioner to strict proof of the

authenticity, contents, circumstances and relevance of any documents relied upon in support of those allegations.

2.6. The 1st Respondent's position is that allegations of illegal practices or irregularities attributed to third parties or the 2nd Respondent cannot, in the absence of sufficient evidence connecting such conduct to the 1st Respondent and demonstrating its material effect on the election result, constitute a basis for invalidating his election.

2.7. Accordingly, the 1st Respondent contends that the Petition does not disclose sufficient factual or legal grounds to warrant a recount, the setting aside of his election, a declaration that he was not duly elected, or any other relief sought by the Petitioner.

3. SKELETON ARGUMENTS

3.1. **MAY IT PLEASE THIS HONOURABLE COURT**, these are the Skeleton Arguments filed on behalf of the 1st Respondent in support of his Answer to the Petition and Affidavit in Opposition thereto. The Petition challenges the election and subsequent declaration of the 1st Respondent as the duly elected Member of Parliament for Kasenengwa Constituency following the General Election held on 13th August 2026.

3.2. THE LAW AND SUBMISSIONS

3.3. MY LADY/MY LORD, elections are governed by the provisions of the ELECTORAL PROCESS ACT NO. 35 OF 2016 and the applicable electoral regulations and guidelines. The role of the Returning Officer, amongst other things, is to receive and tally the results transmitted from the respective polling stations and to declare the results.

3.4. SECTION 72(1)(B) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016 provides as follows:

"(1) Upon receipt of the items mentioned in section seventy-one, a returning officer shall tally the results of the votes received from the polling station in the constituency, district and ward and shall—

(b) declare the results for the National Assembly and Ward election."

3.5. MY LADY/MY LORD, the above provision, read together with Regulation 50 of the Electoral Process (General) Regulations, 2016, places a duty upon the Returning Officer to tally the votes received from the respective polling stations and, thereafter, declare the results. In the present matter, the Returning Officer acted in accordance with the law by receiving, tallying and announcing the results transmitted from the polling stations and, upon completion of the tallying process, declared the 1st Respondent duly elected as Member of Parliament for Kasenengwa Constituency.

3.6. MY LADY/MY LORD, the Petitioner alleges, inter alia, that there was intimidation, assault and threats against his Polling Agents and further alleges that the 1st Respondent engaged in bribery and other electoral malpractices. These allegations are expressly denied by the 1st Respondent and, in our respectful submission, have not been established by cogent and credible evidence.

3.7. The Petitioner further did not challenge the announcement and declaration of the results at the time the results were announced. The allegations now advanced are, in the circumstances, unsupported by sufficient evidence demonstrating that the alleged acts affected the outcome of the election.

3.8. MY LADY/MY LORD, SECTION 97(1) AND (2) OF THE ELECTORAL PROCESS ACT provides, in the relevant parts, as follows:

"(1) An election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall not be questioned except by an election petition presented under this Part.

(2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that— (a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election—

(i) by a candidate; or (ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;

(b) subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election; or (c) the candidate was at the time of the election a person not qualified or a person disqualified for election"

3.9. MY LADY/MY LORD, it is therefore not sufficient for a Petitioner merely to allege the existence of electoral malpractice or non-compliance with the Electoral Process Act. The Petitioner must establish the alleged malpractice or non-compliance and, where required by the statutory test, demonstrate its effect upon the election and its result.

3.10. Under section 97(2)(b), non-compliance in the conduct of an election must be proved against the body charged with conducting elections and must be shown to have affected the result. The case of MWANAKATWE V SCOTT AND ANOTHER - SELECTED JUDGMENT NO. 50 OF 2018 confirms that an election is not avoided merely because an administrative irregularity is alleged. Section 97(4) preserves an election conducted substantially in accordance with the Act where any breach by an election officer did not affect the result. Section 99 limits relief in an election petition to a declaration that the election was void or that a candidate was duly elected; it does not provide for damages.

3.11. BURDEN AND STANDARD OF PROOF

3.12. In NKANDU LUO & ANOTHER -V- MWAMBA & ANOTHER (Appeal 10 of 2016) [2018] ZMCC 254, the Court held:

"In addition to proving the electoral malpractice or misconduct alleged, the petitioner has the further task of adducing cogent evidence that the electoral malpractice or misconduct was so widespread that it swayed or may have swayed the majority of the electorate from electing the candidate of their choice." Emphasis added

3.13. MY LADY/MY LORD, the above authority makes it clear that proof of an alleged electoral malpractice, standing alone, is not necessarily sufficient. The Petitioner must,

where applicable, establish by cogent evidence that the alleged malpractice was of such a nature or magnitude as to have affected the choice of the electorate.

3.14. Further, in ANDERSON KAMBELA MAZOKA & OTHERS -V- MWANAWASA & 2 OTHERS (SCZ EP 1 OF 2002; SCZ EP 2 OF 2002) [2018] ZMSC 391, the Supreme Court stated:

"The standard of proof must depend on the allegations pleaded. Given the national character of the exercise where all the votes in the country form a single electoral college, the proven defects must be such that the majority of the voters are prevented from electing the candidate whom they preferred; or that the election is so flawed that the defects seriously affect the result which can no longer reasonably be said to represent the true free choice and free will of the majority of the voters. As regards burden of proof, the evidence adduced must establish the issues raised to a fairly high degree of convincing clarity." Underlined for Emphasis

3.15. In JERE AND OTHERS -V- ZULU - CCZ/A 28 of 2021) (2022), the Constitutional Court reaffirmed that allegations in an election petition must be proved to a fairly high degree of convincing clarity, being a standard higher than a mere balance of probabilities

3.16. MY LADY/MY LORD, the Petitioner has also failed to demonstrate that the alleged acts, even if proved, materially affected the outcome of the election. The results demonstrate that the 1st Respondent obtained 14,582 votes, whilst the Petitioner obtained 13,339 votes, giving the 1st Respondent a majority of votes.

3.17. We accordingly submit that the allegations raised by the Petitioner are, individually and collectively, insufficient to satisfy the statutory threshold for nullification of an election under Section 97 of the Electoral Process Act.

CONCLUSION

3.18. MY LADY/MY LORD, in view of the foregoing, we respectfully submit that the Petitioner has failed to establish, to the requisite standard of proof, the allegations of electoral malpractice, bribery, intimidation, violence, vote buying or other misconduct alleged against the 1st Respondent.

3.19. We further submit that the Petitioner has failed to demonstrate that any alleged irregularity or misconduct affected the result of the election or undermined the free choice of the electorate.

3.20. The evidence establishes that the electoral process was duly conducted, the votes were counted and tallied, and the 1st Respondent was duly declared the winner of the Parliamentary election for Kasenengwa Constituency.

3.21. MY LADY/MY LORD, we therefore respectfully pray that the Petition be dismissed with costs and that the election and declaration of the 1st Respondent as the duly elected Member of Parliament for Kasenengwa Constituency be upheld.

3.22. We forever pray.

Dated at Lusaka this _____ day of _____ 2026

Prepared by:_____

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LUSAKA
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BETWEEN:

ZIWA LEVISON	PETITIONER
AND	
TWASA PHILIMON	1ST RESPONDENT
THE ELECTORAL COMMISSION OF ZAMBIA	2ND RESPONDENT

1ST RESPONDENT'S ANSWER TO PETITION

The 1st Respondent, **TWASA PHILIMON**, in answer to the Petition challenging his election and declaration as the duly elected Member of Parliament for Kasenengwa Constituency, responds to the said Petition as follows:

1. The 1st Respondent admits the description of the Petitioner contained in paragraph 1 of the Petition only to the extent that the same relates to matters within the Petitioner's own knowledge and puts the Petitioner to strict proof of the remainder.
2. In answer to paragraph 2 of the Petition, the 1st Respondent admits that the Petitioner contested the Parliamentary Election for Kasenengwa Constituency during the General Election held on 13th August 2026.
3. The 1st Respondent, however, states that, following the counting, verification and declaration of the results, the 1st Respondent was declared the duly elected Member of Parliament for Kasenengwa Constituency.
4. In answer to the relevant paragraph of the Petition, the 1st Respondent admits that the 2nd Respondent is an election management body established pursuant to Article 229 of the Constitution of Zambia, and is mandated, inter alia, to implement the electoral process and conduct elections in accordance with the Constitution and applicable law.
5. The 1st Respondent further states that the 2nd Respondent duly conducted the said election in accordance with its constitutional and statutory mandate and, following the counting, verification and declaration of the votes cast, declared the 1st Respondent duly elected as Member of Parliament for Kasenengwa Constituency.

PARTICULARS AGAINST THE 1ST RESPONDENT

6. In answer to paragraph 4 of the Petition, save where expressly admitted herein, the 1st Respondent denies each and every allegation of fact and/or alleged illegal practice made against him, his election agents, polling agents, and further denies any allegation of any illegal practice or electoral misconduct allegedly committed by the 2nd Respondent insofar as the same is sought to be attributed to, or relied upon against, the 1st Respondent.
7. In answer to paragraphs 4(a), 4(b) and 4(c) of the Petition, the 1st Respondent admits the allegations contained therein.

8. In answer to paragraph 4(d) of the Petition, the 1st Respondent denies any knowledge of, or involvement in, the alleged acts of intimidation. The 1st Respondent states that he neither directed, authorised nor sanctioned any person to engage in any such conduct.
9. The 1st Respondent further states that he does not know the said Village Headman Mulenga or Malijeni and puts the Petitioner to strict proof of the allegations made against him.
10. In answer to paragraph 4(e) of the Petition, the 1st Respondent states that he has no personal knowledge of the allegation that GEN 20 Forms were not provided at Shamombo Polling Station. The 1st Respondent, however, states that the Polling Agents representing the respective candidates were present during the electoral process and were aware of the proceedings and documentation relating to the counting and declaration of results.
11. The Petitioner is accordingly put to strict proof of the allegation that the Polling Agents were not provided with GEN 20 Forms and, in particular, is required to demonstrate the alleged non-provision and how the same affected the result of the election.
12. In answer to paragraph 4(f) of the Petition, the 1st Respondent denies the allegation that he and/or his agents engaged in widespread corrupt practices at polling stations, including the alleged distribution of sausages for the purpose of influencing voters.
13. The 1st Respondent states that the sausages referred to by the Petitioner were provided as lunch for the 1st Respondent's election agents and were not distributed to voters for the purpose of inducing them to vote for the 1st Respondent.
14. The Petitioner is accordingly put to strict proof of the alleged corrupt practice and, in particular, the alleged connection between the provision of the said food and the 1st Respondent.
15. In answer to paragraph 4(g) of the Petition, the 1st Respondent denies the allegation that Presiding Officers improperly assisted illiterate voters or that any such assistance amounted to electoral misconduct attributable to the 1st Respondent.
16. The Petitioner is put to strict proof of the allegation that any Presiding Officer voted on behalf of an illiterate voter and, further, is required to establish how any such

alleged conduct is attributable to the 1st Respondent and materially affected the result of the election.

17. In answer to paragraphs 4(h) and 4(i) of the Petition, the 1st Respondent denies that there were any material irregularities during the sorting, counting and announcement of results at the various polling stations.
18. The 1st Respondent states that the said processes were duly conducted in accordance with the applicable electoral procedures and were witnessed by the Polling Agents representing the respective candidates.
19. In answer to paragraph 4(j) of the Petition, the 1st Respondent denies the allegation that rejected ballots were unlawfully added to the votes attributed to him. The Petitioner is put to strict proof of the allegation and is required to particularise the number of alleged rejected ballots, the polling stations at which the alleged conduct occurred, and how the alleged ballots were added to the 1st Respondent's votes and materially affected the outcome of the election.
20. In answer to paragraphs 4(k) and 4(l) of the Petition, the 1st Respondent denies that there were any material irregularities during the counting and announcement of results. The 1st Respondent states that the counting and announcement of results were duly conducted and witnessed by the Polling Agents representing the respective candidates.
21. The 1st Respondent states that the allegations relating to the counting and announcement of results are, to the extent that they were not raised contemporaneously at the relevant polling stations, an afterthought, and the Petitioner is put to strict proof of the veracity, particulars and materiality of the said allegations.
22. In answer to paragraphs 4(m) and 4(n) of the Petition, the 1st Respondent denies that there were no objections raised by the Petitioner's Polling Agents during the relevant electoral processes.
23. The 1st Respondent states that the processes were conducted in the presence of the respective Polling Agents and that the allegations now advanced by the Petitioner are an afterthought. The Petitioner is put to strict proof thereof.
24. In answer to paragraphs 4(o) and 4(p) of the Petition, the 1st Respondent denies the allegation that the Petitioner's Polling Agents did not raise objections and/or make

written complaints requesting a recount. The 1st Respondent further states that any alleged complaint relied upon by the Petitioner must be strictly proved as to its authenticity and relevance to the election results.

25. The 1st Respondent accordingly denies that he, his agents or any person acting on his behalf, or with his knowledge, consent, authority or approval, engaged in any bribery, vote buying, intimidation, violence, undue influence, unlawful campaigning or other electoral misconduct as alleged in the Petition.

ALLEGED CONTRAVENTION OF THE LAW

26. In answer to paragraph 4(r) of the Petition, insofar as the allegation is intended to implicate the 1st Respondent, the 1st Respondent denies that he contravened any provision of Sections 67(3) and 83 of the Electoral Process Act No. 35 of 2016, and puts the Petitioner to strict proof of the alleged contravention.
27. In answer to paragraph 4(s) of the Petition, the 1st Respondent denies that the 2nd Respondent contravened any provision relating to Sections 64, 69 and 70 of the Electoral Process Act No. 35 of 2016, and puts the Petitioner to strict proof thereof.
28. In answer to paragraph 4(t) of the Petition, the 1st Respondent denies that the 2nd Respondent contravened any provision relating to Sections 69 and 70 of the Electoral Process Act No. 35 of 2016.
29. The 1st Respondent states that the sorting, counting and announcement of results were duly conducted in accordance with the applicable electoral procedures and in the presence and to the knowledge of the Polling Agents representing the respective candidates.
30. In answer to paragraph 4(u) of the Petition, to the extent that the said paragraph alleges any breach of the constitutional mandate relating to the conduct of the election, the 1st Respondent denies the same. The 1st Respondent states that the election was conducted in a peaceful, free and fair manner and in accordance with the Constitution and applicable electoral laws.

RELIEFS SOUGHT BY THE PETITIONER

1) In respect of the Petitioner's prayer for a recount of all votes cast, the 1st Respondent contends that the Petitioner bears the burden of establishing the requisite factual and legal basis upon which such relief may properly be granted.
2) The 1st Respondent denies that the Petitioner is entitled to a declaration that the election and declaration of the 1st Respondent as the duly elected Member of Parliament for Kasenengwa Constituency ought to be set aside.
3) The 1st Respondent opposes the Petitioner's prayer for a declaration that the 1st Respondent was not duly elected as Member of Parliament for Kasenengwa Constituency and states that no sufficient factual or legal basis has been established for such relief.
4) The 1st Respondent opposes the Petitioner's prayer for costs and contends that the Petitioner is not entitled to any of the reliefs sought.
5) The 1st Respondent denies that the allegations pleaded in the Petirion, whether considered individually or collectively, establish any ground upon which the election of the 1st Respondent may lawfully be invalidated or any of the reliefs sought by the Petitioner may properly be granted.

THE FIRST RESPONDENT'S POSITION

31. The 1st Respondent contends that the burden of proof rests upon the Petitioner to establish, by sufficient and admissible evidence, the allegations upon which the challenge to the 1st Respondent's election is founded.
32. The 1st Respondent further contends that allegations of corrupt or illegal practices attributed to third parties cannot, without sufficient evidence connecting such persons and their alleged conduct to the 1st Respondent, constitute a proper basis for attributing such conduct to the 1st Respondent.
33. The 1st Respondent further contends that allegations of illegal practices or irregularities attributed to the 2nd Respondent cannot, without sufficient evidence establishing a connection between the alleged conduct and the 1st Respondent's election, constitute

a proper basis for setting aside the 1st Respondent's election or attributing the alleged conduct to him.

34. The 1st Respondent shall rely upon his own evidence and such admissible documentary and witness evidence as may properly be adduced at the hearing of the Petition.
35. Save as expressly admitted herein, the 1st Respondent denies each and every allegation contained in the Petition as though the same were specifically set out herein and traversed seriatim.

WHEREFORE, the 1st Respondent prays that this Honourable Court:

(a) dismisses the Petition against the 1st Respondent;

(b) declines to grant the Petitioner's prayer for a recount of the votes cast in the election for Kasenengwa Constituency;

(c) declines to grant the Petitioner's prayer for a declaration that the 1st Respondent was not duly elected as Member of Parliament for Kasenengwa Constituency;

(d) declines to grant any relief against the 1st Respondent which has not been established by sufficient and admissible evidence;

(e) upholds the election and declaration of the 1st Respondent as the duly elected Member of Parliament for Kasenengwa Constituency; and

(f) grants such further or other relief as this Honourable Court may deem just and appropriate.

Dated this 4th day of September 2026

1st RESPONDENT'S SIGNATURE

Answer prepared by:

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THE ELECTORAL PROCESS ACT, 2016

ARRANGEMNET OF SECTIONS

PART I

PRELIMINARY

Section

1. Short title
2. Interpretation
3. Principles of electoral system and process
4. Administration, enforcement and prosecution
5. Delegation of powers and duties by Commission
6. Delegation of powers and duties by Chief Electoral Officer

PART II

REGISTRATION OF VOTERS AND REGISTER

7. Continuous voter registration
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Single copies of this Act may be obtained from the Government Printer, P.O. Box 30136, 10101 Lusaka, Price K144.00 each.

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SCHEDULE

GOVERNMENT OF ZAMBIA

ACT

No. 35 of 2016

Date of Assent: 6th June, 2016

An Act to provide for a comprehensive process for a general election; provide for the conduct of elections by the Electoral Commission of Zambia and empower the Commission to make regulations in matters relating to elections; provide for the registration of voters and the keeping of voters registers; prescribe the procedures for nominations for elections; provide for the role of presiding officers, election officers and conflict management officers; prescribe the procedure for voting during an election; provide for the accreditation and roles of observers and monitors; criminalise corrupt practices and other illegal practices related to elections and provide for penalties in connection with an election; provide for election petitions and the hearing and determination of applications relating to a general election; provide for voter education; prescribe the electoral code of conduct; repeal and replace the Electoral Act, 2006; and provide for matters connected with, or incidental to, the foregoing.

[7th June, 2016

ENACTED by the Parliament of Zambia. Enactment

PART I

PRELIMINARY PROVISIONS

1. This Act may be cited as the Electoral Process Act, 2016. Short title

2. In this Act, unless the context otherwise requires— Interpretation

"area" has the meaning assigned to it in section *two* of the Local Government Act; Cap. 281

"ballot box" means a box prescribed by the Commission for the purpose of an election;

"ballot paper" means the document prescribed by the Commission in respect of an election;

"ballot paper account" means a document prescribed by the Commission for purposes of recording the ballot papers issued to a returning officer and completed by a presiding officer at the close of a poll;

Cap. 1 "by-election" has the meaning assigned to it in the Constitution;

"campaign material" means party or candidate manifestos, advertisements, billboards, posters, tshirts, cloth or other material depicting colours regarding symbols, and other designs of a party or pictural images of a candidate;

"campaign period" means a period of three months before the holding of an election;

"candidate" means a person contesting a presidential, parliamentary or local government election;

"caricature" means the exaggerated imitation of a cartoon, effigy, picture, drawing or sketch of a person or literary style for comic or satirical effect;

"casual vacancy" means a vacancy in the office of councillor as specified in the Local Government Act;

Cap. 281

"Chief Electoral Officer" has the meaning assigned to it in the Electoral Commission of Zambia Act, 2016;

Act No. 25 of 2016

"Code" means the Electoral Code of Conduct set out in the Schedule;

"Commission" means the Electoral Commission of Zambia established by the Constitution;

Cap. 1

"conflict management officer" means an officer appointed as a conflict management officer in accordance with section *one hundred* and *thirteen;*

"constituency" has the meaning assigned to it in the Constitution;

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"Constitutional Court" has the meaning assigned to it in the Constitution;

Cap. 1

"corrupt practice" means any conduct which is declared to be a corrupt practice in accordance with section *eighty-one;*

"costs"includes charges and expenses;

"council"has the meaning assigned to it in the Constitution;

Cap. 1

"council chairperson" has the meaning assigned to it in the Constitution; Cap. 1

"councillor" has the meaning assigned to it in the Constitution; Cap. 1

"designated person" means a person or officer appointed by the Chief Justice for the purpose of receiving election petitions filed before a tribunal and attending to such other matters regarding petitions before a tribunal as are assigned to the Registrar under this Act;

"election" has the meaning assigned to it in the Constitution; Cap. 1

"election agent" means a person appointed as an agent of a candidate for the purpose of an election and who is specified in the candidate's nomination paper;

"election officer" means a person appointed by the Commission as—

(a) a registration officer;

(b) an assistant registration officer;

(c) a district electoral officer;

(d) a returning officer;

(e) a presiding officer;

(f) an assistant presiding officer; or

(g) a polling assistant;

and includes a person appointed to assist the Chief Electoral Officer in the performance of the functions of the Chief Electoral Officer as specified in this Act;

"election petition" means an election petition related to a presidential, parliamentary or local government election as specified in the Constitution; Cap. 1

"election timetable" means a timetable for an election published by the Commission in accordance with section *twenty-eight;*

"employee" has the meaning assigned to it in section *two* of the Local Government Act; Cap. 281

"general election" has the meaning assigned to it in the Constitution; Cap. 1

"illegal practice" means an offence which is declared under this Act to be an illegal practice;

"interim period" means the period commencing at the commencement of this Act and expiring on such date as the President may prescribe by statutory order;

"media" includes publicly or privately operated print and electronic media;

"Member of Parliament" has the meaning assigned to it in the Constitution; Cap. 1

"monitor"means a person accredited as such by the Commission;

"national registration card" means a national registration card issued under and in terms of the National Registration Act; Cap. 126

"national registration number"means the serial number inserted on a national registration card issued in accordance with the National Registration Act; Cap. 126

"nomination day" means the day appointed by the Commission as the day on which a candidate files that candidate's nomination paper with the Commission;

"nomination centre" means a place prescribed by the Commission as a nominating office;

"nomination paper" means a document prescribed by the Commission for the purpose of a candidate registering that candidate's intention to contest an election under this Act;

"observer" means a person accredited as such by the Commission;

"petitioner" in relation to an election petition, means a person who signs and presents an election petition under section *ninety-eight*, and includes a person substituted for a petitioner;

"political party" has the meaning assigned to it in the Constitution; Cap. 1

"polling agent" means an agent appointed by a candidate in respect of a polling station;

"polling assistant" means a person appointed as polling assistant by the Commission;

"polling day" means—

(a) in relation to a general election, the day specified in accordance with the Constitution for the taking of the poll in a general election; and Cap. 1

(b) in relation to a by-election, a day appointed by the Commission for the taking of the poll in a by-election;

"polling district" means a district established by the Commission as a polling district under section *twenty-one;*

"polling station" means a place established as a polling station by the Commission under section *twenty-four;*

"public officer" has the meaning assigned to it in the Constitution; Cap. 1

"presidential election" has the meaning assigned to it in the Constitution; Cap. 1

"presiding officer" means a person appointed as a presiding officer by the Commission under section *thirty-seven;*

"Register of Voters" means the Register of Voters prepared and certified by the Commission under section *fourteen;*

"registration officer" means a person appointed as a registration officer by the Commission;

"Registrar" means the Chief Registrar of the High Court, and includes the Deputy Registrar, District Registrar and Assistant Registrar;

"respondent" means a person against whom an election petition is filed in accordance with section *ninety-eight;*

"Returning Officer" has the meaning assigned to it in the Constitution; Cap. 1

"returning officer" has the meaning assigned to it in the Constitution; Cap. 1

"traditional leader" means a paramount chief, senior chief, chief or village headman;

"tribunal" means a local government elections tribunal established in accordance with Article 159 of the Constitution; Cap. 1

"voter" means a person who is registered as a voter and whose name appears in the Register of Voters;

"voter's card" means a voter's card prescribed and issued by the Commission; and

"ward" means any of the divisions into which a council area is divided under section *twenty-five.*

Principles of electoral system and process

3. Subject to the Constitution, the principles applied in the electoral system and process shall ensure the following:

(a) equal and universal suffrage;

(b) no discrimination based on gender or disability when providing electoral services;

(c) transparent and credible electoral process;

(d) no special privileges accorded to a political party or social group, except for persons with special needs;

(e) no impediments to lawful inclusion in the electoral register;

(f) impartial voter-education programmes;

(g) access to polling stations for representatives of political parties, accredited local or international election monitors, observers and the media;

(h) secrecy of the vote;

(i) design of the ballot paper that promotes easy use;

(j) transparent and secure ballot boxes;

(k) impartial assistance to voters at the polling station;

(l) transparent, accurate and reliable vote counting procedure;

(m) proper management of invalid ballot papers;

(n) precautionary measures for transporting of election materials;

(o) impartial protection of polling stations;

(p) established procedures for lodging and dealing with complaints;

(q) impartial handling of election complaints;

(r) impartial delimitation of electoral boundaries; and

(s) timely resolution of electoral disputes.

Administration, enforcement and prosecution

Cap. 1

4. (1) This Act shall be administered and enforced by the Commission and the Commission shall not be subject to the direction or control of any person or authority in the exercise of its functions under the Constitution and this Act.

(2) The Commission shall, in order to ensure compliance with the provisions of this Act, appoint such number of officers as it may consider necessary for purposes of this Act.

(3) An officer appointed pursuant to subsection (2) shall be provided with a letter of appointment which shall be *prima facie* evidence of that person's appointment.

(4) An officer shall, on demand by a person affected by the exercise of the powers of that officer under this Act, produce for inspection the letter referred to in subsection (3).

(5) The Anti-Corruption Commission shall investigate and prosecute any corrupt practice committed under this Act in accordance with the Anti-Corruption Act, 2012. Act No. 3 of 2012

(6) The Zambia Police Service shall enforce law and order at polling stations and undertake any criminal proceedings, subject to subsection (2), in respect of an offence committed by any person in contravention of this Act.

Delegation of powers and duties by Commission

5. (1) The Commission may—

(a) delegate any of its powers under this Act to a member, employee or officer of the Commission excluding the power to prescribe anything under this Act or make an appointment under this Act or any other written law; and

(b) instruct a member, employee or officer of the Commission to perform any of its duties under this Act or any other written law.

(2) A delegation or instruction made under subsection (1)—

(a) shall be subject to any limitations and conditions that the Commission may impose; and

(b) does not prevent the Commission from exercising or performing the assigned power or duty.

(3) The Commission may, by statutory order, confer powers or impose duties on an officer or authority of the Government or council for the purpose of discharging its functions under this Act.

Delegation of powers and duties by Chief Electoral Officer

6. (1) The Chief Electoral Officer may—

(a) delegate any of the powers of the Chief Electoral Officer under this Act or any other law to an employee or officer of the Commission; or

(b) instruct an employee or officer of the Commission to perform any of the duties of the Chief Electoral Officer under this Act or any other written law.

(2) Subsection (2) of section *five* with the necessary modification, shall apply to a delegation or instruction of the Chief Electoral Officer under subsection (1).

PART II

Registration of Voters and Registers

Continuous voter registration

7. The Commission shall conduct a continuous registration of voters.

Qualification for registration as voter

8. (1) A person qualifies for registration as a voter if that person—

(a) is a citizen of Zambia;

(b) has attained the age of eighteen years; and

(c) is in possession of a national registration card.

(2) The Commission shall register a person as a voter as prescribed.

(3) A person who has been registered in the Register of Voters shall be issued with a voter's card.

(4) A person shall not register as a voter in more than one constituency.

Disqualification from registration as voter

9. (1) The Commission shall not register a person as a voter if that person

(a) is not a citizen of Zambia;

(b) is not in possession of a national registration card;

(c) suffers from a mental disability which makes the person unable to exercise their right to vote;

Cap. 88

(d) is detained under the Criminal Procedure Code during the pleasure of the President;

(e) is disqualified from voting under section *forty-seven*;

(f) is under a sentence of death imposed by a competent court, or a sentence of imprisonment imposed by a court or substituted by a competent authority for some other sentence imposed by that court; or

(g) does not qualify to be registered as a voter as may be prescribed;

(2) In this section, the reference to a sentence of imprisonment shall not be construed as including a sentence of imprisonment the execution of which is suspended or a sentence of imprisonment imposed in default of payment of a fine.

De-registration of voter

10. A registration officer shall de-register a voter if the registration officer is satisfied that the voter—

(a) does not qualify to be registered as a voter;

(b) no longer meets the qualifications for registration as specified in section *eight*;

(c) has been fraudulently registered; or

(d) obtained the registration through submission of false information or making of a misleading statement.

Notification by registration officer

11. (1) A registration officer shall notify a person—

(a) whose registration as a voter has been refused;

(b) whose application to have a change of name or ordinary place of residence recorded has been refused;

(c) who has been disqualified from registration as a voter under section *ten*; or

(d) whose registration details have been changed.

(2) A notification given under subsection (1) shall give reasons for the refusal or action taken.

Suspension of registration of voters

12. (1) The Commission may suspend the registration of voters whenever an election is due for the purposes of the conduct of the election.

(2) The Commission shall, where it prescribes the polling day for a byelection, immediately suspend the registration of voters in the district in which the byelection is to take place until the byelection is concluded.

Provisional Register of Voters

13. (1) The Commission shall establish a Provisional Register of Voters as prescribed.

(2) The Provisional Register of Voters shall include the details of persons entitled to vote in an election or referendum under this Act or the Referendum Act. Cap. 14

Register of Voters

14. (1) The Commission shall compile and maintain the Register of Voters as prescribed.

(2) The Register of Voters shall include the details of persons entitled to vote in an election or referendum under this Act or the Referendum Act. Cap. 14

(3) The Register of Voters shall not preclude any person from voting in a referendum in accordance with the Constitution. Cap. 1

Application to change registration details

15. A voter whose name or ordinary place of residence has changed may apply, in the prescribed manner, to have that change recorded in the Register of Voters, except that a person shall not apply when a change of name is due to change in marital status.

Amendments to Register of Voters

16. (1) A registration officer shall—

(a) change the registration details of a voter if the registration officer is satisfied that the details of a voter as reflected in the Register of Voters are incorrect or have changed;

(b) add the name and other particulars of a voter resulting from a new registration, as prescribed; or

(c) delete the name of a voter who is deceased.

(2) A registration officer shall record, in the Register of Voters, a change in a polling district for which a person is registered as a voter if that person's place of ordinary residence after a change in the boundaries of the polling district falls in another polling district.

Objections concerning details in Provisional Register of Voters

17. (1) A person whose name appears in the Provisional Register of Voters may object to an error or omission regarding the person's details, in the prescribed manner, within ninety days' of the publication of the Provisional Register of Voters.

(2) A person may object to an error or omission to the exclusion or regarding the registration details of another person.

(3) A person who objects to another person's registration details shall serve notice of the objection on that person.

(4) The Commission shall consider an objection to the Provisional Register of Voters within fourteen days from the date the objection was made and shall notify the person who made the objection and the registration officer.

(5) A registration officer shall give effect to a decision of the Commission, made under this section, within three days of the decision.

Publication of Register of Voters

18. (1) A copy of the Register of Voters, as it exists at any time, shall be available for inspection during office hours at the Commission's head office.

(2) A person who requires a copy or extract of the Register of Voters may, upon payment of a prescribed fee, obtain the copy or extract which shall be certified by the Chief Electoral Officer.

(3) A document purporting to be a copy or extract of the Register of Voters, which is duly certified by the Chief Electoral Officer, shall be received in evidence in any legal proceedings as to the matters stated in the Register of Voters.

Inspection of Register of Voters before election

19. (1) The Register of Voters or the segments of the Register of Voters that shall be used for an election shall be the register certified for the purposes of that election.

(2) The Chief Electoral Officer shall certify the Register of Voters, or segments of the Register of Voters, and publish the Register of Voters or the segments of the Register of Voters and make the Register of Voters or the segments of the Register of Voters available for inspection at the following venues:

(a) at the Commission's head office;

(b) at the polling station in each polling district; and

(c) at the office of each council.

Cut-off dates for registration of voters and Register of Voters

20. (1) The Commission may prescribe cut-off dates with respect to the registration of voters and the compilation of the Register of Voters, including the date by which—

(a) a person may apply to be registered as a voter or change the person's registration details;

(b) a registration officer shall give notice of the venue and dates on which the Provisional Register of Voters may be inspected;

(c) the Commission shall consider an objection made under section *seventeen* and notify the objector and the registration officer and a person other than the objector whose name or registration details are involved; and

(d) a registration officer shall complete the compilation of the Register of Voters and publish it.

PART III

POLLING DISTRICTS AND BOUNDARIES

Establishment of polling districts

21. (1) The Commission shall—

(a) establish polling districts for the whole of the territory of the Republic;

(b) determine the boundaries of each polling district in accordance with the criteria provided in section *twenty-two*; and

(c) keep a map of each district.

(2) The polling districts for an election shall be those polling districts which, on the date on which an election is called, are within the area in which the election is called.

Criteria for determining polling district boundaries

22. The Commission shall determine the boundaries of a polling district by taking into account any factor within the proposed polling districts that could affect the free, fair and orderly conduct of elections, including—

(a) the availability of a suitable venue for a polling station;

(b) the number and distribution of eligible voters;

(c) the accessibility of a polling station to voters given—

(i) the radius of the proposed polling district;

(ii) the availability of transport;

(iii) telecommunications facilities; and

(iv) any geographical or physical feature that may impede access to the polling station;

(d) district and provincial boundaries; and

(e) cultural diversity.

Inspection and copies of maps of polling district

23. (1) As soon as practicable after the polling districts have been established, the Chief Electoral Officer shall give notice that copies of the map of each polling district are available for inspection.

(2) The notice referred to in subsection (1) shall be published in the *Gazette* and publicised in the media so as to ensure wide publicity of the maps.

(3) The notice shall state, and the Chief Electoral Officer shall ensure, that copies of—

(a) the maps are available for inspection at the Commission's head office; and

(b) the maps of the polling districts are available for inspection at the office of the person administering the district.

(4) A person may inspect a copy of a map provided for in subsection (1).

(5) The Chief Electoral Officer shall provide a certified copy of a map of a polling district to any person who pays the prescribed fee for that purpose.

Establishment of polling station

24. (1) The Commission shall establish a polling station for an election, in each polling district, as the Commission may prescribe.

(2) The Commission shall, when determining the location of a polling station, take into account any factor that could affect the free, fair and orderly conduct of elections, including—

(a) the number and distribution of eligible voters in the polling districts;

(b) the availability of suitable venues for polling stations;

(c) the distance to be travelled to reach the polling station;

(d) access routes to the polling station;

(e) the availability of transport to the polling station;

(f) traffic density at or near the polling station;

(g) telecommunications facilities at the polling station;

(h) general facilities at the polling station;

(i) the safety and convenience of voters;

(j) any geographical or physical feature that may impede access to or at the polling station; and

(k) the accessibility of the polling station.

(3) The Commission may, before determining the location of a polling station, consult on the proposed location of that polling station with the council for the area in which that polling station shall fall.

(4) The Chief Electoral Officer shall, not later than the date stated in the election timetable, publicise a list containing the addresses of the established polling stations available for inspection.

(5) Section *twenty-three* shall apply, with the necessary modifications, to the inspection and obtaining of copies of the established polling stations.

Division of area of councils into wards

25. (1) The Commission shall, after consultation with every council, by statutory order, divide the area of each council into wards, defining the boundaries of the wards by reference to polling districts, and assigning names to the wards and polling districts.

(2) The number of wards into which the area of a council is divided shall be equal to the number of elected councillors prescribed in respect of that council by the Minister under the Local Government Act. Cap. 281

(3) The Commission shall exercise its powers under this section so that each ward comprises one or more complete polling districts.

(4) Whenever the Minister alters the area of a council or the number of councillors of a council, the Commission shall, after consultation with such council, by statutory order, make such alterations to the boundaries of the wards of such council or to the division of the area of such council into wards as may be necessary to give effect to the provisions of this section.

(5) Whenever the Commission is satisfied that there has been a material alteration in the number of registered voters in the area of a council or of any of the wards into which such area is divided, the Commission may, after consultation with the council concerned, exercise in respect of the area of that council or any part of the council the powers conferred by this section.

Election in newly created Council

26. (1) The Commission may, by statutory order, whenever—

(a) a new council is established; or

(b) an alteration is made in the division of the area of an existing council into wards or in the definition of the boundaries of any ward;

direct that an ordinary election of councillors in every ward or in any particular ward of that council shall be held on such date as may be appointed by the statutory order.

(2) A statutory order made under this section shall specify the day or days on which, and the hours within which, returning officers may receive nominations of candidates for election in any ward to which such order relates.

Relocation of polling station in emergencies

27. (1) Despite section *twenty*, the Commission may relocate a polling station if it is necessary to do so for the conduct of a free and fair election.

(2) The Chief Electoral Officer shall publicise the relocation of a polling station among voters in the polling district concerned.

PART IV

NOMINATIONS FOR ELECTIONS

Election timetable

28. (1) Subject to the Constitution, the Commission shall, before the polling day—

(a) compile an election timetable for each election to provide for the following:

(i) the closing date of the registration of voters;

(ii) the dates for inspection of the Provisional Register of Voters;

(iii) the date and method for the submission of nominations;

(iv) the date and method for the acceptance of nominations;

(v) the opening and closing dates of the campaign period;

(vi) the date of the election and voting hours for the election;

(vii) any cut-off time for any act to be performed; and

(viii) any other relevant information; and

(b) publish the election timetable in the *Gazette*.

(2) The Commission may amend the election timetable by notice in the *Gazette* if—

(a) it considers it necessary for a free and fair election; or

(b) the polling day is postponed under section *fifty-six*.

(3) The campaign period shall commence and close on such date as the Commission may determine.

Electoral campaign

29. (1) A public officer and public entity shall give equal treatment to candidates.

(2) A candidate and political party has the right to have the content of the candidate's or political party's campaign message reported in public media in a fair and balanced manner.

(3) A candidate or political party may, during an electoral campaign, publish or distribute campaign materials of such a nature and in such a manner as may be prescribed by the Commission.

(4) For the purposes of this section "campaign messages" means an activity, statement or any other form of expression aimed at promoting particular political ideas, policies and strategies for purposes of obtaining votes for a candidate or political party contesting an election.

Nomination of Presidential and Vice-Presidential candidates

30. (1) A candidate for election as President or Vice-President shall deliver to the Returning Officer—

(a) the candidate's nomination paper;

(b) the prescribed election fee, except that a candidate for election as a Vice-President shall not pay the prescribed fee;

(c) the prescribed statutory declaration of the candidate's assets and liabilities; and

(d) an affidavit attesting that the person is qualified for election as President or Vice-President, as the case may be.

(2) A person who swears or affirms falsely under this section commits an offence and is liable, upon conviction, to imprisonment for a term of seven years without the option of a fine.

(3) A candidate delivering a nomination paper, referred to in subsection (1), to the Returning Officer shall be supported by one hundred supporters from each Province who are registered voters in that Province.

Nomination for election in constituency

31. (1) A person who applies to be a candidate for election in any, constituency shall lodge with the returning officer for that constituency that person's nomination paper and an affidavit in the prescribed manner and form.

(2) A nomination submitted under subsection (1) may be withdrawn at any time, before the expiry of the period appointed for lodging nomination papers in respect of the constituency concerned, if the candidate delivers to the returning officer a written notice to that effect.

Conduct of local government elections

32. Subject to the other provisions of this Act, the Commission shall conduct local government elections.

Nomination of candidates in district or ward

33. (1) Subject to subsection (2), a candidate for election in a district or ward of a council shall be nominated by means of a nomination paper in such form as may be prescribed and such nomination paper shall be subscribed, in the presence of the returning officer for that council, by a proposer and a seconder and not less than seven other persons, each of whom shall be a voter registered in a polling district in such ward.

(2) A person appearing before a returning officer for the purpose of subscribing a nomination paper under subsection (1) shall produce a voter's card and a national registration card to the returning officer for inspection as proof of identity.

(3) A person qualifies to be a mayor or council chairperson if that person—

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(a) possesses the same qualifications as those specified for a Member of Parliament in Article 70 of the Constitution;

(b) is not a Member of Parliament; and

(c) has a certificate of clearance showing the payment of council taxes, where applicable.

Restriction on nomination papers

34. (1) In an election, a person shall lodge nomination papers in only one constituency, district or ward.

(2) Where, upon the expiry of the period for lodging nomination papers in any constituency, district or ward a person is found to have lodged, and not withdrawn, nomination papers in more than one constituency, district or ward then every one of those nominations shall be invalid.

Appointment of election agents and polling agents

35. (1) A candidate may appoint—

(a) two polling agents for each polling station; and

(b) two election agents for each venue where counting of the votes will take place.

(2) An election or polling agent—

(a) shall be a Zambian citizen or resident permit holder; and

(b) shall not be a candidate in an election.

(3) The appointment and revocation of appointment of a person as an election or polling agent shall be effected in the prescribed manner.

Powers and duties of election or polling agents

36. (1) An election or polling agent may observe the proceedings during—

(a) voting;

(b) the counting of votes; and

(c) the announcement and declaration of the result of an election.

(2) The absence of an election or polling agent from a gazetted or prescribed place where an electoral proceeding is being conducted shall not invalidate those proceedings.

(3) An election or polling agent shall, while at a polling station or venue where the proceedings are taking place—

(a) wear the prescribed identification indicating—

(i) that the person is an election or polling agent; and

(ii) the candidate represented by that election or polling agent; and

(b) comply with any lawful order issued by—

(i) an election officer; or

(ii) a police officer acting on the instructions of an election officer.

PART V
Election Officers

Appointment of presiding officer

37. The Commission shall, after prescribing a date for an election, appoint a presiding officer for each polling station at which the election is conducted.

Powers and duties of presiding officer

38. (l) A presiding officer shall coordinate and supervise the voting at a polling station so as to ensure that the election at the polling station is free and fair.

(2) A presiding officer—

(a) shall exercise the powers and perform the duties assigned to a presiding officer by or under this Act;

(b) shall ensure orderly conduct at a polling station; and

(c) may order a police officer to assist in ensuring orderly conduct at that polling station and the police officer shall comply with the order.

(3) A presiding officer for a polling station or venue for the counting of votes shall coordinate and supervise the counting of votes and announcement of the result of the election at the polling station or venue.

(4) A presiding officer shall exclude from the area within the boundary of a polling station any person other than—

(a) a member, employee or officer of the Commission;

(b) an election or polling agent who is entitled under this Act to be present at a polling station;

(c) a candidate in that election;

(d) an accredited observer or monitor;

(e) a voter present for the purpose of casting a vote; and

(f) a person or category of persons authorised by the Commission to be present at the polling station.

(5) Despite subsection (4), a presiding officer may order a person referred to in paragraphs *(b)* to *(f)* of subsection (4), to leave the area within the boundary of the polling station if that person's conduct is not conducive to a free and fair election at that polling station and shall give that person the reasons for making the order.

(6) If a person refuses to comply with an order under subsection (5), a presiding officer may direct a police officer to forcibly remove that person, and the police officer shall comply with that order.

Appointment of polling assistant

39. The Commission shall appoint for each polling station as many polling assistants as it considers necessary to conduct an election.

Powers and duties of polling assistant

40. A polling assistant shall—

(a) assist the presiding officer in the exercise of the presiding officer's powers and the performance of the presiding officer's duties; and

(b) exercise the powers and perform the duties assigned to a polling assistant by or under this Act.

Appointment of additional persons as election officers

41. (1) The Commission may appoint as many additional persons as election officers as may be necessary to enable the Commission to exercise its powers and perform its duties effectively during an election.

(2) A person appointed by the Commission under this section shall exercise any power and perform any duty assigned to an election officer by or under this Act.

(3) An appeal shall not be brought against a decision by the Commission to appoint a person as an election officer or to dismiss an election officer.

(4) Despite subsection (3), a person may object to the appointment of an election officer under this section if the person appointed is disqualified under section 42 (3).

General provisions concerning appointment of election officer

42. (1) The Commission shall determine, in writing, the terms and conditions of appointment of an election officer.

(2) The assignment of a power or duty to an election officer shall not prevent the Chief Electoral Officer from exercising that power or performing that duty.

(3) A person shall not be appointed as an election officer or remain in that office if that person—

(a) is a candidate contesting an election;

(b) is an election or polling agent in an election;

(c) holds political office in a registered party or is affiliated to a political party; or

(d) was convicted of an offence or reported of any corrupt practice or illegal practice, under this Act, within a period of five years preceding an election.

(4) A person shall not be appointed as an election officer unless that person signs a prescribed undertaking which shall include an undertaking to be bound by—

(a) the Code; and

(b) a declaration of secrecy.

(5) An election officer shall exercise the powers and perform the duties assigned to that election officer subject to the direction, control and discipline of the Commission.

(6) An election officer shall not place in jeopardy that officer's independence or harm the credibility, impartiality, independence or integrity of the Commission by any membership, association, statement or conduct.

(7) An appointment as an election officer does not constitute an employment relationship.

(8) The Commission may dismiss an election officer for—

(a) misconduct, incompetence or incapacity;

(b) absence from duty without leave of the Chief Electoral Officer;

(c) a material contravention of this section;

(e) a material contravention of the declaration of secrecy; or

(f) any other consideration related to a free and fair election.

Immunity of election officer

43. An election officer shall not be liable for any loss suffered by a person as a result of an act performed or omitted in good faith in the exercise of a power or the performance of a duty under this Act.

PART VI
VOTING

Qualifications for voting

44. A voter is entitled to vote at an election held in a district, constituency or ward.

Identification of voter

45. A voter shall produce identification documents to a presiding officer as may be prescribed.

One vote and secrecy

46. (1) A voter shall not be entitled to vote more than once in the same election.

(2) A poll shall be taken by means of a secret ballot in accordance with the Constitution, this Act and as may be prescribed.

Dis-qualification from voting

47. A person shall not be entitled to vote at an election if, at the date of the election, that person is in lawful custody or the person's freedom of movement is restricted under any written law.

Special vote

48. (1) The Commission may allow a person to apply for a special vote if that person cannot vote at a polling station in the polling district in which the person is registered as a voter due to that person's—

(a) physical infirmity or disability;

(b) pregnancy;

(c) absence from that polling district while serving as an election officer in the election concerned; or

(d) while on duty as a member of the security services in connection with the election.

(2) The Commission shall prescribe the procedure and conditions under which a voter who is unable to vote in the polling district in which that voter is registered may apply for a special vote.

Election officers at polling stations

49. On polling day each polling station shall be staffed by the—

(a) presiding officer appointed for that polling station;

(b) polling assistants appointed for that polling station; and

(c) other officers appointed by the Commission.

Hours of voting

50. (1) The Commission shall prescribe the voting hours for an election.

(2) The Commission may, where it is necessary to do so, prescribe different voting hours for different polling stations.

(3) The Commission shall publish the prescribed voting hours in the media.

(4) A polling station shall—

(a) open for voting at the prescribed time; and

(b) subject to subsection (7)*(b)*, remain open for voting until the prescribed time or such later time as the Commission may determine under subsection (7)*(a)*.

(5) A person shall not be admitted to a polling station for the purpose of voting after the polling station has closed for voting.

(6) Voting at a polling station shall continue until every voter who had reported at a polling station to vote at the time prescribed for voting hours has voted.

(7) The Commission—

(a) may extend voting hours at a polling station after the voting day or prescribed time; and

(b) may temporarily close a polling station for part of a polling day if it is temporarily impossible to conduct an election at that voting station.

Ballot paper

51. Subject to the other provisions of this Act and section *fifty-two*, the Commission shall prescribe the form and design of a ballot paper and the manner in which ballot papers issued shall be accounted for.

Design of ballot paper

52. (1) Despite section *fifty-one*, a ballot paper shall be designed in a way that prevents fraudulent voting.

(2) A ballot paper shall include—

(a) a portrait of the candidate nominated for elections to the office of President, Member of Parliament, mayor, council chairperson and councillor; and

(b) the symbol of a political party registered with the Commission under which a candidate shall stand for elections and where the candidate is an independent candidate, the symbol the Commission shall allocate to the independent candidate.

(3) A ballot paper shall be colour coded so as to differentiate the ballot paper for use in a presidential, parliamentary or local government elections.

Ballot boxes

53. (1) The Commission shall use in an election transparent ballot boxes capable of being securely closed.

(2) The Commission shall prescribe the manner in which ballot boxes shall be—

(a) numbered and labelled; and

(b) closed, secured, opened, sealed and unsealed.

Voting compartments

54. (1) Subject to subsection (2), the Commission shall prescribe the design and material of voting compartments to be used in an election.

(2) A voting compartment shall, while screening a voter from observation by other persons when marking a ballot paper, be designed and placed in such a manner as to ensure that a clear view of the voters' back can be observed from the outside.

Conduct of general election Cap. 1

55. A general election shall be held in accordance with the Constitution, this Act and as may be prescribed.

Postponement of voting at polling station

56. (1) If it is not possible to conduct a free and fair election at a polling station on a prescribed polling day, the Commission may, at any time before voting at the polling station has commenced, postpone voting at that polling station.

(2) A postponement under subsection (1) shall be—

(a) effected in the prescribed manner;

(b) to a day that would fall within the period referred to in section *twenty-eight;* and

(c) publicised in the media so as to ensure wide publicity of the postponement of the polling day at the polling station.

Postponement of by-election

57. The Commission may postpone the polling day of a by-election if it is satisfied that—

(a) the postponement is necessary for ensuring a free and fair election; and

(b) the polling day for the election shall fall within the period required by the Constitution. Cap. 1

Voting materials

58. (1) The Commission shall supply, before voting opens at a polling station, the voting materials necessary for the election at that station including—

(a) ballot papers;

(b) ballot boxes;

(c) voting compartments;

(d) a certified register of voters for the polling district concerned; and

(e) a document to be signed by the presiding officer detailing the voting materials entrusted to that presiding officer.

(2) A presiding officer shall be responsible for the safe-keeping of all the voting materials supplied to that presiding officer.

Initial procedures

59. A presiding officer shall, immediately before opening a polling station for voting—

(a) show all accredited observers, monitors, election and polling agents present, that each ballot box to be used at that polling station is empty; and

(b) in the presence of the accredited observers, monitors, election and polling agents, close, seal and secure the ballot boxes in the prescribed manner.

Voting procedure

60. (1) Subject to section *forty-eight*, a voter shall only vote at the polling station in the polling district for which that voter is registered.

(2) A voter is entitled to vote at a polling station—

(a) on production of that voter's national registration card and voter's card to the presiding officer or election officer at the polling station; and

(b) if that voter's details are in the certified segment of the Register of Voters for the polling district concerned.

(3) When a voter produces a national registration card to the presiding officer or election officer as required by subsection (2), the presiding officer or election officer shall examine the identity document and determine whether—

(a) the voter is the person described in that national registration card;

(b) the voter's details are in the certified segment of the Register of Voters for the polling district concerned; and

(c) the voter has not already voted in the election.

(4) For the purposes of subsection (3) (c), the presiding officer or election officer shall examine the voter's hands to ensure that the voter does not possess the mark indicating that the voter has already voted.

(5) If the presiding officer or election officer is satisfied in respect of all the matters referred to in subsection (3), the presiding officer shall—

(a) record that the voter is treated as having voted in the election;

(b) mark the hand of the voter in the prescribed manner;

(c) mark the back of a ballot paper for that election; and

(d) hand the ballot paper to the voter.

(6) A voter shall, once the voter has received a ballot paper marked under subsection (5)(c) —

(a) enter an empty voting compartment;

(b) mark the ballot paper in a way that indicates the candidate the voter wishes to vote for;

(c) fold the ballot paper to conceal the voter's vote;

(d) cast the ballot paper in the ballot box; and

(f) without delay leave the voting station.

Assistance to voters with disabilities

61. (1) A person may assist a voter to vote where—

(a) the voter requires assistance due to a physical disability;

(b) the voter has requested to be assisted by that person; and

(c) the presiding officer is satisfied that the person assisting the voter has attained the age of eighteen years.

(2) In the absence of a person referred to in subsection (1), the presiding officer or another election officer, at the request of a voter who is unable to read, shall assist that voter to vote.

(3) Subject to subsection (2), the presiding officer or election officer shall assist voters in the presence of—

(a) a person appointed by the presiding officer or an accredited observer or monitor, if available; or

(b) two election agents of different candidates, if available.

(4) A presiding officer shall record in a copy of the Register of Voters, by means of a mark placed next to the name of the voter concerned, that the presiding officer or another person has assisted the voter as provided under this section and give the reasons for doing so.

(5) A person assisting another person under subsection (2) shall maintain the secrecy of the vote cast by the person being assisted.

Issuance of new ballot paper

62. (1) If a voter accidentally marks a ballot paper in a way that does not indicate for whom the voter wishes to vote and the ballot has not yet been placed in the ballot box—

(a) the voter may return that ballot paper to the presiding officer or a polling assistant;

(b) the presiding officer or polling assistant shall deal with the ballot paper in accordance with subsection (2), and shall give the voter a new ballot paper in accordance with this section; and

(c) the voter may vote in accordance with section *sixty*.

(2) Upon receiving a ballot paper from a voter under subsection (1), the presiding officer or a polling assistant shall mark "cancelled" on the back of the ballot paper and file it separately to be dealt with in accordance with section *sixty-three.*

Spoilt ballot papers

63. Where a voter inadvertently deals with a ballot paper in such manner that it cannot be used as a valid ballot paper, the voter shall deliver that ballot paper to the presiding officer and, if the presiding officer is satisfied that the ballot paper has been spoilt inadvertently, the presiding officer shall issue another ballot paper to the voter, and shall cancel the spoilt ballot paper and the counterfoil to which it relates.

Objections concerning voting

64. (1) A person may, at any time before a voter is handed a ballot paper, object to that voter being entitled to vote or to vote at the polling station concerned.

(2) A person may object to a voter's vote where the voter—

(a) has already voted;

(b) is not the owner of the voter's card;

(c) is not registered at the polling station;

(d) is not a citizen; or

(e) is disqualified from voting.

(3) An election agent or a voter may object to any conduct of an election officer or any other person present at a polling station.

(4) An objection under this section shall be made to the presiding officer in the prescribed manner.

(5) A presiding officer shall make a decision on the objection and notify the objector and any other parties involved in the objection of the presiding officer's decision in the prescribed manner.

(6) An appeal against the decision of a presiding officer may be made to a returning officer in the prescribed manner.

(7) A presiding officer or returning officer shall keep a written record of each objection and decision made under this section in the prescribed manner .

Sealing of full ballot boxes

65. (1) As soon as a ballot box is full, a presiding officer, in the presence of an accredited observer, monitor or polling agent, shall seal the ballot box and allow the agents to affix their seals to the ballot box.

(2) Immediately after the last vote has been cast, every remaining used ballot box shall be similarly dealt with.

(3) A sealed ballot box shall remain—

(a) sealed until opened for the counting of votes; and

(b) in the polling station until the commencement of the counting of the votes.

Completion of ballot paper account form and sealing of voting materials

66. (1) A presiding officer shall, at the close of a polling station, in the presence of an accredited observer, monitor or election agent

(a) complete a ballot paper account form reflecting the number of—

(i) ballot boxes entrusted to that presiding officer;

(ii) used ballot boxes;

(iii) unused ballot boxes;

(iv) ballot papers entrusted to that presiding officer;

(v) issued ballot papers;

(vi) unissued ballot papers; and

(vii) cancelled ballot papers;

(b) seal each unused ballot box entrusted to that presiding officer; and

(c) seal in separate ballot boxes

(i) the certified segment of the Register of Voters for that polling district;

(ii) the unused ballot papers entrusted to that presiding officer;

(iii) the spoilt ballot papers; and

(iv) the written record of any objections concerning voting.

Place and time of counting of votes

67. (1) Votes shall be counted at the polling station at which those votes were cast.

(2) A presiding officer shall ensure that the procedures set out in this Part relating to the counting of votes commences immediately after the polling station is closed for voting and continue the counting of votes until completion.

(3) The procedures provided for in this Part relating to the counting of votes may be suspended only with the approval of the Commission and, if they are suspended, the presiding officer shall ensure the safekeeping of all the voting materials entrusted to the presiding officer until the counting of votes has been completed.

Counting of votes and announcement of provisional results

68. (1) A presiding officer shall open the ballot boxes and—

(a) cause the ballot papers to be sorted on the basis of the ballot papers for each election, if more than one election was held at a polling station on the same day;

(b) cause the ballot papers for each election to be sorted and compare them with the number of ballot papers issued in the prescribed manner;

(c) cause the votes cast in each election to be counted in the prescribed manner; and

(d) announce and publish the result of each count at that polling station in both figures and words in the prescribed manner.

(2) A presiding officer shall reject a ballot paper—

(a) that indicates the identity of the voter;

(b) on which a vote is cast for more than one candidate;

(c) that is unmarked;

(d) that is marked in such a way that it is not reasonably possible to determine the voter's choice;

(e) that does not bear the official mark required in terms of section *sixty* (5) (c); or

(f) that is not an official ballot paper.

(3) The presiding officer shall mark A for rejection on the back of each rejected ballot paper and file the rejected ballot paper separately.

Objections concerning sorting of ballot papers

69. (1) An election or polling agent may object to any alleged irregularity in the sorting of the ballot papers.

(2) An objection under subsection (1) shall be made to a presiding officer, in the prescribed form, at any stage before the presiding officer has commenced the count.

(3) Section *sixty-four,* with the necessary modifications, applies to an objection under this section.

Objections concerning counting of votes and announcement of provisional result

70. (1) An election or polling agent may object to an alleged inaccuracy in the counting of the votes or the announcement of a result under section *seventy-one.*

(2) An objection under subsection (1) shall be made to a presiding officer, in the prescribed form, at any stage before the presiding officer has announced the result.

(3) A presiding officer shall determine the objection and decide whether to order a recount.

(4) A presiding officer shall notify the objector and any other party involved in the objection, of the decision made under subsection (3).

(5) If a presiding officer orders a recount, the presiding officer shall announce the result afresh.

(6) An appeal against the decision of a presiding officer may be made to the returning officer in the prescribed form.

(7) A presiding officer shall keep a written record, in the prescribed form, of each objection under subsection (1) and each decision under this section.

Procedure concerning provisional results and voting materials

71. (1) After announcing the result at a polling station, a presiding officer shall complete a form, as may be prescribed, reflecting—

(a) the number of ballot papers supplied to the polling station;

(b) the result at the polling station;

(c) the number of rejected ballot papers;

(d) the number of spoilt ballot papers; and

(e) the number of unused ballot papers.

(2) When a presiding officer has complied with subsection (1), the presiding officer shall publicly announce the result of the count at the polling station to members of the public, the accredited observers, monitors, election and polling agents present at the polling station.

(3) When the presiding officer has complied with subsection (2), the presiding officer shall inform the returning officer of the result of that count at the polling station.

(4) When the presiding officer has complied with subsection (3), the presiding officer shall—

(a) seal in separate ballot boxes each of the items mentioned in subsection (l) and the written record of any objections; and

(b) deliver the form, completed in terms of subsection (l), and the sealed ballot boxes to the returning officer.

Announcement and declaration of results by returning officer

72. (1) Upon receipt of the items mentioned in section *seventy-one*, a returning officer shall tally the results of the votes received from the polling station in the constituency, district and ward and shall—

(a) announce the results of the votes for the presidential and mayoral or council chairperson elections; and

(b) declare the results for the National Assembly and Ward election.

(2) The returning officer shall submit the results referred to in subsection (1) (a) and (b) to the Commission.

Announcement and declaration of results in Presidential election

73. (1) The Returning Officer shall tally, announce and declare the result of a presidential election as soon as they are received.

(2) The Returning Officer shall announce and declare the result of a presidential election without having received the results of all polling stations if—

(a) to wait for the receipt of the result from every polling station would unduly and unreasonably delay the determination and declaration of the result of that election; and

(b) the outstanding results are not likely to materially influence the overall result of that election.

Electronic transmission of results

74. The Commission may use electronic means to transmit results from polling stations.

Revoting at polling station

75. (1) If ballot papers used in an election at a polling station are lost, destroyed or unlawfully removed before the votes cast at the polling station have been counted and announced, the Commission shall allow a revote at that polling station.

(2) A revote at a polling station shall be—

(a) conducted on a date that would fall within the period referred to in section *twenty-eight;*

(b) publicised in the media so as to ensure wide publicity of the date determined for the revote; and

(c) conducted in accordance with a procedure prescribed by the Commission.

Correction of mistakes

76. The Commission may correct a mistake committed by an electoral officer in the tabulation of results within seven days after the declaration of the results.

PART VII

OBSERVERS, MONITORS AND VOTER EDUCATION

Accreditation of observers and monitors

77. (1) A juristic person may apply to the Commission, in the prescribed manner, for accreditation to observe or monitor an election.

(2) The Commission may require any information it may consider necessary in support of an application under subsection (1).

(3) The Commission shall, where it decides to to accredit an applicant—

(a) issue the applicant with a certificate of accreditation in the applicant's name, stating the period and other conditions of accreditation; and

(b) enter the applicant's name in the register of persons accredited as observers and monitors.

(4) The Commission may accredit an applicant, without the payment of a fee, to observe or monitor an election after considering the application and any other information provided by the applicant, and whether—

(a) the accreditation of the applicant shall promote conditions conducive to a free and fair election; and

(b) the persons appointed by the applicant shall—

(i) observe the election impartially and independently of any registered party or candidate contesting that election;

(ii) be competent and professional in observing the election; and

(iii) subscribe to a code governing observers and monitors issued by the Commission under this Act.

(5) The Commission shall, where it decides not to accredit the applicant, inform the applicant accordingly, in writing, and give the reasons for its decision.

(6) If a person accredited as an observer or monitor fails to comply, to a material extent, with the conditions of the accreditation, the Commission may cancel that accreditation and, in writing, notify the person concerned of the cancellation and state the reasons for such cancellation.

(7) Any person may inspect the register and copies of the certificates of persons accredited as observers and monitors.

(8) The register and copies of the certificate shall be kept at the Commission's head office.

(9) The Chief Elections Officer shall provide a certified copy of, or extract from, the register or a certificate to any person upon payment of the prescribed fee.

(10) A person representing an accredited observer or monitor shall abide by the Code.

(11) A person representing an accredited observer or monitor who is found guilty of violating any election law shall be disqualified from observing or monitoring an election.

(12) A register of juristic persons and institutions accredited as observers or monitors and copies of the certificates of the observers and monitors shall be kept at the Commission's head office.

(13) In this section "juristic person" includes an institution and organisation registered under the Non-Governmental Organisations Act, 2009.

Act No. 16 of 2009

Powers and duties of accredited observers and monitors

78. (1) An accredited observer or monitor may, in relation to an election for which that observer or monitor is accredited, observe the proceedings concerning voting, the counting of votes and the announcement and declaration of the election results.

(2) Whilst observing an election, a person appointed by an accredited observer or monitor shall wear the prescribed identification indicating that the person is representing an accredited observer or monitor.

(3) A person appointed by an accredited observer or monitor shall comply with any order issued by an election officer or a police officer acting on the instructions of an election officer.

Provision of voter education generally

79. (1) Any natural or juristic person may provide voter education for an election.

(2) Any natural or juristic person providing voter education shall do so in a manner that—

(a) is impartial and independent of any registered party or candidate contesting an election; and

(b) shall promote conditions conducive to free and fair elections.

Voter education

80. Despite section *eight*, the Commission shall provide voter education for an election.

PART VIII

Elections Offences

Bribery

81. (1) A person shall not, either directly or indirectly, by oneself or with any other person corruptly—

(a) give, lend, procure, offer, promise or agree to give, lend, procure or offer, any money to a voter or to any other person on behalf of a voter or for the benefit of a voter in order to induce that voter to vote or refrain from voting or corruptly do any such act as aforesaid on account of such voter having voted or refrained from voting at any election;

(b) give, lend or procure, offer, promise or agree to give, lend, procure, offer or promise, any money to a voter or for the benefit of a voter or to any other person or on behalf of that person on behalf of any voter or to or for any other person for acting or joining in any procession or demonstration before, during or after any election;

(c) make any gift, loan, offer, promise, procurement or agreement to or for the benefit of any person in order to induce the person to procure or to endeavour to procure the return of any candidate at any election or the vote of any voter at any election;

(d) upon or in consequence of any gift, loan, offer, promise, procurement or agreement, procure or engage, promise or endeavour to procure, the return of any candidate at any election or the vote of any voter at any election;

(e) advance or pay or cause to be advanced or paid any money to or for the use of any other person with the intent that such money or any part thereof shall be expended in bribery at any election, or knowingly pay or cause to be paid any money to any person in discharge or repayment of any money wholly or partially expended in bribery at any election;

(f) before or during any election, receive or contract for any money or loan for oneself or for any other person for voting or agreeing to vote or for refraining or agreeing to refrain from voting at any election;

(g) after any election, receive any money on account of any person having voted or refrained from voting or having induced any other person to vote or refrain from voting at any election; or

(h) convey or transfer or be concerned with the conveyance or transfer of any property, or pay or be concerned with the payment of any money, to any person for the purpose of enabling that person to be registered as a voter, thereby to influence that person's vote at any future election, or pay to or be concerned with the payment of any money on account of any voter for the purpose of inducing that person to vote or refrain from voting.

(2) A person who contravenes any provision of subsection (1) commits an offence.

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

Impersonation

82. (1) A person shall not—

(a) at any election, apply for a ballot paper in the name of some other person, living or dead, or of a fictitious person;

(b) having voted once at any election, apply again at the same election for a ballot paper;

(c) vote at any election knowing that the person is not entitled to vote at that election or induce or procure any person to vote at any election knowing that person is not entitled to vote at that election;

(d) apply to be registered as a voter in the name of any other person, whether living, dead or fictitious; or

(e) impersonate—

(i) a representative of a registered political party;

(ii) a candidate in an election;

(iii) a member, employee or officer of the Commission; or

(iv) a person appointed by an accredited observer, or monitor.

(2) A person who contravenes any provision of subsection (1) commits an offence.

Undue influence

83. (1) A person shall not directly or indirectly, by oneself or through any other person—

(a) make use of or threaten to make use of any force, violence or restraint upon any other person;

(b) inflict or threaten to inflict by oneself or by any other person, or by any supernatural or non-natural means,or pretended supernatural or non-natural means, any physical, psychological, mental or spiritual injury, damage, harm or loss upon or against any person;

(c) do or threaten to do anything to the disadvantage of any person in order to induce or compel any person—

(i) to register or not to register as a voter;

(ii) to vote or not to vote;

(iii) to vote or not to vote for any registered political party or candidate;

(iv) to support or not to support any political registered party or candidate; or

(v) to attend and participate in, or not to attend and participate in, any political meeting, march, demonstration or other political event;

(d) interfere with the independence or impartiality of the Commission, any member, employee or officer of the Commission;

(e) prejudice any person because of any past, present or anticipated performance of a function under this Act;

(f) advantage, or promise to advantage, a person in exchange for that person not performing a function under this Act; or

(g) unlawfully prevent the holding of any political meeting, march, demonstration or other political event.

(2) Subject to the other provisions of this Act, a person shall not prevent another person from exercising a right conferred by this Act.

(3) A person, knowing that another person is not entitled to be registered as a voter, shall not—

(a) persuade that other person that, that other person is entitled to be registered as a voter; or

(b) represent to anyone else that the person is entitled to be registered as a voter.

(4) A person, knowing that another person is not entitled to vote shall not—

(a) assist, compel or persuade that other person to vote; or

(b) represent to anyone else that the other person is entitled to vote.

(5) A person who contravenes any of the provisions of subsections (1) to (4) commits an offence.

(6) A person who, by abduction, duress or any fraudulent device or contrivance, impedes or prevents the free exercise of the vote of any voter or thereby compels, induces or prevails upon any voter either to give or to refrain from giving the person's vote at any election, commits an offence.

Illegal practice of publishing false statements in respect of candidates

84. (1) A person shall not, before or during an election, publish a false statement of the illness, death or withdrawal from election of a candidate at that election for the purpose of promoting or procuring the election of another candidate, knowing that statement to be false or not believing it to be true.

(2) A person who, contravenes subsection (1) commits an illegal practice, unless that person had reasonable grounds for believing, and did believe, the statement to be true.

Illegal practice in respect of nomination of candidates

85. (1) A person shall not—

(a) forge or fraudulently destroy any written authority of a candidate or nomination paper; or

(b) deliver to a returning officer any written authority of a candidate or nomination paper or affidavit knowing the same to be forged.

(2) A person who knowingly makes a false statement relating to that person's nomination in that person's nomination paper or affidavit commits an offence.

Illegal practices in respect of public meetings

86. A person shall not, at a lawful public meeting held in connection with the election of any person between the day of the publication of a notice appointing a nomination day and the day on which the result of the election is published, act or incite others to act in a disorderly manner for the purpose of preventing the transaction of the business for which the meeting is called.

Illegal practices relating to the poll

87. (1) A person shall not—

(a) forge, counterfeit or fraudulently deface or fraudulently destroy any ballot paper or the official mark on any ballot paper;

(b) without authority supply any ballot paper to any person;

(c) without authority put into any ballot box any ballot paper which that person is not authorised by law to put in;

(d) sell or offer to sell any ballot paper or voter's card to any person or purchase or offer to purchase any ballot paper or voter's card from any person;

(e) not being a person entitled under this Act to be in possession of a ballot paper or voter's card, have any such ballot paper or voter's card in that person's possession;

(f) without authority destroy, take, open or otherwise interfere with any ballot box or packet of ballot papers in use or intended to be used for the purpose of an election;

(g) without authority print or make any ballot paper or what purports to be or is capable of being used as a ballot paper or any identity document at an election;

(h) manufacture, construct, have in that person's possession, supply, or use for the purpose of an election, or cause to be manufactured constructed, supplied or used for the purposes of any election any appliance, device or mechanism by which a ballot paper may be extracted or manipulated after having been deposited in a ballot box in the course of polling at any polling station; or

(i) at an election obstruct a voter either at the polling station or on that voter's way thereto or therefrom.

Penalty for illegal practices

88. A person who engages in an illegal practice commits an offence and is liable, upon conviction, to a fine not exceeding five hundred thousand penalty units or to imprisonment for a period not exceeding five years, or to both.

Other election offences

89. (1) A person shall not—

(a) within a period prescribed for the receipt of nominations, under this Act, loiter in any public place within four hundred metres from the entrance to a nomination centre;

(b) having been required to leave a nomination office, fail to leave such nomination office or the precincts thereof;

(c) put into any ballot box anything other than the ballot paper which that person is authorised by law to put therein;

(d) without due authority take out of the polling station any ballot paper or be found in possession of any ballot paper outside a polling station;

(e) on any polling day, at the entrance to or within a polling station, or in any public place or in any private place within four hundred metres from the entrance to such polling station

(i) canvass for votes;

(ii) solicit the vote of any person;

(iii) induce any person not to vote; or

(iv) induce any person not to vote for a particular candidate;

(f) on any polling day loiter in any public place within four hundred metres from the entrance to any polling station;

(g) on any polling day exhibit in any public or private place within one hundred metres from the entrance to any polling station any notice or sign, other than an official notice or sign authorised by an election officer under this Act, relating to the election;

(h) not being a presiding officer, an election officer, candidate, an election agent or a polling agent in the course of their functions within a polling station, make any record showing that any particular person has voted in an election;

(i) without lawful authority, destroy, mutilate, deface or remove any notice which is exhibited in accordance with this Act or under any regulations issued under this Act, or any document made available for inspection under this Act and any such regulations;

(j) wilfully obstruct or interfere with a returning officer, presiding officer, or election officer in the execution of their duties;

(k) make a false answer to any question put to that person by a presiding officer or an election officer under this Act;

(l) have any communication with a voter while such voter is in the precincts of a polling station for the purpose of voting;

(m) fail to comply with any requirement or direction to leave a polling station or the precincts thereof; or

(n) being a candidate use a symbol in the course of an election other than the symbol registered with the Chief Electoral Officer in accordance with this Act and any regulations thereunder or, in the case of any other person, associate any candidate with, any symbol in the course of an election other than the candidate's registered symbol.

(2) A person who contravenes any of the provisions of subsection (1) commits an offence and is liable, upon conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a period not exceeding two years, or to both.

Property in certain election material

90. In a prosecution for an offence in relation to a nomination paper, ballot box or ballot paper, the property in such nomination paper, ballot box, as well as the property in the counterfoil of any ballot paper, shall be vested in the Commission at that election.

Secrecy and penalty for breach of secrecy

91. (1) A person in attendance at a polling station shall maintain, and aid in maintaining, the secrecy of the voting at such station and shall not communicate, except for some purpose authorised by law, to any person, any information as to the name or number on the Register of Voters of any voter who has or has not applied for a ballot paper or voted at such polling station, or as to the official mark or official seal at such polling station.

(2) A person other than a presiding officer or polling assistant in exercise of the presiding officer or polling assistants' functions under this Act shall not, obtain or attempt to obtain in a polling station information as to the candidate for whom any person in such polling station is about to vote or has voted or communicate at any time, to any person, any information obtained in a polling station as to the candidate for whom any person in such polling station is about to vote or has voted, or as to the number on the ballot paper issued to any person at such polling station.

(3) A person in attendance at the counting of the votes shall maintain, and aid in maintaining, the secrecy of the voting and shall not ascertain at the counting the number on any ballot paper or communicate any information obtained at the counting as to the manner in which any vote is given by any particular ballot paper.

(4) A person who contravenes any of the provisions of this section commits an offence and is liable, upon conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a term not exceeding two years, or to both.

Offences by election officers

92. An election officer who wilfully fails to perform the functions of that office under this Act commits an offence and is liable, upon conviction, to a fine not exceeding two hundred thousand penalty units or to inprisonment for a term not exceeding two years, or to both.

Offences by printers and publishers

93. (1) A bill, placard, poster, pamphlet, circular or other printed matter having reference to an election shall bear upon the face thereof the name and address of the printer and of the publisher.

(2) A person who prints, publishes or posts, or causes to be printed, published or posted any matter referred to in subsection (1), which does not bear upon the face thereof such name and address of the printer or publisher commits an offence.

(3) The proprietor and publisher of every newspaper shall cause the word advertisement to be printed as a headline to each article or paragraph appearing in that person's newspaper containing electoral matter, the insertion of which is or is to be paid for, and any proprietor or publisher who fails to comply with this provision commits an offence.

(4) For the purposes of this section—

(a) any process for producing copies of a document, other than by copying it by hand, shall be deemed to be printing, and the expression "printed" shall be construed accordingly; and

(b) "electoral matter" shall be deemed to include all matters which, on the face of them, are intended or calculated to affect the result of an election.

Obstruction of officer

94. (1) A person shall not—

(a) wilfully delay or obstruct an officer in the carrying out of that officer's duties and powers under this Act; or

(b) assault an officer in the lawful exercise of that officers duties and power under this Act.

(2) A person who contravenes a provision of subsection (1), commits an offence and is liable, upon conviction, to a fine not exceeding fifty thousand penalty units or to imprisonment for a term not exceeding six months, or to both.

Attempts to commit offence

95. A person who attempts to commit an offence under this Part commits an offence and is liable upon conviction to the penalty specified for that offence.

PART IX

Election Petitions

Application to members and officers of Parliament

96. (1) A question which may arise as to whether—

(a) a person has been validly appointed or nominated as a Member of Parliament;

(b) the seat of an elected or nominated Member of Parliament, mayor, council chairperson or councillor, has become vacant, other than a question arising from the election of a candidate as a Member of the Parliament; or

(c) a petition may be heard and determined by the High Court or tribunal upon application made by—

(i) any person to whom the question relates; or

(ii) the AttorneyGeneral;

may be determined by the High Court or a tribunal, as the case may be.

(2) A person who makes an application to the High Court or a tribunal under subsection (1), has the right to appear and be represented before the High Court or tribunal.

(3) Subject to any rules of court or tribunal, the powers, practice and procedure of the High Court or a tribunal in respect of the trial of an election petition under this Part shall apply, with the necessary modifications, to the hearing and determination of such applications.

Avoidance of elections

97. (1) An election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall not be questioned except by an election petition presented under this Part.

(2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that—

(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election—

(i) by a candidate; or

(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and

the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;

(b) subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election; or

(c) the candidate was at the time of the election a person not qualified or a person disqualified for election.

(3) Despite the provisions of subsection (2), where, upon the trial of an election petition, the High Court or a tribunal finds that a corrupt practice or illegal practice has been committed by, or with the knowledge and consent or approval of, any agent of the candidate whose election is the subject of such election petition, and the High Court or a tribunal further finds that such candidate has proved that—

(a) a corrupt practice or illegal practice was not committed by the candidate personally or by that candidate's election agent, or with the knowledge and consent or approval of such candidate or that candidate's election agent;

(b) such candidate and that candidate's election agent took all reasonable means to prevent the commission of a corrupt practice or illegal practice at the election; and

(c) in all other respects the election was free from any corrupt practice or illegal practice on the part of the candidate or that candidate's election agent;

the High Court or a tribunal shall not, by reason only of such corrupt practice or illegal practice, declare that election of the candidate void.

(4) An election shall not be declared void by reason of any act or omission by an election officer in breach of that officer's official duty in connection with an election if it appears to the High Court or a tribunal that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such act or omission did not affect the result of that election.

Presentation of election petition

98. An election petition may be presented to the High Court or a tribunal by one or more of the following persons:

(a) a person who lawfully voted or had a right to vote at the election to which the election petition relates;

(b) a person claiming to have had a right to be nominated as a candidate or elected at the election to which the election petition relates;

(c) a person claiming to have been a candidate at the election to which the election petition relates; and

(d) the AttorneyGeneral.

Relief which may be claimed in election petition

99. Any of the following reliefs may be claimed in an election petition:

(a) a declaration that the election was void; or

(b) a declaration that any candidate was duly elected.

Form and procedure for presentation of election petition

100. (1) An election petition shall be in such form as the Chief Justice may by rules prescribe.

(2) An election petition shall be presented—

(a) in the case of an election of a candidate as a Member of Parliament, to the Principal Registry or District Registry of the High Court by lodging it with the Registrar in accordance with this Act; or

(b) in the case of an election of a candidate as a mayor, council chairperson or councillor, to the appropriate tribunal by lodging it with the designated person.

(3) An election petition shall be signed by the petitioner or by all the petitioners, if more than one, and shall be presented not later than fourteen days after the date on which the result of the election to which it relates is duly declared.

(4) Where an election petition is presented under this section—

(a) in the case of an election petition presented in respect of an election of a candidate as a Member of Parliament, the Registrar shall, in writing, inform the Speaker of the National Assembly and the Commission of such presentation; and

(b) in the case of an election petition presented in respect of the election of a candidate as a mayor, council chairperson or councillor, the designated person shall, in writing, inform the Commission of the presentation.

Duty of Registrar and designated person to make out list of election petition

101. (1) Subject to the provisions of subsection (2), the Registrar and the designated person shall make out a list of all election petitions presented under this Act, placing them on such list in the order in which they are presented, and the Registrar or the designated person, as the case may be, shall keep at the Registrars office or the designated person's office a copy of the list which shall be open for inspection by any person making application for inspection thereof.

(2) An election petition shall, unless the High Court or a tribunal orders otherwise, be tried in the order in which it stands on the list made out by the Registrar or designated person under subsection (1), but where more election petitions than one are presented in respect of the same election, the election petitions shall be bracketed together and shall be dealt with as one petition, standing, unless the

High Court or a tribunal orders otherwise, in the list in the place where the last of the election petitions would have stood if it had been the only election petition presented in respect of that election.

Rules of practice and procedure, security for costs etc

102. (1) Subject to the other provisions of this Act, the Chief Justice may make rules regulating generally the praetice and procedure of the High Court and tribunals with respect to the presentation and trial of election petitions, including rules as to the time within which any requirement of the rules is to be complied with and as to the costs of and incidental to the presentation and trial of the election petitions and as to the fees to be charged in respect of proceedings therein, and generally as regard to any other matter relating thereto as the Chief Justice may consider necessary or desirable.

(2) After the presentation of an election petition, a petitioner to it shall give such security for costs, not exceeding in amount the sum of eight thousand fee units, as the High Court or a tribunal may order, and such seeurity shall be given within the time and in the manner and form as the Chief Justice may prescribe by rules under this section or, in the absence of the rules, as the High Court or a tribunal may order.

(3) Where, after the presentation of an election petition, no security for costs is given as required by or under this section, no further proceedings shall be heard on that election petition.

Withdrawal of election petition

103. (1) A petitioner shall not withdraw an election petition without the leave of the High Court or a tribunal.

(2) An application for leave to withdraw an election petition shall not be made until notice of intention to withdraw the election petition has been given in such manner as the Chief Justice may prescribe.

(3) Where an election petition is presented by two or more petitioners, an application to withdraw the election petition shall not be made except with the consent of all the petitioners to it.

(4) The High Court or a tribunal may, upon an application for leave to withdraw an election petition, make such order as to costs as it may consider just.

Substitution of new petitioners

104. (1) Upon the hearing of an application under section *one hundred and three* for leave to withdraw an election petition, any person who might have been a petitioner in respect of the election to which that election petition relates may, despite the provisions of

section *one hundred*, apply to the High Court or tribunal to be substituted for the petitioner applying to withdraw, and the High Court or a tribunal may, if it grants leave to the petitioner to withdraw, order that person (hereinafter referred to as "the substituted petitioner") to be substituted for the petitioner.

(2) Subject to the other provisions of this section, the substituted petitioner shall, as nearly as may be, stand in the same position, and be subject to the same liabilities, under this Act as the petitioner for whom a substitution was made (hereinafter referred to as "the original petitioner").

(3) Where the High Court or a tribunal makes an order under subsection (1), it may direct that the security for costs given by the original petitioner shall remain as security for any costs caused thereafter by the substituted petitioner upon the trial of the election petition, and may direct that, to the extent of the amount of the security, the original petitioner shall be liable to pay the costs of the substituted petitioner.

(4) Unless the High Court or tribunal gives directions as in subsection (3), section *one hundred and three* (1) and (2) shall apply to the substituted petitioner as they apply in relation to a petitioner presenting an election petition.

Abatement of election petitions

105. (1) If a sole petitioner or the survivor of several petitioners dies, then subject to the provisions of this section, no further proceedings shall be heard upon the election petition.

(2) The death of a petitioner shall not affect that petitioner's liability for the payment of costs previously incurred.

(3) On the abatement of an election petition under subsection (1), any person who might have been a petitioner in respect of the election to which that election petition relates may, despite section *one hundred and one* apply to the High Court or tribunal to be substituted as a petitioner in place of the deceased petitioner and the High Court or a tribunal may, if it thinks fit, order that such person be substituted accordingly.

(4) Where the High Court or a tribunal makes an order under this section for the substitution of a person in place of a deceased petitioner such person shall, as nearly as may be, stand in the same position, and be subject to the same liabilities, under this Act as the

deceased petitioner would have been but for the death, and section *one hundred and three* (1) and (2) shall apply to the person as they apply in relation to a petitioner presenting an election petition.

Trial of election petitions

106. (1) An election petition shall be tried and determined by the High Court or a tribunal in open court—

(a) in the case of the election of a candidate as a Mayor, council chairperson or Councillor, within thirty days from the date of filing an election petition; and

(b) in the case of the election of a candidate as a Member of Parliament, within ninety days from the date of filing an election petition.

(2) Where an election petition is not tried and determined within the period specified in subsection (1) due to a failure by the petitioner to actively prosecute the petition, the High Court or a tribunal shall dismiss the petition for want of prosecution.

(3) The High Court or a tribunal may adjourn the trial of an election petition from time to time and from place to place.

(4) Subject to the provisions of this Act, the High Court may in respect of the trial of an election petition, exercise such powers within its civil jurisdiction as it may deem appropriate.

(5) On the trial of an election petition, a verbatim record of all evidence given orally in the trial shall be taken and transcripts of the record shall, at the conclusion of the proceedings, be delivered to the Commission by the Registrar or designated person, as the case may be.

Witnesses

107. (1) On the trial of an election petition, the High Court or a tribunal may—

(a) order a person who appears to the High Court or a tribunal to have been concerned in the election to attend as a witness at the trial; and

(b) examine any witness or any person who is present at the trial although such witness or person is not called as a witness by any party to the proceedings, except that after the examination by the High Court or a tribunal of a witness or person, the witness or person may be cross examined by or on behalf of the petitioner or the respondent.

(2) A person who is called as a witness at the trial of an election petition shall not be excused from answering any question relating to any offence connected with an election on the ground that the answer thereto may tend to incriminate that person, or on the ground of privilege.

(3) Despite subsection (2), a witness who answers to the satisfaction of the High Court or a tribunal every question which is required to be answered under subsection (2), and the answers to which may tend to incriminate that witness, shall not be liable to prosecution for any offence committed by that witness in connection with the election and in respect of which that witness is examined and the witness shall be entitled to receive a certificate of indemnity under the hand of the Registrar or designated person as the case may be, stating that the witness is freed and discharged from liability to prosecution for that offence.

(4) Despite subsection (2), an answer by a witness to a question before the High Court or tribunal under subsection (2) shall not, except in the case of any criminal proceedings for giving false evidence in respect of the evidence, be admissible in any proceedings, civil or criminal, in evidence against that witness.

(5) Where a person has received a certificate of indemnity under subsection (3), and any legal proceedings are at any time brought against that person for any offence to which the certificate relates, the court having conduct of the case shall, on proof of the certificate of indemnity, stay the proceedings and may award to that person such costs as that person may have been put to in the proceedings.

(6) All reasonable expenses incurred by any person in attending at or appearing before the High Court or a tribunal to give evidence as a witness at the trial of an election petition shall be allowed to that person according to the scale of allowances and expenses appropriate in civil proceedings before the High Court.

Conclusion of trial of election petition

108. (1) At the conclusion of the trial of an election petition, the High Court or a tribunal shall determine whether the respondent, or any other, and which, person, was duly elected, or whether the election to which the election petition relates was void, and the Registrar or designated person shall, as soon as is practicable, submit a copy of such determination to—

(a) in the case of an election petition in the High Court, the Speaker of the National Assembly and the Commission; and

(b) in the case of an election petition in a tribunal, the Commission.

(2) Where the High Court or a tribunal determines that the respondent was duly elected, the election shall be and remain valid.

(3) Where the High Court or a tribunal determines that the respondent was not duly elected but that some other person was duly elected, that other person shall be deemed to have been elected accordingly.

(4) Where the High Court or a tribunal determines that the respondent was not duly elected, and that no other person was duly elected, at the election concerned, the vacancy in the membership of the National Assembly or a Council in respect of which that election was held shall be deemed to continue until duly filled.

(5) Where a determination under subsection (1) alters the results of an election as previously declared, the Commission shall publish the results as so altered in the *Gazette*.

(6) Where it appears to the High Court or a tribunal upon the trial of an election petition that any corrupt practice or illegal practice has been committed by any person in connection with the election to which the election petition relates, the High Court or tribunal shall, at the conclusion of the proceedings, prepare a report stating

(a) the evidence given in the proceedings in respect of the corrupt practice or illegal practice;

(b) the names and particulars of any person by whom the corrupt practice or illegal practice was, in the opinion of the High Court or a tribunal, committed;

(c) in the event that there is an appeal, the Constitutional Court shall prepare the report, except that the Court shall not state the name of any person under this paragraph unless the person has been given an opportunity of appearing before the Court and of showing cause why that person's name should not be so stated.

(7) The Registrar or designated person shall deliver a copy of every report prepared by the High Court or a tribunal under subsection (6) to—

(a) the Commission; and

(b) the Director of Public Prosecutions.

(8) The Commission shall, as soon as it receives the report under subsection (7), recommend the prosecution of the person stated in the report by the Director of Public Prosecutions.

Costs

109. (1) Subject to the provisions of this section, costs, charges and expenses of, and incidental to, the presentation and trial of an election petition shall be borne in such manner and in such proportions as the High Court or a tribunal may order and in particular, any costs which in the opinion of the High Court or a tribunal have been caused by any vexatious conduct or by any frivolous or vexatious allegations or objections on the part of the petitioner or of the respondent, may be ordered to be paid by the party by whom such costs have been caused.

(2) Where, on the trial of an election petition, the High Court or a tribunal determines that the respondent was not duly elected and is of the opinion, having regard to the circumstances, that it would be just and reasonable to relieve any party to the election petition from all or a portion of the costs thereof, then—

(a) if the High Court or a tribunal finds that the election of the respondent was due to a mistake or improper performance or failure or performance of any function *bona fide* made by any election officer, it may, after sufficient notice to the Attorney-General to show cause to the contrary, make such order as to the payment by the State of the costs of the proceedings or a portion thereof, as it may deem proper;

(b) if the High Court or a tribunal finds that the election of the respondent was due to a mistake or improper performance, or failure of performance of any function *mala fide* made by any election officer, it may, after sufficient notice to such officer to show cause to the contrary, make such order as to the payment by such election officer of the costs of the proceedings or a portion thereof, as it may consider proper.

(3) The High Court or a tribunal may, on application made by any person to whom any costs, charges or expenses are payable under this Act, order the same to be paid out of any deposit made to secure the same, or by any surety who gave a recognizance to secure the same.

(4) The notice of an application made pursuant to subsection (3) shall be given, in such manner as may be prescribed by rules of the High Court or a tribunal, to the party by or on whose behalf the deposit was made or for whom the surety gave a recognizance, requiring the party, or the surety and the party, as the case may be, to state, within the time and in the manner as prescribed, whether that party resists the application.

(5) Where, on the trial of an election petition, any person appears to the High Court or a tribunal to have been guilty of any corrupt practice or illegal practice relating to the election which is the subject of the election petition, the High Court or a tribunal may, after giving that person an opportunity of making a statement to show cause why the order should not be made, order the whole or a portion of the costs of, or incidental to, the trial of the election petition to be paid by that person to such person or persons as the High Court or a tribunal may determine.

(6) Execution may be levied under any order for payment made by the High Court or a tribunal under this section in the same manner and to the same extent as execution may be levied under a judgement of the High Court or tribunal for the payment of money.

(7) Money deposited as security shall, when no longer needed as security for costs, be returned to the person in whose name it is deposited or to any person entitled to received the same by order of the High Court or a tribunal which may be upon motion after notice and proof that all just claims have been satisfied or otherwise sufficiently provided for as the High Court or a local government elections tribunal may require.

PART X

General Provisions

Code of Conduct

110. (1) The Commission shall enforce the Code of Conduct specified in the Schedule.

(2) The Commission may disqualify a political party or candidate in breach of the Code.

Appeal against decision of registration officer

111. (1) A person aggrieved by a decision or action taken by a registration officer may appeal to the Commission in the prescribed manner.

(2) The Commission shall notify the appellant of its decision within thirty days from the date of receipt of the appeal.

Powers to decide objections and appeals

112. (1) Whenever the Commission, is required under this Act to decide an objection, dispute, complaint or an appeal, the Commission may resolve the issue, that is the subject of the objection, dispute, complaint or appeal, through conciliation or mediation where applicable.

(2) The Commission shall prescribe the manner for handling any objection, dispute, complaint or appeal under this Act.

Constitution of conflict management committees

113. (1) The Commission shall, for purposes of resolving electoral disputes, constitute such number of conflict management committees as the Commission may determine.

(2) A conflict management committee shall comprise, as members, such number of conflict management officers appointed by the Commission, as the Commission shall determine.

(3) The Chairperson of the committee shall be appointed by the Commission and the Vice-Chairperson shall be elected by the members from amongst themselves.

(4) Subject to subsection (5), a member of a committee shall hold office for such period as the Commission shall determine.

(5) A member shall be paid such allowances as the Emoluments Commission may, on the recommendation of the Commission, determine.

(6) A committee shall meet for the transaction of business at such places and times as the Chairperson of the Committee may determine.

(7) The quorum at any meeting of a committee shall be one half of the members of the committee.

(8) There shall preside at any meeting of a committee—

(a) the Chairperson;

(b) in the absence of the Chairperson, the Vice-Chairperson; or

(c) in the absence of both the Chairperson and the Vice-Chairperson, such member as the members present may elect from their number for the purposes of that meeting.

(9) The determination of any matter before a committee shall be according to the votes of the majority of the members present and considering the matter.

(10) A committee may invite any person whose presence in its opinion is desirable to attend and to participate in the deliberations of a meeting of the committee but such person shall have no vote.

(11) A committee shall cause minutes to be kept of the proceedings of every meeting of a committee.

(12) The Commission shall assign persons employed in the Commission to perform such secretarial and administrative functions in connection with a committee as may be necessary for the performance of its functions.

Printing, manufacture, use, removal etc., of election materials

114. The Commission may authorise—

(a) the printing, manufacture or supply of any voting or election material;

(b) the use of the register of voters or any voting or election material for a purpose other than an election purpose; or

(c) the removal or destruction of any voting or election material.

Ownership of voting and election material and disposal

115. (1) The Commission shall own all voting and election materials used for, or provided by it in, an election.

(2) Unless the Constitutional Court, the High Court or a tribunal orders otherwise, the Commission may dispose of the voting and election materials used in a particular election six months after the date on which the final result of the election was declared, in the manner directed by the Commission.

Effect of certain irregularities

116. A mistake in the certified segment of the register of voters under this Act shall not invalidate that register of voters.

Inspection and copying of documents

117. Where this Act requires that documents be publicised, or made available for inspection or copying, the Commission shall endeavour to also publicise or make available those documents in electronic form.

When incapacity may be removed

118. Whenever a person has become subject to any incapacity under this Act by reason of a conviction or by reason of any declaration or report of any court, and any witness who gave evidence against such person upon the proceeding for such conviction, declaration or report is convicted of perjury in respect of that evidence, such person may apply to the High Court or a tribunal which, if satisfied that the conviction, declaration or report, so far as it concerns that person, was based upon perjured evidence, may order that, that person's incapacity shall from that time cease, and the same shall cease accordingly.

Person not required to state how person voted

119. A person who has voted at an election shall not in any proceedings, whether brought under this Act or otherwise, be required, to state for whom the person voted.

Evidence as to holding of election

120. Upon any charge of a corrupt practice or an illegal practice, or any other offence against this Act, alleged to have been committed at or in connection with an election, the certificate of a returning officer that the election mentioned therein was being or had been held shall be sufficient evidence of the fact that such election was being or had been held.

Validation of certain documents

121. A misnomer or inaccurate description of a person or place in a register, nomination paper, notice or other document required for the purposes of this Act shall not affect the full operation of the document with respect to that person or place in any case where the description of the person or place is such as to be commonly understood.

Powers of officer

122. (1) An officer may, during the campaign period and on polling day, enter any area, place and premises in which the officer reasonably believes there is being, or had been carried on, an activity that is an offence under this Act, except that an officer shall not enter into a private dwelling without the consent of the occupant or the authority of a court warrant.

(2) An officer may request any information from any person who appears to have custody or control of any material or thing which the officer reasonably believes is being used, or was intended to be used or is likely to be used, to commit an offence under this Act.

(3) An officer may seize or detain any material or thing where the officer has reasonable ground to believe that the material or thing is being used, was intended to be used or is likely to be used, to commit an offence under this Act.

Power of arrest

123. (1) A police officer may, without warrant, arrest a person and keep that person in custody where—

(a) the person is found committing an offence or is reasonably suspected of having committed an offence under this Act; or

(b) upon being requested by the police officer, the person wilfully, fails or refuses to furnish that person's name, address or other relevant information to the satisfaction of the police officer; and

(c) the police officer has reasonable grounds to believe that unless arrested, the person shall—

(i) escape or cause unreasonable delay to or trouble during or for, the election;

(ii) interfere with witnesses; or

(iii) tamper with or destroy relevant evidence or material.

(2) Any person arrested under subsection (1), shall be taken before a court within fortyeight hours, and shall not be detained for longer than is reasonably necessary for the purpose.

General penalty

124. A person who is convicted of an offence under this Act for which a penalty is not prescribed is liable, upon conviction—

(a) for a first offence, to a fine not exceeding five hundred thousand penalty units or to a term of imprisonment not exceeding five years, or to both;

(b) for a second or subsequent offence, to a fine not exceeding seven hundred thousand penalty units or to a term of imprisonment not exceeding seven years, or to both.

Regulations

Cap. 1

125. (1) Subject to the provisions of the Constitution and this Act, the Commission may, by statutory instrument, make regulations providing for the registration of voters for the purposes of elections and for the procedure and manner of conducting elections.

(2) Without prejudice to the generality of subsection (1), the Commission may, by statutory instrument, make regulations providing for all or any of the following matters:

(a) the registration of voters;

(b) the preparation of, and the form of, registers to be used in the registration of voters;

(c) the manner of ascertaining whether persons applying for registration as voters are qualified for registrations or for their inclusion in a register for a particular constituency;

(d) the making and determination of appeals, claims and objections with respect to the registration of voters;

(e) voter education;

(f) the correction, amendment and certification of registers of voters;

(g) the manner in which the name of any person may be deleted from a register of voters, the transfer of the names of persons from the register of voters of one polling district to that of another polling district and the restoration of the name of a registered voter;

(h) the manner and form for nomination of candidates for any election that a candidate at a direct election for the National Assembly is the authorised candidate of a political party;

(i) the publication of the names of candidates whose nominations are accepted;

(j) the payment of election fees by candidates, and the circumstances in which such fees are to be returned.

(k) the use of symbols at an election;

(l) the manner and procedure of voting at an election;

(m) the manner of ascertaining the identity of persons wishing to vote at elections and whether such persons are qualified to vote;

(n) the administering of oaths by election officers in respect of such matters as may be prescribed;

(o) the procedure to be followed at the conclusion of a poll in an election;

(p) for the purpose of declaring any candidate duly elected, the procedure to be followed where there is an equality of votes between candidates in an election for members of the National Assembly or Council;

(q) the procedure to be followed where only one person is duly nominated for election to the office of President, in a constituency for election to the National Assembly or in an election to a Council;

(r) the declaration, notification and publication of the results of an election;

(s) the custody and disposal of nomination papers, ballot papers, records, documents or other things relating to the registration of voters and the conduct of elections;

(t) election expenses and the return of election expenses;

(u) the notification and publication of any casual vacancy in the elected membership of the National Assembly or a Council and the fixing of a date of an election to fill such vacancy;

(v) the forms and records to be used for any of the purposes of this Act;

(w) the delimitation of provinces, constituencies, wards and polling districts; and

(x) any matter to be prescribed by or under this Act.

(3) Separate regulations may be made in respect of each category of elections.

(4) Regulations under this section may provide in respect of any contravention thereof that the offender shall be liable to a fine not exceeding two hundred thousand penalty units or to a term of imprisonment not exceeding two years, or to both.

(5) A prosecution for an offence against this Act shall not be commenced after the lapse of one year from the date on which the offence is alleged to have been committed.

Repeal of Act No.12 of 2006

126. The Electoral Act, 2006, is repealed.

SCHEDULE
(Section 107)

CODE OF CONDUCT

Enforcement of Code

1. (1) A person has, subject to paragraph (2), the right to—

(a) express political opinions;

(b) debate the policies and programmes of political parties;

(c) canvas freely for membership and support from voters;

(d) distribute election literature and campaign materials;

(e) publish and distribute notices and advertisements;

(f) erect banners, placards and posters;

(g) campaign freely;

(h) participate freely in partisan political activities; and

(i) seek the protection of the law from harm as a result of that person's political opinion or affiliation.

(2) A public officer shall not engage in any active partisan political activity referred to in subparagraph (1) whilst in the public service.

Promotion of free and fair elections

2. A person shall, during an election campaign or election, promote conditions conducive to the conduct of free and fair elections and be bound by this Code.

Duty of Commission

3. (1) The Commission shall, where reasonable and practicable to do so—

(a) meet political party representatives on a regular basis to discuss matters of concern related to on election campaign and election itself;

(b) ensure that political parties do not use State resources to campaign for the benefit of any political party or candidate;

(c) avail political parties with the election timetable and election notices in accordance with the Act;

(d) censure acts done by leaders of political parties, candidates, supporters, and Government and its organs, which are aimed at jeopardising elections or done in contravention of this Code;

(e) declare election results expeditiously from the close of the election day;

(f) ensure that a campaign rally or meeting which is legally organised by a political party is not disrupted or arbitrarily prohibited;

(g) ensure that an election officer, police officer, monitor, observer or media person is not victimised in the course of their election duties;

(h) ensure that police officers act professionally and impartially during the electoral process;

(i) ensure that traditional leaders do not exert undue influence on their subjects to support a particular political party or candidate;

(j) ensure that equal opportunity is given to all stakeholders, particularly political parties and independent candidates to participate in and conduct their political activities in accordance with the law; and

(k) condemn acts of media organisations and personnel aimed at victimisation, punishment or intimidation of media practitioners implementing any of the provisions of this Code.

(2) A member of the Commission may attend political rallies to monitor compliance with this Code.

Obligation of Political Party and candidate during election

4. (1) A political party and candidate shall—

(a) establish and maintain effective lines of communication with the Commission and with other registered political parties and candidates, at national, political and local level, including the provision of names and the contact details and addresses of or a candidate's party election agents and of other relevant office bearers and representatives;

(b) accept and respect decisions of the Commission in respect of election results announced by returning officers and the Commission in accordance with the law;

(c) issue directives to their members and supporters to observe this Code and take any necessary steps to ensure compliance;

(d) hold public meetings in compliance with the law;

(e) adhere to the election timetable issued by the Commission in conducting election campaigns in accordance with this Act;

(f) take appropriate measures to ensure environmental protection and cleanliness in the course of posting or distributing electoral campaign material;

(g) remove campaign materials within fourteen days of the declaration of election results;

(h) take necessary measures to ensure public safety in the course of posting or distributing electoral campaign material; and

(i) carry out campaign meetings and rallies peacefully.

(2) A member or supporter of a political party or a candidate shall not—

(a) use language which incites hatred or violence in any form against any person;

(b) issue any pamphlet, newsletter, poster or other propaganda which contains materials that incite people to violence or rebellion;

(c) deface, remove or destroy campaign materials of another political party or publications of the Commission;

(d) disrupt another political party's rally, meeting, march or demonstration or seek to obstruct another person from attending a political rally of another political party;

(e) continuously remain at a polling station during the campaign period or elections; and

(f) wear any campaign materials within four hundred metres of the polling station on the polling day.

(3) Without prejudice to any other written law, any person who contravenes subparagraph (2) commits an offence and shall be liable upon conviction to a fine not exceeding one hundred thousand penalty units or to imprisonment not exceeding one year, or to both.

Duty of election agent or polling agent during election

5. (1) An election agent or polling agent shall, subject to this Code, have the following duties during an election:

(a) observe the opening and closing of a polling station assigned to them on polling day;

(b) witness the voting process;

(c) witness the count of ballot papers for candidates;

(d) witness the announcement of results; and

(e) witness the declaration of results, where applicable.

(2) An election agent or polling agent shall counter sign the election results duly announced or declared by a presiding officer or returning officer, as the case may be, except that failure to countersign the election results by such election agent or polling agent shall not render the results invalid.

Duties of Zambia Police

6. The Zambia Police Service shall—

(a) enforce law and order at campaign meetings and processions in order to maintain peace and order;

(b) ensure that police officers do not abuse their authority or Government resources to campaign for the benefit of any political party or candidate;

(c) refrain from disrupting any campaign, rally or meeting which is legally convened by any political party; and

(d) ensure that police officers do not use their office to oppress any political party, candidate or supporter.

Duties of media

7. (1) Print and electronic media shall—

(a) provide fair and balanced reporting of the campaigns, policies, meetings, rallies and press conferences of all registered political parties and candidates during the campaign period;

(b) provide news of the electoral process up to the declaration of results;

(c) abide by regional codes of conduct in the coverage of elections provided that such guidelines are not in conflict with this Code;

(d) be bound by the provisions of this Code during elections; and

(e) in liaison with the Commission, recognise a representative media body authorised to receive complaints and provide advice regarding fair coverage of elections.

(2) A media organisation shall endeavour to—

(a) undertake capacity building of media personnel in their respective organisations;

(b) report election news in an accurate manner and not make any abusive editorial comment, incite violence or advocate hatred based on race, ethnicity, tribe, gender, sex, political or religious conviction; and

(c) identify any editorial comment it intends to make and separate it from the factual reporting of the news.

(3) The heads, senior management and staff of public and private media organisations shall not intimidate media practitioners and shall allow them to exercise professional judgment without undue influence.

(4) Public and private media personnel shall—

(a) conduct interviews with candidates with fairness both in the style of the interview and in the amount of the time given;

(b) refrain from broadcasting their own political opinions, commentary or assessment, and where they do so, clearly identify the opinion, commentary or assessment as their own and carefully balance it in order to avoid bias; and

(c) be duly accredited by the Commission to enter a nomination centre, polling centre or totalling centre.

Allocation of air time

8. (1) A public television, radio and electronic media shall allocate public air time equally to all political parties and candidates for their political broadcasts.

(2) The Commission shall prescribe the amount of air time in any given language on public television or radio to be allocated to a political party or candidate.

(3) On polling day, media shall not broadcast any campaign interviews for political parties or independent candidates or predict election results.

(4) Broadcasters shall inform the public on the source of any public opinion poll and shall indicate the margin of error.

Election results programme

9. (1) Media shall disclose accurate election results and provide updates on the progress of the vote counting process and shall not speculate election results but shall broadcast confirmed election results as they are announced and published by presiding officers.

(2) Television and radio stations shall—

(a) maintain full records of all radio and television news bulletins and recordings of all other programmes related to the election, including party political broadcasts and shall institute a close and meticulous monitoring system to ensure balance throughout the campaign and up to the close of poll; and

(b) provide the Commission, at any reasonable time, with such records, information and recordings as the Commission may require to fulfill its monitoring role.

(3) The Commission shall require newspapers to make available archived copies of newspapers for inspection in the event of a complaint.

(4) A candidate or political party who alleges that the candidate or political party has been unfairly treated or covered by any media organisation in the course of the election campaign, may lodge a complaint against the media organisation, in writing, to the Commission.

(5) Where a complaint made under subparagraph (4) requires any media organisation to rectify an error, the candidate or political party making the complaint shall send the complaint to that media organisation and a copy of the complaint to the Commission and the media organisation shall respond to the complaint.

(6) Where a right of reply, a retraction or the correction of a matter of significance is necessary, it shall be made in a like manner and with equal prominence as the original report or publication.

Monitors and observers

10. (1) A person shall not act as a monitor or observer, during an election campaign or election unless the person is duly accredited by the Commission.

(2) A monitor shall be nominated by the organisation to which the monitor belongs and shall undergo training and assessment by that organisation.

(3) A monitor or observer shall be provided with necessary identification by the Commission and the monitor's or observer's organisations.

(4) A monitor or observer shall discharge monitors or observer's functions in accordance with this Code and any other written law or such lawful directives as may be given by the Commission or any person acting on its behalf.

(5) A monitor or observer shall—

(a) bring to the attention of the presiding officer or returning officer or member of the Commission any observed electoral malpractice;

(b) be impartial in the conduct of the monitor's or observer's duty and shall, at no time, publicly indicate or express any bias or preference with reference to any political party or candidate;

(c) be in a sufficient number at each polling station and shall ensure that their presence is widely known and recognised by the electorate;

(d) not interfere with the duties of the election officials in any way and shall immediately report any violation to the proper authority;

(e) ensure that any material information or report which the monitor or observer receives or any event, occurrence or statement of which the monitor or observer has been notified or which indicates the commission of an offence or contravention of the Act or this Code are brought to the attention of the monitor's or observer's organisations, the police, the Commission, conflict management committees and other parties concerned;

(f) not by themselves or through the monitor's or observer's organisation, forecast, declare or disclose the result of any election before the declaration by the Commission;

(g) when so requested, immediately identify themselves to any election officer or police officer and shall, during the conduct of the monitor's or observer's activities, at all times carry, wear or otherwise prominently display the identification issued by the Commission;

(h) not display allegiance to any political party at any time and shall refrain from carrying, wearing and displaying electoral material or any article of clothing, colours, badges or other items denoting support for or opposition to any political party or candidates or any of the issues in contention in the elections;

(i) not be involved in corrupt practices or accept any favours, so as to make statements in favour of or against any candidate or politieal party; and

(j) not carry or display arms or other dangerous weapons during the conduct of the monitor's or observer's activities or while wearing the identification issued by the Commission.

(6) Monitors and observers and their sponsoring organisations shall, whenever requested by the Commission, attend such briefings, training workshops and other meetings convened in order to co ordinate their activities.

(7) After the declaration of results of the elections, monitors and observers shall hand over to the Commission any identification received from it.

(8) The Commission may revoke the accreditation of any monitor or observer who contravenes the provisions of this Code.

Powers of Commission

11. (1) The Commission may—

(a) reprimand a political party, candidate or stakeholder for any conduct in violation of this Code;

(b) report a breach of this Code to the Zambia Police Service, Anti-Corruption Commission and Drug Enforcement Commission or any other relevant law enforcement agency;

(c) revoke the accreditation of election agents, polling agents, monitors observers or the media where it is necessary in the interest of public safety and security to do so; and

(d) impose any administrative measures on any person, candidate or political party for persistent breach of this code.

(2) The Commission may where practicable to do so, summon any person contravening this Code and any voter, candidate or political party alleging a breach to appear before it.

Complaints

12. (1) The following persons may lodge a complaint to the Commission in relation to an election:

(a) a voter or candidate in a constituency where a breach of this Code has been committed; or

(b) from a political party participating in an election.

(2) Complaints arising during election campaigns and elections may be made to an election officer or to a conflict management committee at the place where the conduct complained against occurred.

(3) The Commission may refer and report any violation of the Code to the Zambia Police Service, AntiCorruption Commission or any other appropriate law enforcement agency for investigation and prosecution where appropriate.

Conflict management committee

13. (1) Conflict management committees established by the Commission pursuant to section *one hundred and eight* may resolve electoral disputes.

(2) The conflict management committees shall take into account the provisions of this Code in resolving electoral disputes.

(3) Conflict management committees shall mediate in electoral disputes and shall encourage amicable settlement of electoral disputes within twentyfour hours of receipt of a formal complaint.

Prohibition on coercion and intimidation

14. A person or a member of a law enforcement agency, civil society, a Church, faith-based organisation, traditional leader, political party or media shall not, by means of threats, violence or sanction, coerce or intimidate another person during campaigns, public debates or elections.

General offence

15. (1) A person shall not—

(a) cause violence or use any language or engage in any conduct which leads or is likely to lead to violence or intimidation during an election campaign or election;

(b) carry or display arms or weapons, traditional or otherwise, of any kind at a political meeting or in the course of any march, demonstration or other public gathering of a political nature;

(c) make false, defamatory or inflammatory allegations concerning any person or political party in connection with an election;

(d) arrange a public meeting, demonstration, rally or march at the same time and venue as another similar political event organised by another political party or candidate;

(e) prevent the reasonable access to voters of any candidate or political party in any manner for the purposes of conducting voter education, fund raising, canvassing membership or soliciting support;

(f) plagiarise the symbols, colours or acronyms of candidates or other political parties;

(g) deface, remove or destroy any political campaign materials of any person or political party or publications of the Commission;

(h) offer any inducement, reward or bribe to any person in consideration of such person—

(i) joining or not joining any political party;

(ii) attending or not attending any political event;

(iii) voting or not voting;

(iv) accepting, refusing or withdrawing that person's domination as a candidate in an election;

(v) surrendering that person's voter's card, or national registration card or both; or

(vi) offering to surrender a voter's card or national registration card, or both;

(i) abuse or attempt to abuse a position of power, privilege or influence, including parental, patriarchal or traditional authority for political purposes including any offer of a reward or for the issuance of a threat;

(j) propagate any opinion or action which is prejudicial to—

(i) the sovereignty, integrity or security of the country;

(ii) the maintenance of public order; or

(iii) the independence of any institution;

(k) use Government or parastatal transportation or facilities for campaign purposes, except that this paragraph shall not apply to the President and the Vice President in connection with their respective offices;

(l) use Government transportation or resources or facilities to transport voters to polling stations;

(m) discriminate against any person on grounds of race, ethnicity, class, disability, gender, sex, religion or in any other manner in connection with an election or political activity;

(n) carry any statue, caricature or anything which tends to ridicule, revile or scandalise any political party or its leader, a candidate or the Government, at any public political gathering, meeting or procession; and

(o) be in possession of a voter's card or national registration card belonging to another person during the campaign period.

(2) A person who contravenes subparagraph (1) commits an offence and is liable, upon conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a term not exceeding two years, or to both.

General Penalty

16. A person who contravenes any provision of this Code for which no specific penalty is provided commits an offence and is liable, upon conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a period not exceeding two years, or to both.

Revocation of SI No. 90 of 2006

17. The Electoral (Code of Conduct) Regulations, 2006, are revoked.

Zambia

Electoral Process Act, 2016

High Court (Election Petition) Rules, 2026

Statutory Instrument 31 of 2026

Published in Supplement to Government Gazette 7922 on 15 May 2026

Assented to on 11 May 2026

Commenced on 15 May 2026

[This is the version of this document from 15 May 2026.]

IN EXERCISE of the powers contained in section 102 of the Electoral Process Act, the following Rules are made:

Part I – Preliminary provisions

1. Title

These Rules may be cited as the High Court (Election Petition) Rules, 2026.

2. Interpretation

In these Rules, unless the context otherwise requires—

"**Commission**" has the meaning assigned to the word in the Act;

"**Court**" means the High Court established by the Constitution;

[Cap. 1]

"**Constitutional Court**" means the Constitutional Court established by the Constitution;

[Cap. 1]

"**election petition**" means an election petition relating to a parliamentary election;

"**District Registry**" has the meaning assigned to the words in the High Court Act;

[Cap. 27]

"**legal practitioner**" has the meaning assigned to the word "practitioner" in the Legal Practitioners Act;

[Cap. 30]

"**Member of Parliament**" has the meaning assigned to the words in the Constitution;

[Cap. 1]

"**nomination petition**" means a nomination petition relating to a parliamentary election;

"**petitioner**" means—

(a) in relation to an election petition, a person who signs and presents an election petition and includes a person substituted for a petitioner; and

(b) in relation to a nomination petition, a person who signs and presents a nomination petition;

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"**Principal Registry**" has the meaning assigned to the words in the High Court Act;

[Cap. 27]

"**Registrar**" has the meaning assigned to the word in the High Court Act; and

[Cap. 27]

"**respondent**" means a person against whom an election petition or nomination petition is filed in accordance with the Act.

3. Practice and procedure

The jurisdiction vested in the Court to hear and determine a nomination petition or an election petition shall, as regards practice and procedure, be exercised in the manner provided by the Act, these Rules, the High Court Act or any other written law, or by such order of the Court made under the Act or any other written law.

[Cap. 27]

Part II – Nomination petitions

4. Petition to challenge nomination of candidate for election as Member of Parliament

(1) A person who intends to challenge the nomination of a candidate for election as a Member of Parliament shall, within seven days of the close of nominations, file a nomination petition in Form I set out in the First Schedule on payment of a fee set out in the Second Schedule.

(2) A nomination petition referred to under subrule (1) shall disclose the—

(a) name and address of a petitioner or the petitioner's legal practitioner, if any;

(b) facts relied on;

(c) provisions of the Constitution or any other written law relating to nominations relied on; and

[Cap.1]

(d) relief sought by the petitioner.

(3) A nomination petition referred to under subrule (1) shall be accompanied by—

(a) an affidavit verifying facts;

(b) skeleton arguments of not more than fifteen pages, in font size 12 and with double spacing;

(c) a list of authorities and copies of those authorities;

(d) a list and description of documents to be relied on, if any; and

(e) a bundle of documents, if any.

(4) A nomination petition shall be served on a respondent in accordance with rule 14.

(5) Subject to the Act, a nomination petition shall be personally signed by the petitioner or by all the petitioners if the petitioners are more than one.

5. Answer to nomination petition

(1) A respondent may, within two days of receipt of a nomination petition referred to under rule 4, respond to the nomination petition by filing an answer in Form II set out in the First Schedule on payment of a fee set out in the Second Schedule.

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(2) An answer referred to under subrule (1) shall be accompanied by—

(a) an affidavit in opposition;

(b) skeleton arguments of not more than fifteen pages, in font size 12 and with double spacing;

(c) a list of authorities and copies of those authorities;

(d) a list and description of documents to be relied on, if any; and

(e) a bundle of documents, if any.

(3) A respondent who does not file an answer to a nomination petition in accordance with this rule shall not participate in the proceedings of the nomination petition.

(4) A respondent shall, within twenty-four hours of filing an answer, serve that answer on the petitioner.

(5) A respondent shall prove service of an answer referred to under subrule (4) by filing an affidavit of service.

(6) A petitioner may, within two days of being served with an answer referred to under subrule (4), file a reply.

(7) A reply referred to under subrule (6) may be accompanied by—

(a) an affidavit in reply;

(b) skeleton arguments of not more than ten pages in font size 12 with double spacing; and

(c) list of authorities and copies of those authorities.

(8) A reply referred to under subrule (6), shall only respond to the issues raised in the answer filed under subrule (1).

(9) A petitioner shall, within twenty-four hours of filing a reply, serve that reply on the respondent.

(10) A petitioner shall prove service of a reply referred to under subrule (9) by filing an affidavit of service.

6. Trial of nomination petition

(1) A nomination petition shall be heard and determined by the Court, in open Court, within twenty-one days from the date of filing the nomination petition.

(2) On the trial of a nomination petition, a verbatim record of all evidence given orally in the trial shall be taken and transcripts of the record shall, at the conclusion of the proceedings, be delivered to the Commission by the Registrar.

7. Decision of Court on nomination petition

(1) The Court shall, at the conclusion of the trial, give the Court's decision and—

(a) give reasons for the decision; or

(b) reserve the reasons for the Court's decision to a later date.

(2) The Court shall, where the Court reserves its reasons for a decision under subrule (1)(b)—

(a) give a summary of the decision; and

(b) the date on which the Court shall give its reasons for the decision, which date shall not exceed twenty-one days from the last date of the hearing.

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8. Appeal against decision of Court on nomination petition

An appeal shall not lie against the decision of the Court in respect of a nomination petition.

Part III – Election petitions

9. Petition to challenge election of Member of Parliament

(1) A person who intends to challenge the election of a Member of Parliament shall file an election petition in Form III set out in the First Schedule on payment of a fee set out in the Second Schedule.

(2) An election petition referred to under subrule (1) shall disclose the—

(a) name and address of a petitioner or the petitioner's legal practitioner, if any;

(b) constituency in which an election being challenged was held;

(c) outcome or results of an election being challenged;

(d) date of declaration of the results of an election being challenged;

(e) grounds relied on; and

(f) relief sought by a petitioner.

(3) An election petition referred to under subrule (1) shall be accompanied by—

(a) an affidavit verifying facts;

(b) skeleton arguments of not more than fifteen pages, in font size 12 and with double spacing;

(c) a list of authorities and copies of those authorities;

(d) a list and description of documents to be relied on, if any; and

(e) a bundle of documents, if any.

(4) An election petition shall be served on a respondent in accordance with rule 14.

(5) Subject to the Act, an election petition shall be personally signed by a petitioner or by all the petitioners, if the petitioners are more than one.

(6) Subject to the Act, a petitioner shall, within five days of filing an election petition, deposit security for costs not exceeding eight thousand fee units as the Court may order.

(7) Where a petitioner fails to deposit security for costs in accordance with subrule (6), a Court shall not hear and determine an election petition or any other proceedings relating to that election petition.

10. Answer to election petition

(1) A respondent may, within five days of receipt of an election petition referred to under rule 9, file an answer in Form II set out in the First Schedule on payment of a fee set out in the Second Schedule.

(2) An answer referred to under subrule (1) shall be accompanied by—

(a) an affidavit in opposition;

(b) skeleton arguments of not more than fifteen pages, in font size 12 and with double spacing;

(c) a list of authorities and copies of those authorities;

(d) a list and description of documents to be relied on, if any; and

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(e) a bundle of documents, if any.

(3) A respondent who does not file an answer to an election petition under this rule shall not participate in the proceedings of the election petition.

(4) A respondent shall, within two days of filing an answer, serve that answer on the petitioner.

(5) A respondent shall prove service of an answer referred to under subrule (4) by filing an affidavit of service.

(6) A petitioner may, within five days of being served with an answer under subrule (1), file a reply.

(7) A reply referred to under subrule (5) may be accompanied by—

(a) an affidavit in reply;

(b) skeleton arguments of not more than ten pages, in font size 12 and with double spacing; and

(c) a list of authorities and copies of those authorities.

(8) A reply referred to under subrule (6), shall only respond to the issues raised in the answer filed under subrule (1).

(9) A petitioner shall serve a reply referred to under subrule (6), on the respondent within two days of filing the reply.

(10) A petitioner shall prove service of a reply under subrule (9) by filing an affidavit of service.

11. Trial of election petition

(1) An election petition shall be heard and determined by the Court, in open Court, within ninety days from the date of filing of the election petition.

(2) Subject to the Act, on the trial of an election petition, a verbatim record of all evidence given orally in the trial shall be taken and transcripts of the record shall, at the conclusion of the proceedings, be delivered to the Commission by the Registrar.

12. Conclusion of trial of election petition

Subject to the Act, the Court shall, at the conclusion of the trial of an election petition, make a determination as to the validity or invalidity of an election.

13. Appeal against decision of Court on election petition

A person who is dissatisfied with the decision of the Court may, within fourteen days of the decision, appeal to the Constitutional Court.

Part IV – General provisions

14. Service of nomination petition or election petition

(1) A petition filed in accordance with—

(a) rule 4 shall be served by a petitioner on a respondent within twenty-four hours of filing the nomination petition; or

(b) rule 9 shall be served by a petitioner on a respondent within five days of filing the election petition.

(2) Subject to subrule (5), service of a nomination petition or an election petition under subrule (1) shall be personally served on a respondent or at the address shown in the nomination papers filed with the Commission.

(3) A petitioner may, where the petitioner fails to effect personal service of a nomination petition or an election petition referred to under subrule (1) make an application for substituted service within twenty four hours of failing to effect personal service.

(4) The Court shall, on receipt of an application under subrule (3) and where the Court is satisfied that personal service cannot be effected on a respondent, order that service be effected by—

(a) a registered letter addressed to the respondent at the postal address shown in the nomination paper;

(b) advertisement in a daily newspaper of general circulation in the Republic; or

(c) electronic mail.

(5) A petitioner shall prove service of a nomination petition or an election petition under this rule by filing an affidavit of service.

15. Scheduling conference

(1) The Court shall summon the parties to a scheduling conference—

(a) in the case of a nomination petition, within twenty-four hours of the filing of the nomination petition; or

(b) in the case of an election petition, within seven days of filing the election petition.

(2) The Court shall, at a scheduling conference referred to under subrule (1), issue directions or orders —

(a) that the Court considers necessary; and

(b) which shall be strictly adhered to by the parties.

(3) The Court shall, at a scheduling conference—

(a) set a date for—

(i) a status conference; and

(ii) the hearing of a nomination petition or election petition as the case may be; and

(b) determine any outstanding issues.

16. Status conference

The Court shall, at a status conference referred to under rule 15(3) —

(a) confirm compliance of directions or orders issued under rule 15(2); and

(b) determine any outstanding issues.

17. Interlocutory applications

(1) Subject to subrule (3), a party may make an interlocutory application to be heard and determined by the Court.

(2) The Court may give directions or orders in relation to any interlocutory matter.

(3) Despite subrule (1), an interlocutory application shall not be raised seven days before commencement of trial.

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18. Consolidation of nomination petition or election petition

The Court shall, where more than one nomination petition or election petition is filed relating to the same nomination or election, consolidate the nomination petitions or election petitions and hear and determine the petitions at the same time.

19. Adjournments

(1) A party may apply to the Court to adjourn a hearing.

(2) A party who intends to apply for an adjournment in accordance with subrule (1) shall, not less than ten days before the date set for the hearing, file a notice of an intention to adjourn.

(3) The Court shall only grant an application for an adjournment in compelling and exceptional circumstances as the Court may determine.

20. Amendment process

(1) A party may, with leave of the Court, at any stage of the proceedings and before a hearing, amend process filed by that party.

(2) The Court shall, where the Court grants leave to a party to amend process under subrule (1), allow the other party to respond to the amendment as the Court may determine.

21. Default of appearance

(1) The Court may, where a petitioner does not appear at the time and place appointed for the hearing of a nomination petition or an election petition, strike-off or dismiss the nomination petition or election petition.

(2) The Court may, where a respondent does not appear at the time and place appointed for the hearing of a nomination petition or an election petition—

(a) proceed to hear the nomination petition or election petition; or

(b) adjourn the hearing on terms that the Court considers appropriate.

(3) A petitioner may, where a nomination petition or an election petition is struck off under subrule (1), within two days of the nomination petition or election petition being struck off, apply to the Court to restore the nomination petition or election petition, failing which the nomination petition or election petition shall stand dismissed.

(4) The Court shall restore a nomination petition or an election petition where the Court is satisfied that an application under subrule (3) has merit.

22. Withdrawal of nomination petition or election petition

(1) Subject to the Act, a petitioner may with leave of Court at any stage of the proceedings and before conclusion of the proceedings, apply to withdraw a nomination petition or an election petition.

(2) The Court may grant a party leave to withdraw a nomination petition or an election petition on terms that the Court may consider appropriate.

(3) The Court shall hear and determine an application to withdraw a nomination petition or an election petition referred to under subrule (1) within two days of receipt of the application.

(4) A petitioner shall not, where the petitioner withdraws a nomination petition or an election petition, file a fresh nomination petition or an election petition in respect of the same nomination or election.

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23. Abatement of nomination petition or election petition

Subject to section 105 of the Act, where a sole petitioner or the survivor dies, no further proceedings shall be heard on a nomination petition or an election petition.

24. Commission as respondent

The Commission may be cited by a petitioner as a respondent in a nomination petition or an election petition.

25. Office hours

For purposes of filing a document under these Rules, the offices of the Court in the Principal Registry and District Registry shall be open to the public on week days, other than Saturdays, Sundays or public holidays, from 08:30 hours to 18:00 hours.

26. Fees

The fees set out in the Second Schedule are payable for the matters specified in that Schedule.

27. Revocation of S.I. No. 426 of 1968

The Electoral Petition Rules, 1968, are revoked.

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First Schedule (Rule 5, 6, 10 and 11)

Prescribed forms

Form I (Rule 4(1))

Form I
(*Rule* 4(1))

IN THE HIGH COURT FOR ZAMBIA **20../H.../No...**

AT THE.....REGISTRY

HOLDEN AT .....

(Civil Jurisdiction)

IN THE MATTER OF:

AND

IN THE MATTER OF:

BETWEEN

..... **PETITIONER(S)**

AND

..... **RESPONDENT(S)**

NOMINATION PETITION

The Petition of .....(name of petitioner), whose address for service is ....., shows that:

1. Your petitioner is (capacity in which petitioner challenges nomination) .....

2. And your petitioner states that the nomination of ..... (name of nominated candidate) was announced on the .....day of ..... 20..... by the Commission.

3. Facts relied on:

(here state the facts on which the petitioner relies)

And your petitioner says that:

.....

.....

4. Relief:

WHEREOF your petitioner prays that:

.....

.....

Signed (petitioner only)

NOTE: The Petition *MUST BE* accompanied by the following documents (Checklist):

1. (a) affidavit verifying facts;
   (b) skeleton arguments of not more than fifteen pages in font size 12 with double spacing;
   (c) list of authorities and copies of the authorities cited;
   (d) list and description of documents to be relied on, if any; and
   (e) bundle of documents, if any.
2. *DO NOT* state any evidence
3. You can complete details on additional paper.
4. File affidavit of service after serving the respondent.

Form II (Rules 5(1) and 10(1))

Form II

(*Rules* 5(1) and 10(1))

HIGH COURT FOR ZAMBIA **20../H...../No....**

AT THE..... REGISTRY

HOLDEN AT.....

(Civil Jurisdiction)

IN THE MATTER OF:

AND

IN THE MATTER OF:

BETWEEN

..... **PETITIONER(S)**

AND

..... **RESPONDENT(S)**

ANSWER

The respondent responds as follows (respond to each and every allegation):

(a).....

(b).....

(c).....

Signed (respondent only)

NOTE: The Answer to the nomination petition or election petition *MUST BE* accompanied by the following documents (Checklist):

1. (a) affidavit in opposition;
   (b) skeleton arguments of not more than fifteen pages in font size 12 and with double spacing;
   (c) list of authorities and copies of the authorities cited;
   (d) list and description of documents to be relied on, if any; and
   (e) bundle of documents, if any.
2. *DO NOT* state any evidence.
3. You can complete details on additional paper.
4. File affidavit of service after serving the petitioner.

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Form III (Rule 9(1))

Form III

(*Rule* 9(1))

IN THE HIGH COURT FOR ZAMBIA **20../H...../No....**

AT THE..... REGISTRY

HOLDEN AT.....

(Civil Jurisdiction)

IN THE MATTER OF:

AND

IN THE MATTER OF:

BETWEEN

..... **PETITIONER(S)**

AND

..... **RESPONDENT(S)**

ELECTION PETITION

The Petition of .....(name of petitioner), whose address for service is ....., shows that:

1. Your petitioner is (choose which of the following is applicable)

   (a) a person who lawfully voted;

   (b) a person who lawfully had a right to vote;

   (c) a person claiming to have had a right to be nominated as a candidate at the election to which the election petition relates;

   (d) a person claiming to have had a right to be elected at the election to which the election petition relates;

   (e) a person claiming to have been a candidate at the election to which the election petition relates; or

   (f) the Attorney-General.

2. And your petitioner states that the election was held on the .....day of ..... 20.....when (name of petitioner(s))..... and (name of respondent(s)) ..... were candidates and the returning officer has returned ..... (name of elected candidate) as being duly elected.

3. Grounds relied on:

And your petitioner says that:

(here state the facts and grounds on which the petitioner relies)

.....

.....

.....

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4. Relief:

WHEREOF your petitioner PRAYS for a declaration that:

(a) the election of the respondent be declared void;

or

(b) ..... be declared duly elected.

Signed (Petitioner only)

NOTE: The Petition *MUST BE* accompanied by the following documents (Checklist);

1. (a) affidavit verifying facts;
   (b) skeleton arguments of not more than fifteen pages in font size 12 and with double spacing;
   (c) list of authorities and copies of the authorities cited;
   (d) a list and description of documents to be relied on, if any;
   (e) bundle of documents.
2. *DO NOT* state any evidence.
3. You can complete details on additional paper.
4. File affidavit of service after serving the respondent.

Second Schedule (Rule 26)

Prescribed fees.

No.	Item	Fee units
1.	Sealing any amendment	85
2.	Filing summons in chambers	85
3.	Filing summons for restoration	277.5
4.	Scaling a commission or letter of examination or application not specifically provided for	112.5
5.	Filing depositions	112.5
6.	Application for copies of the notes of the Judge (per page)	55
7.	Filing a Praecipe for a writ of subpoena for each witness	85
8	Filing a Writ of Subpoena	85
9.	Filing commissioned affidavit	27.5

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No.	Item	Fee units
10.	Personal general search for every name	27.5
11.	General search for unspecified number of times in a calendar	2, 777.5
12.	On search for appearance of any other search (including an inspection) not otherwise provided	27.5
13.	Certificate of Urgency	140
14.	Filing an order in chambers	55
15.	On setting or approving an advertisement or any other document or deed (other than Judgment or order)	85
16.	On entering or setting any matter for hearing in court, except where otherwise provided	277.5
17.	Filing any other judgment or order	85
18.	Any notice provided for	277.5
19.	For copies of documents or proceedings (per page or part thereof)	55
20.	For certifying a copy, an office copy and in addition if under seal	20
21.	On taxation of a Bill of Costs	112.5
22.	Election or nomination petition	2,777.5
23.	On filing application for leave to the Court (the Notice)	85

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No.	Item	Fee units
24.	On leave being granted to appeal to the Court (the Order)	85
25.	On hearing an appeal (the Judgment)	112.5
26.	Commissioning or Certification	82.5
27.	Notarisation (per page)	370

NOTE: These fees payable the High Court are stipulated in fee units. To arrive at the amount payable, a conversion rate of 40 ngwee (Statutory Instrument No. 25 of 2024) for each fee unit is used.

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THE PRESIDENTIAL PETITION JUDGEMENT IN THE SUPREME COURT OF ZAMBIA
SCZ/EP/01/02/03//2002 HOLDEN AT LUSAKA (Constitutional Jurisdiction)

IN THE MATTER OF AN ELECTION PETITION And IN THE MATTER OF an application under Article 41 (2) of the Constitution of Zambia
And

IN THE MATTER OF Regulation 15 made pursuant to the Electoral Act, 1991
And

IN THE MATTER OF the Presidential Elections held in Zambia between the 27th and 31st December 2001

BETWEEN: ANDERSON KAMBELA MAZOKA	1ST PETITIONER
AND	
LT GENERAL CHRISTON SIFAPI TEMBO	2ND PETITIONER
AND	
GODFREY KENNETH MIYANDA	3RD PETITIONER
AND	
LEVY PATRICK MWANAWASA	1ST RESPONDENT
AND	
THE ELECTORAL COMMISSION	2ND RESPONDENT
AND	
THE ATTORNEY GENERAL	3RD RESPONDENT

CORAM: Sakala, CJ, Lewanika, DCJ, Chirwa, Chibesakunda, Mambilima, Chitengi and Silomba, JJS.

On various dates between 22nd July 2002 and 30th November 2004 and 16th February 2005.

For the 1st Petitioner: Prof. M.P. Mvunga, SC., of Mvunga Associates
Mr. S. Sikota, of Central Chambers
Mr. J. Mwiimbu, of Jack Mwiimbu and Company

For the 2nd Petitioner: Mr. C.K. Banda, SC., of Chifumu Banda and Associates
Mr. E. Mwansa, of Ernest Mwansa and Associates.

For the 3rd Petitioner: In Person.

For the 1st Respondent: Dr. J.B. Sakala, SC., of J.B. Sakala and Company
Mr. S.M. Malama, of Jacques and Partners
Mr. M.M. Mundashi, of Mulenga Mundashi and Company

For the 2nd Respondent and the 3rd Respondent: Hon. George Kunda, SC., Attorney-General
Mr. J. Jalasi, Principal State Advocate
Mr. D. Sichinga, Acting Chief State Advocate

JUDGMENT

Sakala, CJ, delivered the judgment of the court.

Cases referred to:

(1) Northman Vs Barnet Council (1978)) 1 ALL ER 1243 and page 1246
(2) Pyx Granile Co. Limited Vs Ministry of Housing and Local Government (1960) AC. 260 at 286
(3) Akashambatwa Mbikusita Lewanika and Others Vs Frederick Jacob Titus Chiluba SCZ Judgment No. 14 of 1998
(4) Miyanda Vs Handahu (1993 – 1994) Z.R. 187.

(5) Miyanda Vs Attorney General (1985) Z.R. 185
(6) Abel Banda Vs The People (1986) Z.R. 105
(7) Re The nomination paper of A.C. Ngoma and the Federal Electoral Act (1958) NLR 974,
(8) The Controverter Election for the Electoral District of Two Mountains (1912) 47 C.S.C. 183
(9) Charan Lal Sahu Vs Giani Zail Singh and Another (1985) LRC 31
(10) The Attorney General and the MMD vs Akashambatwa Mbikusita Lewanika and four others (1993/1994) ZR 164.
(11) Mwamba and Another Vs The Attorney-General of Zambia (1993) 3 LRC 16
(12) Sussex Peerage Case 1843 – 1845 (65RR) 11 at Page 51
(13) Seaford Court Estates Limited Vs Asher (1949) 2KB 481 at 499.
(14) Yonnah Shimonde and Freight and Liners -Vs- Meridien BIAO Bank (Z) Limited SCZ Judgment No. 7 of 1999.
(15) Mlewa Vs. Wghtman, (1995) Z.R. 171
(16) Bater Vs. Bater, (No. 2) (1950) 2 ALL ER 458
(17) Zulu Vs. Avondale Housing Project Ltd. [1982] Z.R. 172
(18) Mwelwa Vs. The People [1975] Z.R. 166
(19) Khalid Mohamed Vs. the Attorney General (1982) Z.R. 49
(20) Christopher Lubasi Mundia Vs Sentor Motor limited (1992) ZR 66 at page 70
(21) London Passenger Transport Board Vs Moscrop (1942) SC 332 at 347 (22)
(22) Zambia Electricity Supplies Cooperation Vs Redline Limited (1990/92) Z.R. 170
(23) Carver Foel Jere Vs. DVR/SGT Shamayuwa and Attorney General (1978) Z.R. 204
(24) Re Robinson Settlement, Grant Vs. Hobbs [1978] 1Ch.D.728 (25)
(25) Kearny Company Limited Vs. Agip (Zambia Ltd Asphalt and Tamarc (1985) Z.R. 7

Legislation referred to:
Constitution of Zambia, Cap.1: Articles: 34,35,38 (1) (2) (3), 41 (1) (2), 75 (2)
Electoral Act, Cap. 13: Sections: 2, 8, 9 (1), 17,18 (2), 20 27 (1)
Electoral (Amendment) Act, No. 23 of 1996: Section 9 (3)
Interpretation and General Provisions Act, Cap. 2, Section 10, 20 (3)
Electoral (Presidential Elections) Regulations: Reg. 17.
Supreme Court rules, Cap. 25: Rule 72A
Election Petition Rules, Cap. 13: Rule 4 (1)
Electoral (General) Regulations Reg. 3, 22 and 23
Electoral (Conduct) Regulations of 1996:7 (l) (l)

The trial and the determination of this Consolidated Presidential Election Petition of 2002 has seemingly taken a long period to complete and justifiably so, the delay caused a lot of anxiety in the nation and others. Yet, the number of the actual days, when the court sat and heard witnesses, arguments and submissions in support of various interlocutory applications, does not reflect the long duration the Petition has taken. The Court sat for 89 days in all to hear evidence, arguments and submissions. But in terms of duration, the Petition commenced in January 2002 and judgment is being delivered today, a period of three years and one month from the dates the separate Petitions were filed. The circumstances, some of which were procedural, leading to the protracted trial, were, in most instances, unavoidable and beyond the control of the court. In fact, the court was all along desirous to complete the matter as quickly as possible. To put the record straight, it is necessary to allude to some of the circumstances leading to this protracted trial. There are three Petitioners and three Respondents in this Petition. While the 3rd Petitioner appeared in person, the other two Petitioners were represented. On the part of the 1st and the 2nd Petitioners, there were initially seven Counsel of record, while there were also seven Counsels on the part of the Respondents. During the examination of witnesses, each of the Counsel had, at times, to put questions to the witnesses. The three Petitioners originally filed separate Petitions. The 1st Petitioner filed his original Petition on 15th January 2002, while the 2nd Petitioner filed his original Petition on 16th January 2002. The 3rd Petitioner, who represented himself, filed his original Petition on 17th January 2002 and subsequently; he filed an Amended Petition on 17th March 2002.

The filing of these Petitions was followed by various interlocutory applications and rulings before single Judges of this court. These are on record. The Respondents, too, initially filed separate Answers to each of the separate Petitions. The 1st Respondent filed his Answer to the 1st and the 2nd Petitioners' Petitions on 14th May 2002, while the 1st Respondent's Answer to the 3rd Petitioners' Petition was filed on 18th July 2002. The 2nd and the 3rd Respondents filed a joint Answer to the 1st and the 2nd Petitioners' Petitions on 4th June 2002. After close of pleadings, the matter was set down for hearing for 22nd July 2002. On that day, interlocutory matters, which are also on record, were raised. The hearing of witnesses could not start on that day. The matter was adjourned to 23rd July 2002. After, again, disposing of some interlocutory matters on that day, the hearing of evidence could not proceed. The matter was adjourned to 16th September 2002. On the same 23rd July, it transpired that the earlier Order for Directions issued by the court, in relation to pleadings, had not been fully complied with. Consequently, a fresh Order for Directions had to be issued.

This fresh Order was in the following terms; that the Petitioners file their Amended Consolidated Petition by 31st July 2002; that the Amended Consolidated Answer be filed by 12th August 2002; that the Reply, if any, be filed by 22nd August 2002; that Discovery and Inspection be completed by 2nd September 2002; that the Bundle of Documents and Pleadings be filed by 9th September 2002; and that the hearing of the Amended Consolidated Petition be commenced on 16th September 2002. In the course of hearing the Petition, it transpired that this fresh Order was also not fully complied with in that Discovery and Inspection seemed not to have been done. As a result of this failure to fully comply with the Order of Discovery and Inspection, fresh documents continued to surface in the midst of hearing a witness resulting in further arguments and rulings. All in all, the exchange of pleadings took about nine months. The hearing of evidence from witnesses commenced on 16th September 2002. The 3rd Petitioner closed his case on 6th October 2003, while the 1st and the 2nd Petitioners closed their case on 10th October 2003, after all the Petitioners had called a total of 76 witnesses. Although it took 57 days to hear evidence, arguments and submissions on behalf of the three Petitioners, there were in between the hearings 20 long adjournments for a variety of reasons. Some of the reasons were difficulties encountered by the parties in securing the attendance of witnesses, Counsel seeking instructions from their respective clients and also the courts' work schedule. There was also the problem of securing suitable hearing dates convenient to all the parties as well as the court.

The hearing of the evidence on behalf of the Respondents commenced on 10th November 2003. They closed their case on 6th October 2004, after hearing evidence from 80 witnesses. The hearing of the Respondents' case took 32 days with 11 long adjournments in between the hearings. After the close of the Respondents' case, the court invited written submissions from the parties. The Petitioners were to file their written submissions by 29th October 2004. But the 1st and the 2nd Petitioners filed their written submissions on 4th November 2004. The 3rd Petitioner filed his written submissions on 19th November 2004, instead of 29th October 2004 as directed by the court. The Respondents were directed to file their responses to the Petitioners' written submissions by 21st November 2004. Instead, the 1st Respondent filed his written submissions on 25th November 2004, while the 2nd and the 3rd Respondents filed their written submissions on 26th November 2004. Thus, again the dates directed by the court were not followed thereby contributing to the long period the Petition has taken. As a consequence of not following the directed dates, the Petitioners, who had been directed to file their written replies, if any, by 26th November 2004, to enable the Court to sit on 30th November 2004 for oral submissions, were unable to file their replies by 26th November 2004. The Court, however, sat on 30th November 2004. But the Petitioners insisted on their right to file written replies. The court granted them the application to file their replies by 7th December 2004. On the same 30th November 2004, the court reserved judgment to a date after the written replies by the Petitioners had been filed and the date for delivery of judgment was to be communicated to the parties. This is the history of this Consolidated Petition leading to this unprecedented long period it has taken. We have deliberately delved into this detailed history of this Petition in order to bring out two points. The first point is that the events leading to the long period it has

taken to complete this matter were unavoidable and in the interest of justice. The second point is that elections, be it Presidential or Parliamentary, by their nature of demanding a quick resolution, ought not and must not follow the course of the existing clogged court system which has very slow wheels of resolution because of the strict requirement of adherence to rules of pleadings, practice and procedure.

Matters pertaining to elections must be determined very expeditiously lest they be rendered an academic exercise at the end. During the hearing of this Petition, on a number of occasions, the court passionately appealed to the parties to expedite the bringing of witnesses to court. The court also expressed its serious concerns at the slow pace the Petition had been proceeding. At one stage, the court was even told by Counsel that "it can take as long as it takes". Indeed, the long history of the trial of this Petition cannot be said that it was the court's intention that it goes on *ad infinitum* as suggested in some quarters. Issues of bereavements, which were some of the issues leading to long adjournments, were matters beyond anyone's control. The long period it has taken the court to conclude this matter is very much regretted. It has taken two months and eight days to render this judgment after the Petitioners filed their replies. This was on account of the complexity of the case, and the novel constitutional issue based on the special jurisdiction of this court given to it by the Constitution. The court had to examine the issue of jurisdiction carefully as it was raised and argued for the first time. We shall deal with the issue of jurisdiction and other related matters later in this judgment. It was also necessary for the court to do a thorough research in the matter. Apart from that, the court had to study the evidence of all the 156 witnesses contained in 11 box files of typed transcripts of evidence. The typed evidence alone runs into 7,180 pages. The court had also to study over 500 pages of written submissions by the parties and study the authorities referred to it. We are indebted to Counsel on both sides and the 3rd Petitioner for the detailed learned written submissions. In addition to all that has been said, in the course of hearing the Petition, the court had to contend itself with the schedule of other cases in Lusaka, Kabwe and Ndola. Having explained the long journey the Petition has taken, we now turn to deal first with the preliminary issues of jurisdiction and/or remedies, as raised in the written arguments and submissions on behalf of the 2nd and the 3rd Respondents. The 3rd Petitioner also raised an issue of conflict of interest on the part of the learned Attorney General, suggesting that he had no locus standi in this matter. Before we deal with the preliminary issues, we must allude to the provisions of the Constitution under which the Petition was brought. The Petition was made pursuant to Article 41 (2) of the Constitution of Zambia. This Article reads: "(2) Any question that may arise as to whether – (a) Any provision of this Constitution or any law relating to election of a President has been complied with, (b) Any person has been validly elected as President under Article 34; Shall be referred to and determined by the full bench of the Supreme Court." The first and most cardinal preliminary issue is the one raised by the Respondents with regard to the jurisdiction of this Court to hear and determine this Petition. But when arguing the point, it was argued together with the issue of remedies. The Respondents consider the issue of jurisdiction to be very critical in that they first raised it through a Notice of Motion filed in this court on 13th November, 2002, pursuant to Order 14A, as read with Order 33, rules 3 and 7, of the Rules of the Supreme Court, 1999 Edition. In our Ruling of 19th November 2002, we said that this Petition could not be properly determined through the Motion that was before us because the issues raised in the Notice of Motion went to the very root of the Petition. Consequently, we declined to entertain the motion and advised the parties to raise the issue in their submissions at the conclusion of the hearing of the Petition. It would appear that the Petitioners anticipated that the Respondents would again raise the issue of jurisdiction in their submissions and consequently, the Petitioners made submissions on the issue of jurisdiction to the extent that the Respondents were relegated to the position of replying. The 1st and the 2nd Petitioners referred us to Article 41(1)(2) of the Constitution and submitted that these provisions are not ambiguous in terms of content and construction pertaining to the determination and validity of the election of the President in Zambia. They argued that the role of the court in a Presidential Election Petition is to resolve disputes between different parties of the society so that society does not degenerate into anarchy, otherwise parties to Presideotial Elections would have, as their only recourse, to take their grievances to the streets. They submitted that this court has the jurisdiction to determine the matter on

merit. It is the 1st and the 2nd Petitioners' further submission that the Supreme Court of Zambia is endowed with the final authority to determine and interpret the laws of the land. One of the authorities to which they referred us is the case of Northman Vs Barnet Council (1) at page 1246 in which Lord Denning stated, inter alia, "The literal method is now completely out of date. It has been replaced by the approach, which Lord Diplock described as purposive approach.....

In all cases now in the interpretation of statutes we adopt such a construction as will promote the general legislative purpose underlying the provision. It is no longer necessary for the Judges to wring their hands and say: "There is nothing we can do about it." Whenever the strict interpretation of the statute gives rise to an absurd and unjust situation the Judges can and should use their good sense to remedy it by reading words in, if necessary so as to do what Parliament would have done, had they had the situation in mind." This decision was confirmed by the House of Lords in (1979) 1 ALL ER Page 142. The 3rd Petitioner also submitted extensively on the issue of jurisdiction of this court to determine these Petitions and cited to us several authorities in support of his submissions. He stated that there is a presumption against the ouster of the jurisdiction of courts. According to the 3rd Petitioner, it would be contrary to public policy to oust the jurisdiction of the full bench of this court in view of Article 41(2) of the Constitution whose purpose and effect is to grant special and/or exclusive jurisdiction to the court to hear and determine Presidential Election Petitions. For this submission, the 3rd Petitioner referred us to various authorities, one of which was Lord Simonds' statement in the case of Pyx Granile Co. Limited Vs Ministry of Housing and Local Government (2) where he said, when considering whether a statute had excluded the right of a subject to have recourse to courts of law, that: - "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's Courts for the determination of his rights is not to be excluded except by clear words."

The 3rd Petitioner submitted further that under Article 41(2) of the Constitution, this court has at the end of the hearing, to determine whether the 1st Respondent or any other person was duly elected as President of Zambia. He also stated that as a participant in the last Presidential Elections, he was claiming his rights as guaranteed in the Constitution of Zambia and that those rights be enforced or applied to him (sic). According to the 3rd Petitioner, these constitutional rights cannot be abridged by law or waived by any official. Finally, the 3rd Petitioner submitted that it would be a judicial scandal of the century if, after three years of hearing the Petition, the court, in frustration, failed to give a remedy after finding the 1st Respondent guilty. On behalf of the 1st Respondent, it was submitted that there was no law under which this election may be nullified. We were referred to our earlier decision in the case of Akashambatwa Mbikusita Lewanika and Others Vs Frederick Jacob Titus Chiluba (3) in which we stated, inter alia, that: - "

Since a Presidential Election is conducted under the practices and procedures set out by or under the Electoral Act, Cap 13 of the Laws of Zambia (1995) edition, this court had determined quite early in the proceedings that guidance would be sought from that Act on many of the issues that arose, for example, the grant of indemnities to witnesses. In the same vein, we had to look to the Act and the Regulations when considering the issues of bribery and corruption; irregularities; and the flaws. We also had to borrow from the principles as set out in Section 18 of Cap 13 which reads..."

Counsel also referred us to Article 41 of the Constitution, which empowers this Court to determine whether any person has been validly elected as President and/or whether any provision of the Constitution or any law relating to the election of the President has been complied with. In short, Counsel for the 1st Respondent concedes that this court has power to hear and determine a Presidential Election Petition.

However, Counsel argued that under Article 38 of the Constitution, a vacancy in the office of the President can only occur when: - (a) A sitting President dies; or (b) resigns; or (c) is impeached; or (d) is incapacitated; or (e) the National Assembly is dissolved. In view of this, Counsel submitted that there is a yawning lacuna as to what happens when the court nullifies the election of a President in that the law does not provide for the occurrence of a

vacancy and a remedy as a result of such nullification. In this regard, it was argued that Section 18 of the Electoral Act couldn't be relied upon because on a proper construction of Section 18 of the Electoral Act, which falls under Part VI and which avoids the election of a candidate to the National Assembly, does not apply to a Presidential candidate. It was further argued that while by virtue of Regulation 17, Electoral (Presidential Elections) Regulations, Part IV of the Electoral (General) Regulations, which creates electoral offences under which an election may be nullified, apply to Presidential elections, this Regulation does not and cannot amend the principal Act because it is a subsidiary legislation. It was the 1st Respondent's position that Section 18 of the Act, therefore, does not apply to a Presidential Election. In the view of the 1st Respondent, this court cannot fill in the lacunae created by Article 41 of the Constitution by reading into the Electoral Act matters, which have not been provided for. It was argued that the intention of the legislature was very clear, which is that Part VI of the Electoral Act was not intended to cover Presidential Elections. It was submitted that if this were the case, the legislature would have said so in Act 23 of 1996, which amended Part 111 dealing with Presidential Elections.

To buttress this submission, the 1st Respondent referred us to our decision in the case of Miyanda Vs Handahu (4) where we said: - "It is not what the legislature meant to say or what their supposed intentions were with which the Court should be concerned; the Court's duty is to find out the expressed intention of the legislature. When the language is plain and there is nothing to suggest that any words are used in a technical sense or that the context requires a departure from the fundamental rule, there would be no occasion to depart from the ordinary and literal meaning and it would be inadmissible to read into the terms anything else on grounds such as of policy, expediency, justice or political exigency, motive of the framers and the like....."

On the prayers in the Petition, the 1st Respondent submitted that the orders being sought by the Petitioners are in the nature of declarations. It was argued that while it is conceded that this court can grant a declaration, the question the 1st Respondent poses is: In view of the Constitutional lacuna, how far can any such declaration made by the court be effective, useful and beneficial to the country and the people of Zambia? Relying on the case of Miyanda Vs Attorney General (5) the 1st Respondent submitted that a declaration, being a discretionary remedy, can only be made on proper principles and considerations and will not be made when it will serve no useful purpose. It is the 1st Respondent's position that should the court make the orders, it has to accept that it will be involved in the enforcement of the said orders and gives direction as to what will happen after nullification of the Presidential Election. Consequently, the 1st Respondent invited this court to hold that in view of the lacunae in the law, the success of this Petition will be of an academic value only.

Submitting on behalf nf the 2nd and the 3rd Respondents, the learned Attorney-General stated that the issue of jurisdiction was fundamental. He echoed the submissions on behalf of the 1st Respondent that the constitutional provisions are deficient and have serious lacunae. He pointed out that the law does not prescribe any grounds upon which the election of a President may be annulled. According to him, the office of President cannot become vacant as a result of an Election Petition. He also referred us to Article 41(2) of the Constitution and submitted that this provision is vague in that it does not stipulate what particular provision of the Constitution or any law should be contravened so as to lead to the nullification of a Presidential Election and the grounds upon which the Supreme Court should rely to determine whether a President has been validly elected. The learned Attorney-General also referred us to the case of Akashambatwa Mbikusita Lewanika Vs Fredrick Jacob Chiluba (supra) and submitted that in this case, the propriety of resorting to Section 18 of the Electoral Act, in resolving issues raised in election Petitions originated under Article 41(2) of the Constitution, was not raised and not fully argued. He was of the view that had these arguments in relation to Section 18 been raised, this court could have decided otherwise on the use of this Section in Presidential Election Petitions. He urged us to depart from the approach that we adopted in the Akashambatwa Mbikusita Lewanika Vs Fredrick Titus Jacob Chiluba case by not relying on the grounds prescribed in Section 18 of the Electoral Act.

The learned Attorney-General urged us to overrule this decision, arguing that there are sufficient reasons for us to do so. For this submission, he referred us to the case of Abel Banda Vs The People (6) in which this court held, inter alia, that in order to have certainty in the law, the Supreme Court should stand by its past decisions even if these are erroneous unless there is a sufficiently strong reason requiring that such decisions should be overruled. He went on to state that the court relied on Section 18 of the Electoral Act because the Constitution and the Electoral Act do not provide specific grounds for nullifying a Presidential Election. On the submissions by the Petitioners that this court can seal gaps and lacunae in the law and grant the remedies sought, should the strict interpretation of the statutes lead to an absurd and/or unjust situation; the learned Attorney-General submitted that the authorities relied on by the Petitioners do not apply to the interpretation of electoral statutes.

According to the learned Attorney-General, decided cases are to the effect that electoral legislation should be construed strictly and that courts should not rewrite or read new provisions into such legislation. He referred us to the case of Re The nomination paper of A.C. Ngoma and the Federal Electoral Act (7) where the court quoted from the Canadian Case of The Controverted Election for the Electoral District of Two Mountains (8) in which Davies J stated that: - "In construing the Section of such an important Public Act as the one under consideration, I think that while we should be careful, on the one hand, not to allow merely technical or formal objects to prevail so as to defeat the manifest purpose and intention of the Act, on the other, we should not attempt to re write the Act or to strain the clear, precise language of its Sections so as to render them innocuous."

The learned Attorney-General also extensively quoted from the Indian case of Charan Lal Sahu Vs Giani Zail Singh and Another (9) in which Chandrachud, C.J. threw out a challenge to the election of the President on the ground that he was not a suitable candidate. The enabling legislation, in that case, did prescribe the grounds upon which the election of a candidate could be declared void and suitability was not one of such grounds. The court was of the view that the ballot box was to be the sole judge of the suitability of the candidate. The learned Attorney-General further submitted that while Section 18 of the Act only covered Parliamentary Election Petitions, Sections 8 and 9 of the Electoral Act governed Presidential Election Petitions. According to the learned Attorney General, Section 9 of the Act is as vague as Article 41(2) of the Constitution in that it does not prescribe grounds for nullifying a Presidential Election. He went on to state that in view of this, this court should revisit it's decision in the Akashambatwa Mbikusita Lewanika Vs Chiluba case to the extent that the court sought guidance from Section 18 of the Electoral Act. In his further submissions, the learned Attorney-General stated that neither the Constitution nor the Electoral Act prescribe remedies which may be granted to a Petitioner in a Presidential Election Petition. The statutes merely empower the Court to determine whether; (a) any provision of the Constitution or law relating to election of the President has been complied with; and/or (b) any person has been validly elected as President under Article 34.

The learned Attorney-General pointed out that under this law, the starting point is the Constitution itself. He went on to state that the only provision of the Constitution relating to the election of the President is Article 34. This Article prescribes among others, the qualification of candidates in a Presidential Election; when a Presidential Election would be held; and how the Presidential poll would be conducted. He stated that the court also has to consider other laws apart from the Constitution and consider whether they have been complied with. According to the learned Attorney-General, these other laws are Part III of the Electoral Act, and the Electoral (General) Regulations as extended by the Electoral (Presidential Elections) Regulations. He submitted that these provisions are in contrast to Section 20 of the Electoral Act, which clearly prescribes the remedies that may be granted in a Parliamentary Election Petition. The learned Attorney-General submitted that if it was proved, at the end of this Petition, that there was non compliance with the laws, there is no provision either in the Constitution or the Electoral Act under which this court would grant the remedies sought. He stated that the Constitution does not provide for a vacancy in the office of President arising from nullification of a Presidential Election.

According to the learned Attorney-General, it was not the intention of the legislature that an incumbent President should vacate office pursuant to an Election Petition. He found support for this submission in Articles 35 and 38 of the Constitution, which prescribe instances when the office of President can become constitutionally vacant.

The learned Attorney-General also raised the issue of the limitation period under Section 27(1) of the Electoral Act which provides that Parliamentary Election Petitions should be determined within 180 days of the presentation of the Petition to the High Court. He stated that there is no similar provision applicable to a Presidential Petition. The learned Attorney-General submitted that should this court hold that provisions relating to Parliamentary Election Petitions should be applied in determining Presidential Election Petitions, then Section 27(1) of the Electoral Act should also apply. To support his submission, the learned Attorney-General relied on the case of Re The Nomination Paper of A.C. Ngoma and the Federal Act (supra) which, according to him, expounded the principle that courts must ensure that the provisions of Electoral Acts are properly complied with. He submitted that the idea behind prescribing the period of 180 days was to cure the mischief of delaying Petitions for long periods until they become an academic exercise. He submitted further that this period is mandatory and should be complied with. He stated that since the Petition in this case went well beyond the 180 days period, we should dismiss it for want of prosecution. According to the learned Attorney-General, there was inordinate delay in prosecuting the action and that passing judgment now would be catastrophic and disruptive to the nation. He also stated that such nullification would bring into question, the agreements and appointments made by the 1st Respondent. He submitted that the correct status of the matter is that it is illegally before the court, having exceeded the prescribed period by two and half years.

In reply, the 1st and the 2nd Petitioners made an extensive joint submission, the sum and substance of which is that the Respondents raised the issue of jurisdiction too late in the day. They pointed out that by the time the Respondents raised the issue of jurisdiction the pleadings had been closed and some witnesses had even given evidence. Further, the 1st and the 2nd Petitioners said that a preliminary issue should be raised at the first available opportunity before pleadings from the side raising the preliminary issue. In short, the 1st and the 2nd Petitioners are saying that the Respondents cannot raise the issue of jurisdiction after submitting to the jurisdiction of the court. Citing Article 41(2) of the Constitution, the 1st and the 2nd Petitioners submitted that this court has the jurisdiction to determine a Presidential Election Petition. Quoting the definition of the word "determination" from Blacks Law Dictionary 6th Edition and the Concise Oxford Thesaurus compiled by Betty Patrick 1995, the 1st and the 2nd Petitioners submitted that the word determination in Article 41(2) of the Constitution means decision, conclusion, judgment, verdict, opinion, decree, solution, result, arbitration, settlement, diagnosis or prognosis. It was argued that to determine a case is to decide, resolve, conclude, end, terminate or finish an argument. The 1st and the 2nd Petitioners say the court must therefore determine this Petition. It was emphasized that the jurisdiction of the Supreme Court to hear a Presidential Election Petition is not only provided for by Article 41(2) of the Constitution but also by Section 9(3) of Act Number 23 of 1996 which provides that: -

"Any question by any person which may arise as to whether any provision of the Constitution or any law relating to nomination or election of President has been complied with shall be referred by the Returning Officer or by such person to the full bench of the Supreme Court within 14 days of the person elected as President being sworn-in in accordance with Clause 9 of Article 34 of the Constitution."

The 1st and the 2nd Petitioners then drew the court's attention to the fact that in the 1996 Presidential Election Petition, the Supreme Court conclusively determined the Petition regarding the validity of the election of Frederick Jacob Titus Chiluba. In this case, the 1st and the 2nd Petitioners argued, the Supreme Court has jurisdiction to determine the validity of the election of the 1st Respondent. On the argument that there is a lacuna in the law in that the Constitution does not prescribe the grounds upon which the election of a President may be annulled, the submission on behalf of the 1st and the 2nd Petitioners is that the Supreme Court had, in the 1996 Presidential Election Petition against Frederick Jacob Titus Chiluba, already roled that Section 18 of the Electoral Act applies.

It was argued that the holding by the Supreme Court in case of Lewanika versus Chiluba that Section 18 of the Electoral Act also applied to Presidential Election Petitions was consistent with the preamble to the Electoral Act which says that the provisions relate, inter alia, to the election to the office of the President. It was argued further that by virtue of Regulation 17 of the Electoral (Presidential Elections) Regulations, Part IV of the Electoral (General) Regulations apply with necessary modifications to the election of a President. Further, it was submitted that by Statutory Instrument Number 17 of 2002, the Supreme Court Rules were amended so as to introduce Rule 72A which states that: "The provisions of the Election Petition Rules under the Electoral Act shall apply with necessary modifications to Presidential Petitions." It was also argued that since the Election Petition Rules that apply to Parliamentary Election Petitions also apply to Presidential Election Petitions, it follows that Rule 4(1) of the Election Petition Rules also applies to the Presidential Election Petitions. Rule 4(1) provides that "The Petitioner shall state the right of the Petitioner to petition under Section 18 of the Act." It was then argued that it was for this reason that in the Frederick Jacob Titus Chiluba Presidential Petition the Supreme Court said: - "Since a Presidential Election is conducted under the practices and procedures set out by or under the Electoral Act, Cap 13 of the Laws of Zambia (1985 edition), this Court had determined quite early in the proceedings that guidance would be sought from that Act on many of the issues that arose, for example, the grant of indemnities to witnesses. In the same vein, we had to look at the Act and the regulations when considering the issues of bribery and corruption irregularities and the flaws. We also had to borrow from the principles set out in Section 18 of Cap 13 which reads..." According to the 1st and the 2nd Petitioners, the issue of applicability of the Electoral Act and the Regulations made there under has, therefore, been long settled by this court after due attention and consideration. It was further submitted that the argument by the Respondents that the interpretation of Regulation 17 and Section 18 of the Electoral Act and Articles 34 and 41 of the Constitution that a Presidential Election cannot be annulled, does not fall within the terms of the phrase in Article 41(2) that: "Any question, which may arise as to whether - (a) Any provision of this Constitution or any law relating to the election of a President has been complied with or (b) any person has been validly elected as President under Article 34 (c) shall be referred to and determine by the full bench of the Supreme Court." It was argued that the interpretation the Respondents put on the rules and the constitutional provisions does not accord with the natural and ordinary meaning of the words in the phrase quoted above; nor with the clear purpose of Articles 34 and 41 of the Constitution. It was argued further that the interpretation does not comply with the guarantees that statutes and the Constitution shall be interpreted in a manner which will give life to the intention of Parliament provided by the Supreme Court in the case of The Attorney-General and the MMD vs Akashambatwa Mbikusita Lewanika and four Others (10).

It was the submission of the 1st and the 2nd Petitioners that the Respondents have cited no authority to support the interpretation they seek to place on Articles 34 and 41 of the Constitution and Regulation 17 and Section 18 of the Electoral Act. On the argument on lapse of 180 days within which to complete the hearing and determination of the Petition, it was submitted that this court ruled on that issue in 1996 when it said that the provision in the law that Election Petitions must be completed within 180 days should not be interpreted as an endorsement that an election Petition begun in good time must be stopped and thrown out because the nature of the case takes it beyond the 180 days limit. It was argued that in fact, numerous Election Petitions take more than 180 days and the court should take judicial notice of that fact. On the submissions that the nullification of the election would bring into question the agreements and appointments made by the 1st Respondent, it was submitted, on behalf of the 1st and the 2nd Petitioners, that on the authority of Noris case, which was adopted by this court in Mwamba and Another Vs The Attorney-General of Zambia(11) the agreements and appointments made by the 1st Respondent will remain valid notwithstanding that his election has been nullified. As to the possibility of chaos, it was submitted that like in the Ukraine, nullification of the election of the 1st Respondent will not be catastrophic but will lead to peace. On a rather personal note, it was also argued that the 1st and the 3rd Respondents should not talk about lacunae in the law now because the 1st Respondent was once a Solicitor-General

and at one time leader of the House and the 3rd Respondent is the learned Attorney-General. They stated that the 1st Respondent and the learned Attorney-General should therefore, have seen those lacunae and made the necessary amendments to the law. It was submitted that if there are lacunae in the law, then the learned Attorney-General is taking advantage of his own default or inefficiency. And by pleading the lacunae, the learned Attorney-General is failing to protect the rights of the aggrieved parties in the election process. On the argument by the 2nd and the 3rd Respondents that the election of the 1st Respondent cannot be invalidated by a mere violation of Election Regulations, it was submitted that in Zambia, violation of Electoral Regulations can lead to the nullification of a Presidential Election. On the case of Charan Lal Sahu, relied on by the 2nd and the 3rd Respondents, it was submitted that, that case is irrelevant as the issue at hand is not one of suitability of the 1st Respondent but the validity of his election. On what would happen in the event of the election of the President being annulled, it was submitted that by virtue of Sub Article 2 of Article 38 of the Constitution, the Vice President or in his absence a member of the cabinet elected by the cabinet shall perform the functions of the President in accordance with Article 34 until a new President assumes office. According to the 1st and the 2nd Petitioners, the word "whenever" in Sub Article 2 of Article 38 is contrasted with Sub Article (1) of Article 38 which talks about specific incidents.

Therefore, it was argued, Sub Article (2) of Article 38 will apply regardless of the manner the President vacates office and covers all unforeseen circumstances. It was argued that these unforeseen circumstances include nullification of the President's election under Article 41 of the Constitution. Relying on Section 10 of the Interpretation and General Provisions Act, it was argued and submitted that Sub Articles (1) and (2) of Article 38 should be taken notice of separately in that Sub Article (1) provides for the time within which an election should be held when a vacancy occurs, whereas Sub Article (2) provides that whoever shall act as President will continue until the next elections are held. Further, it was argued that these Sub Articles are distinct and provide for different scenarios. In his reply to the Respondents' submissions, the 3rd Petitioner repeated his earlier submissions on jurisdiction. He pointed out that by virtue of the Akashambatwa Mbikusita Lewanika case (supra), the application of Section 18 of the Electoral Act to a Presidential Election Petition is the correct legal position. He said that any uncertainty has been resolved by the promulgation of Statutory Instruments. He pointed out that Regulation 17 of the Electoral (Presidential Elections) Regulations makes Part IV of the Electoral (General) Regulations applicable with necessary modifications to an election of a President as they apply to and in respect of elections of members of the National Assembly. On the application of the other Electoral Regulations to Presidential Elections, the 3rd Petitioner echoed the submissions of the 1st and the 2nd Petitioners. Further, the 3rd Petitioner echoed the submissions by the 1st and the 2nd Petitioners on what should happen after nullification of the Presidential election. The 3rd Petitioner submitted extensively on the issue of 180 days limitation and cited several authorities but the import of the 3rd Petitioner's submissions is that the issue of limitation has been raised too late and that in any case there is already a precedent by this court where an Election Petition has taken more than 180 days to dispose of.

The 3rd Petitioner also submitted on conflict of interest in so far as the learned Attorney-General's appearance in these proceedings is concerned. However, we do not think that these submissions go to the issue of jurisdiction raised by the Respondents. Therefore, we do not intend to go into the submissions related to conflict of interest. We are, however, satisfied that there is no conflict of interest in the present Petition. We have given our anxious consideration to the submissions by the parties on the issue of jurisdiction. It is common cause that the only provision under which a Presidential Election Petition can come before the Supreme Court is Article 41 of the Constitution. As we understand the submissions and the arguments, the critical issue being canvassed by the Respondents is that while this court has the power to hear and determine any question which may arise as to whether a person has been validly elected as President or indeed, whether the provisions of the Constitution or any other law relating to the election of a President has been complied with, this court has no jurisdiction to grant the remedies

which the Petitioners are seeking in this Petition. Article 41(2) of the Constitution provides as follows –

> "41(1) Any question which may arise as to whether: - (a) any provision of this Constitution or any law relating to election of a President has been complied with; (b) any person has been validly elected as President under Article 34; shall be referred to and determined by the full bench of the Supreme Court."

The question is; what mandate has this provision given to this court? It is trite law that the primary rule of interpretation is that words should be given their ordinary grammatical and natural meaning. It is only if there is ambiguity in the natural meaning of the words and the intention of the legislature cannot be ascertained from the words used by the legislature that recourse can be had to the other principles of interpretation. Tindal C.J. in the old English case of Sussex Peerage(12) lends credence to this view when he said that: - "If words of a statute are in themselves precise and unambiguous then no more can be necessary than to expound those words in their natural and ordinary sense." Indeed, as Lord Denning observed in the case of Seafood Court Estates Limited Vs Asher(13): - "A Judge must not alter that of which it (a statute) is woven, but he can and should iron out the creases." Looking at the words used in Article 41(2) of the Constitution, it is clear to us that this court has been clothed with the mandate to determine whether any person has been validly elected as President and/or whether any provisions of the Constitution or any law relating to the election of a President has been complied with.

The Concise Oxford Dictionary, 9th Edition, at Page 368 defines "determine" to mean: - (a) find out or establish precisely; (b) decide or settle; (c) be a decisive factor in regard to; (d) make or cause a person to make a decision; (e) bring or come to an end; and (f) fix or define the position of. We have no doubt in our minds that the meaning of the word "determine" in the context it is used in Article 41(2) calls upon this Court to find out or establish precisely or decide whether a person was validly elected as President of Zambia and/or whether the applicable laws were followed. Clearly, therefore, Article 41(2) of the Constitution confers this court with the jurisdiction to decide whether a person has been validly elected as President. As such, the submissions by the Petitioners that this Court has jurisdiction to hear and determine this Petition are well grounded. Indeed, even Counsel for the 1st Respondent conceded that this court has jurisdiction to hear and determine the election of a President. Their only quarrel was that there is no legal provision under which we can nullify the election of a President. In trying to show that this court has no power to annul the election of the President and grant the remedies sought, the Respondents took us through the provisions of the Electoral Act and the relevant Regulations made thereunder and the Constitution, arguing that there is no express provision stipulating the grounds upon which an election of the President may be nullified and specifying the remedies to be granted in the event of such nullification. It has been argued by the Respondents, that while by virtue of Regulation 17 of the Electoral (Presidential Elections) Regulations, Part IV of the Electoral (General) Regulations applies to Presidential Elections Petitions, Section 18 of the Electoral Act, which voids an election of a candidate to the National Assembly on the grounds stipulated therein, does not apply to Presidential Election Petitions.

The Respondents pointed out that there has been no amendment to the Electoral Act for Section 18 to apply to Presidential Election Petitions. It has been argued that Regulation 17 cannot therefore purport to amend Section 18 as the Petitioners have argued. We agree with these submissions because Regulation 17 specifically refers to Part IV of the Electoral (General) Regulations. We agree that subsidiary legislation cannot amend provisions of the principal legislation: Yonnah Shimonde and Freight and Liners -Vs- Meridien BIAO Bank (Z)(14). In the event, all the submissions by the Petitioners to that effect are not tenable. Part IV of the Electoral (General) Regulations provides for corrupt and illegal practices and election offences, which in fact are offences for which a candidate may be liable. It is clear to us that the intention of Regulation 17 of the Electoral (Presidential Elections) Regulations was to apply the corrupt, illegal practices and other election offences to a Presidential candidate. Section 18 of the Electoral Act, however,

empowers the High Court to void the Election of a candidate as a Member of the National Assembly on the grounds stipulated therein. Our understanding of this provision is that anyone who intends to impugn the election of a candidate to the National Assembly must invoke the jurisdiction of the High Court under Section 18(1) of the Electoral Act and the election of such candidate shall only be declared void on proof of any of the grounds specified in Sub Section 2.

However, under Article 41(2) of the Constitution, the election of a President can be challenged on any question, either of law relating to the election of a President or the validity of the election itself. In trying the question alleged, this court is at large to look at the conduct of the Presidential election itself or indeed the compliance of the provisions of the applicable law. Should the court be satisfied, on any proven facts, that a candidate was not validly elected or indeed that the relevant laws were not complied with, so as to negate the legitimacy of the election, it will void such an election. In our view, Section 18 of the Electoral Act does not directly apply to Presidential Election Petitions. To argue otherwise would be to limit the wide Provisions of Article 41(2) of the Constitution under which this court is at large to consider any grounds in resolving questions referred to it. Any question relating to the legitimacy of a Presidential Election, including corruption, bribery, non-compliance with the relevant law etc. can be considered under Article 41(2) of the Constitution. Our use of the word "borrow" in relation to Section 18 of the Electoral Act, in the Lewanika Vs Chiluba judgment, should be understood in this context. The issue of jurisdiction was not raised and fully argued in that case. Had the issue been fully argued in the Chiluba case, we would, no doubt, have given the full meaning and extent of Article 41(2) of the Constitution. In any event, the arguments by the Respondents if taken to their logical conclusion suggest that a Presidential Election cannot be challenged at all and that Article 41(2) of the Constitution is of no consequence. This, in our view, could not have been the intention of the framers of our Constitution.

The Respondents also submitted that in the event that we hold that Section 18 of the Electoral Act applies to Presidential Election Petitions, we should also hold that Section 27(1) of the Electoral Act, which prescribes the time limit of 180 days within which to determine an Election Petition, should also apply to a Presidential Election Petition. We have found that Section 18 of the Electoral Act does not directly apply to Presidential Election Petitions. We have found no law, which suggests that Section 27(1) of the Electoral Act applies to Presidential Election Petitions. Though for different reasons, we uphold the Petitioners' submissions that the 180 days limitation does not apply. On the other hand, even if Section 27(1) would be applicable, strict adherence to it, would lead to a number of illogicalities and absurdities in both Parliamentary and Presidential Elections, in that regardless of any reason, a Petition which exceeds 180 days must cease or collapse in midstream without any determination. This, in our view, would be most unsatisfactory. Perhaps, this explains why the Section is silent on what should happen when a Petition has exceeded 180 days.

We take note that in practice most Parliamentary Election Petitions and even the last Presidential Election Petition exceeded 180 days. Another argument advanced by the Respondents is that the law does not provide for a vacancy in the office of the President consequent upon nullification of the election of the holder of the office of President. We do not find much force in these arguments because in view of what we have said, the corollary to the finding by the court that the holder of the office of President was not validly elected, or that his election cannot be upheld by reason of non compliance with the laws relating to the election of a President, is that there will be a vacancy in the office of the President. In short, we find Article 41(2) of the Constitution to be comprehensive and to have envisaged a vacancy in the office of the President in the event that his election is nullified. As to how such a vacancy will be filled, it goes without saying that it will be through an election since there are no any other constitutional means for any one to ascend to the office of the President. In such an event, the court will have to order a fresh Presidential poll to be conducted in a specified time. The provisions of the Constitution in Article 38(1) are that a vacancy created in terms of that Sub Article shall be filled within 90 days. And we do not see the court departing from the spirit of this Article in the event that a fresh Presidential poll is ordered.

There have been arguments and submissions from the parties as to the constitutional arrangement in the event that the election of a sitting President is nullified. Without going into the details of the arguments and submissions, we find Sub Articles (2) and (3) of Article 38 of the Constitution to be sufficient. It is our opinion that these provisions stand alone and independent of Sub Article (1) of Article 38 of the Constitution, as argued by the Petitioners. We have reached this conclusion because Sub Article (2) of Article 38 does not refer to a vacancy that may be created pursuant to Sub Article (1) of Article 38 of the Constitution. Sub Article (2) of Article 38 starts with the words: "Whenever the office of the President becomes vacant." The Concise Oxford Dictionary, 9th Edition, on Page 1595, gives the natural meaning of the word "whenever" as "at whatever time; on whatever occasion etc." In the event, we hold that Sub Article (2) of Article 38 of the Constitution applies to a vacancy in the office of President, however caused. The arguments by the Respondents that Sub Article (2) of Article 38 of the Constitution will only operate when there is a vacancy created by Sub Article (1) of Article 38 is, therefore, untenable because it fails to take into account the election of a President, which has been declared invalid under Article 41(2) of the Constitution. The arguments by the Respondents if taken to their logical conclusion would lead to an absurd situation. If, for example a Presidential candidate would have been found to have cheated on age or citizenship thereby contravening Article 34 of the Constitution, it cannot be validly argued that such a situation would not create a vacancy in the office of the President. Article 38 of the Constitution should not be interpreted in isolation but in light of all the other relevant provisions in the Constitution, one of which is Article 34.

It is not within the spirit of the Constitution, as the arguments by the Respondents suggest, that when the incumbent President's election has been nullified there should be an interregnum, with no one to take care of the affairs of the state, thereby leading to the chaos the Respondents fear. In conclusion, we hold, on the preliminary issue of jurisdiction, that this court has the jurisdiction to hear and determine this Petition and if proven, grant the remedies sought. Another related preliminary issue raised by the 2nd and the 3rd Respondents, in their joint written submission, was for us to determine when one becomes a candidate in a Presidential Election. Their contention is that a person becomes a Presidential candidate only upon nomination as per the definition of candidate in Section 2 of the Electoral Act. Section 2 reads as follows: - "Candidate means any person nominated as a candidate for an election." The 2nd and the 3rd Respondents further contended that in terms of Section 2, a candidate is a person who goes through the prescribed process of nomination for an election and has filed nomination papers to qualify as a candidate. The 2nd and the 3rd Respondents also contended that in relation to Section 18(2) of the Electoral Act, which, inter alia, deals with electoral offences and mal-practices, for which an election may be annulled, can only apply to a Presidential candidate after he or she has lodged his or her nomination papers. In consequence thereof, it was the view of the two Respondents that all Presidential candidates were only answerable for illegal and corrupt practices committed after they lodged their nominations on the 1st December, 2001 and not otherwise.

The two Respondents have also drawn our attention to the definition of candidate in Statutory Instrument No. 108 of 1991, dealing with Electoral (General) Regulations and Statutory Instrument No. 109 of 1991, which deals with Electoral (Presidential Elections) Regulations and which, in their view, have expanded the definition of the term candidate. The Electoral (General) Regulations (S.I. No. 108 of 1991) define candidate as follows: - "Candidate means a person who, in relation to an election, has lodged or intends to lodge his nomination papers." And the Electoral (Presidential Elections) Regulations (S.I. No. 109 of 1991) define a candidate as follows: - (a) in relation to any period before the close of the period appointed under regulation 3 for receiving nomination in an election, any person intending to stand for election in such election; and (b) in relation to any period after the close of the period under regulation 3 for receiving nominations in an election, any person validly nominated as a candidate in such election. It was contended by the 2nd and the 3rd Respondents that these two definitions of candidate in the Regulations are at variance with the definition in Section 2 of the Electoral Act in that the Regulations purport to include persons who intend to stand for elections.

The two Respondents contended that the added meaning given to the term candidate in the two Regulations is contrary to Section 20(2) of the Interpretation and General Provisions Act, Chapter 2, of our Laws, which provides that: - "Terms and expressions used in Statutory Instruments shall have the same meaning as in the written law under which the Statutory Instrument was made." The two Respondents also referred us to our decision in the case of Yonnah Shimonde and Freight and Liners – Vs - Meridien BIAO Bank (Z) Limited SCZ Judgment No. 7 of 1999 in which we subordinated a Statutory Instrument to the enabling Act in the following words:- "In choosing to apply a rate of interest upon a judgment debt based on the current bank rates at the time, the learned Commissioner relied on Statutory Instrument No. 174 of 1990 which amended the rate of interest specified at the time in the High Court Rules. However, that Statutory Instrument in fact flew in the teeth of the Judgments Act, which prevailed over the subordinate legislation and which decreed 6% of the rate of interest on a money judgment. The decisions of this Court, such as Bank of Zambia - Vs – Anderson, SCZ Judgment No. 13 of 1993 and Attorney-General – Vs – Mooka Mubiana, appeal No, 38 of 1993, made it very clear that the provisions of an Act of Parliament could not be ignored or over-ridden by a mere Statutory Instrument. See Section 20(4) of the Interpretation and General Provisions Act, chapter 2. The Judgments Act has since been amended and it accords with what the Statutory Instrument had proposed. However, the fact still is that at the time of the judgment herein, it was not lawful to award more than 6%." On the basis of the Interpretation and General Provisions Act and our reasoning in the Shimonde case, the 2nd and the 3rd Respondents submitted that the definition of candidate should be restricted to those persons who have actually filed nomination papers; that only when candidates are nominated in terms of the Electoral Act are they answerable for their conduct as candidates. The other issue that was canvassed in the written submissions, and which has a bearing on the meaning given to candidate was in respect of the nomination process as provided for in the Electoral (Presidential Elections) Regulations under Statutory Instrument No. 109 of 1991.

The Respondents quoted Regulation 5 in full, but what is of relevance to their subsequent argument is Regulation 5(2)(a) which provides as follows: - "5(2) A nomination paper shall- (a) state the political party of which the candidate is a member or by which he is sponsored and the symbol that the candidate proposes to use." In terms of the foregoing Regulation, the 2nd and the 3rd Respondents contended that political parties merely sponsor candidates; that a person does not become a candidate at the time that he or she is selected or elected by a political party; but that he or she becomes a candidate after going through the nomination process. Consequently, the position of the two Respondents, which forms the gist of their submissions, is that the evidence led by the Petitioners relating to the events, which occurred before the filing of the nomination papers, is irrelevant and should, therefore, be excluded. We note that the 1st and the 2nd Petitioners did not, in their reply, address the issue as to when one becomes a candidate. On the other hand, the 3rd Petitioner, although not directly replying on this issue, condemned the learned Attorney-General for not playing his role of defending the public interest for which purpose he was joined to the proceedings or indeed for which he holds office. According to the 3rd Petitioner, the learned Attorney-General exhibited a conflict of interest between his office and his personal relationship with the 1st Respondent by raising the issue of when one becomes a candidate. We have considered the submission of the 2nd and the 3rd Respondents with regard to the question of candidate in a Presidential Election. The question we have been asked to answer is: when does a person become a candidate in a Presidential Election? Since we are dealing with a Presidential Election Petition, we find that the genesis of a candidate, his or her nomination and qualification to run for the office of President must be in Article 34(3) of the Constitution. The relevant part of this Article provides: - "34(3) A person shall be qualified to be a candidate for election as President if: - (d) he is a member of, or is sponsored by, a political party". Section 9(1) of the Electoral Act, which falls under PART III dealing with Presidential Elections, makes provision, inter alia, for the filing of nomination papers in the following terms:- "9(1) A candidate for election as President shall, on such day, at such time and at such place as may be determined by the Commission, deliver to the Returning Officer- (a) the candidate's nomination paper;"

Regulation 5(2) of the Electoral (Presidential Elections) Regulations provides, inter alia, as follows: - "5(2) A nomination paper shall:- (a) state the political party

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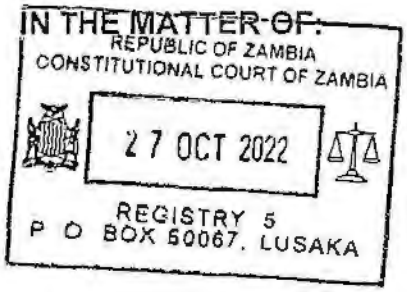
IN THE CONSTITUTIONAL COURT 2021/CCZ/A0028

HOLDEN AT LUSAKA

(Appellate Jurisdiction)



IN THE MATTER OF:	A PARLIAMENTARY ELECTION PETITION FOR LUMEZI CONSTITUENCY NO. 46 OF DISTRICT NO. 13 LUMEZI SITUATE IN THE LUMEZI DISTRICT OF THE EASTERN PROVINCE OF THE REPUBLIC OF ZAMBIA HELD ON THURSDAY 12TH AUGUST 2021
IN THE MATTER OF:	THE CONSTITUTION OF ZAMBIA ACT, CHAPTER 1 VOLUME 1 OF THE LAWS OF ZAMBIA
IN THE MATTER OF:	ARTICLES 1, 2, 5, 8, 9, 45, 46, 47, 48, 49, 50, 54, 70, 71, 72 AND 73 OF THE CONSTITUTION OF ZAMBIA
IN THE MATTER OF:	SECTION 29, 37, 38, 51, 52, 55, 58, 59, 60, 68, 69, 70, 71, 72, 75, 76, 77, 81, 82, 83, 86, 87, 89, 96, 97, 100, 106, 107, 108 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016
IN THE MATTER OF:	THE SCHEDULE TO THE ELECTORAL PROCESS ACT NO. 35 OF 2016
IN THE MATTER OF:	THE ELECTORAL CODE OF CONDUCT (CODE OF CONDUCT), 2016
IN THE MATTER OF:	THE ELECTORAL (CODE OF CONDUCT) REGULATIONS, STATUROTY INSTRUMENT NO. 52 OF 2011
IN THE MATTER OF:	THE ELECTORAL COMMISSION OF ZAMBIA ACT NO.25 OF 2016

BETWEEN:

MWANZA PILILA GETRUDE JERE	1ST APPELLANT
MACDONALD PHIRI	2ND APPELLANT
ZELIPA CHITSULO	3RD APPELLANT
AND	
MUNIR ZULU	1ST RESPONDENT
ELECTORAL COMMISSION OF ZAMBIA	2ND RESPONDENT

CORAM: Sitali, Mulonda, Mulenga, Musaluke and Mulongoti, JJC. On 20th May, 2022 and 27th October, 2022.

For the 1st Appellant:	No Appearance
For the 2nd Appellant:	No Appearance
For the 3rd Appellant:	Mr. B. Sitali of Messrs. Butler and Company Legal Practitioners
For the 1st Respondent:	Mr. J. Ilunga and Mr. M. Zaza of Messrs. Ilunga and Company
For the 2nd Respondent:	Mr. M. Bwalya – In-house Counsel

JUDGMENT

Musaluke, JC, delivered the Judgment of the Court

Cases referred to:

1. Nkandu Luo and Electoral Commission of Zambia v Doreen Sefuke Mwamba and Attorney General CCZ Selected Judgment No. 51 of 2018
2. Stephen Masumba v Elliiot Kamondo CCZ Selected Judgment No. 53 of 2017
3. Austin C. Liato v Sitwala Sitwala CCZ Selected Judgment No. 23 of 2018
4. Reuben Mtolo Phiri v Lameck Mangani SCZ Judgment No. 2 of 2013
5. Josephat Mlewa v Eric Wightman (1995 – 1997) Z.R. 171
6. Michael Mabenga v Sikota Wina, Mafo Wallace Mafiyo and George Samulela SCZ Judgment No. 15 of 2003
7. Belsford James Gondwe Catherine Namugala, SCZ Appeal No.129 of 2012
8. Richwell Siamunene v Gift Sialubalo CCZ Selected Judgment No. 58 of 2018

9. Margaret Mwanakatwe v Charlotte Scott and Attorney GeneralCCZ Selected Judgment No. 50 of 2018

10. Mutotwe Kafwaya v Chasaya Katongo, Justine Chongo and Electoral Commission of Zambia 2021/CCZ/A0020

11. Jonathan Kapaipi v Newton Samakayi CCZ Appeal No. 13 of 2017

12. Kufuka Kufuka v Mundia Ndalamei CCZ Appeal No. 15 of 2016

13. Joseph Malanji v Charles Abel Mulenga and The Electoral Commission of Zambia 2021/CCZ/A0021

Legislation referred to:

1. The Constitution of Zambia Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016

2. The Electoral Process Act No. 35 of 2016

3. The Electoral Process (General) Regulations, Statutory Instrument No. 63 of 2016

Introduction and background

1. When we sat to hear this appeal, our learned sister Lady Justice Sitali sat with us. She is currently on leave and therefore, this judgment is of the majority.

2. This is an appeal by Ms. Mwanza Pilila Getrude Jere, Mr. Macdonald Phiri and Ms. Zelipa Chitsulo (the Appellants) against the High Court Judgment delivered on 22nd November, 2021, which dismissed the Appellants' election petition and declared Mr. Munir Zulu (the 1st Respondent) as duly elected as Member of Parliament for Lumezi Constituency.

3. The brief background to this appeal is that the Appellants and the 1st Respondent were four of the eight candidates in the general elections held on 12th August, 2021, as Member of Parliament for Lumezi Constituency.

4. Ms. Mwanza Pilila Getrude Jere (the 1st Appellant) was the candidate for the Patriotic Front (PF), Mr. Macdonald Phiri (the 2nd Appellant) was the candidate for the United Party for National Development (UPND), Ms. Zelipa Chitsulo (the 3rd Appellant) and Mr. Munir Zulu (the 1st Respondent) were independent candidates.

5. The 1st Appellant received ten thousand four hundred and seventy one (10,471) votes, the 2nd Appellant received four thousand three hundred eighty six (4,386) votes, the 3rd Appellant received one thousand eighty one (1,081) votes and the 1st respondent received eleven thousand nine hundred twenty nine (11,929) votes and was

declared as the duly elected Member of Parliament for Lumezi Constituency.

6. Dissatisfied with the election results, the 1st Appellant filed a petition in the High Court against the 1st Respondent and the Electoral Commission of Zambia (the 2nd Respondent) asserting, amongst other things, that the 1st Respondent committed corrupt practices and electoral malpractices.

7. The 2nd and 3rd Appellants also filed a separate petition in the High Court against the 1st and 2nd Respondents alleging, *inter alia*, that the 1st Respondent did not qualify for election as a Member of Parliament on grounds that he did not possess a valid grade twelve certificate or its equivalent. Both petitions asserted that the 1st Respondent's election as Member of Parliament for Lumezi Constituency was null and void.

8. In her petition, the 1st Appellant alleged that the 1st Respondent engaged in numerous corrupt practices and electoral malpractices. She asserted that the elections for Member of Parliament for Lumezi Constituency were characterised by undue influence. In particular, the 1st Appellant alleged that:

8.1. During the campaign period, the 1st Respondent and his campaign team engaged in rampant bribery, distribution of money, purchasing of cement, iron sheets and other building materials for various schools, health facilities and the community at large. Specifically, that the 1st Respondent engaged in bribery in the form of donations in the following wards: Kaikumbe Ward, Wachitangachi Ward, Chamtowa Ward, Kachana Ward, Kamimba Ward and Diwa Ward. That the 1st Respondent and his campaign team delivered iron sheets, cement and other materials mostly after 18.00 hours in the evening and before dawn.

8.2. Three weeks before the elections, the 1st Respondent donated a Toyota Dyna motor vehicle registration No. ALM 4371 to Mr. Felix Zulu, an Independent Councilor in Lumimba Ward. That the 1st Respondent also gave a sum of K 4,000.00 to Nkanyi School in Diwa Ward and distributed sums of money to health care centers and schools.

8.3. The elections were marred by threats of violence and actual violence to life and property of PF members and the public. Further that the 1st Respondent and his campaign manager warned the 1st Appellant and the electorate that he had a gun

and would "*shoot and kill*" any person that benefitted from his donations but didnot vote for him. The 1st Respondent also threatened that he would know who did not vote for him because he had the voter register for each ward.

8.4. The 1st Respondent and members of his campaign team verbally assaulted and abused the 1st Appellant and threatened that they would cause a "*head-on car collision*" if they met on the campaign trail. On 8th August, 2021, along the Lundazi - Chipata Road, the 1st Respondent and his campaign team nearly caused a road traffic accident by deliberately attempting to drive straight into the 1st Appellant's motor vehicle convoy. Following this near-miss, the 1st Respondent and his campaign team stopped their vehicles and made unpalatable remarks directed at the 1st Appellant before speeding off.

8.5. The 1st Respondent and his campaign team defaced the 1st Appellant's campaign materials. The 1st Appellant and her campaign team received numerous threatening messages and voice call recordings threatening serious harm if they continued to campaign in Lumezi Constituency. The threats and violent acts led to PF members and the public to fear for

their safety and forced some voters not to vote on Election Day.

8.6. Throughout the campaign period, the 1st Respondent and his campaign manager namely, Mr. Patson Chipeta used two Mitsubishi Pajero motor vehicles branded with the registration plate "ECL 2021"and distributed PF branded regalia in Lumezi Constituency. Thus, the 1st Respondent contravened guidelines issued by the 2nd Respondent to the effect that independent candidates were prohibited from campaigning for a presidential candidate of a political party and the use of a political party's campaign materials.

8.7. The 1st Respondent contravened the Electoral Process Act No. 35 of 2016 (EPA) and the Electoral Process Code of Conduct during the entire period of campaigns.

9. In their amended petition, the 2nd and 3rd Appellants alleged that he did not comply with the provisions of the Constitution of Zambia Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016, (the Constitution) and the EPA. Particularly, the 2nd and 3rd Appellants alleged that:

9.1. The 1st Respondent and his agents distributed monetary and non-monetary materials including cement, roofing sheets, blankets, bed sheets, mealie meal, second hand clothes, bicycles, a heavy duty solar battery and a Mitsubishi Canter Registration No. ALM 4371;

9.2. On 10th August, 2021, the 1st Respondent threatened the 2nd Appellant and Baldwin Chitsulo (PW19) with a gun while they were erecting campaign posters. The 1st Respondent also removed the 2nd and 3rd Appellants' campaign posters;

9.3. On 11th August, 2021, the 1st Respondent made large cash payouts and disbursed social cash transfer funds to voters in Lumezi Constituency; and

9.4. The 1st Respondent did not have a grade twelve certificate and therefore, he was not a person that was qualified to be elected as a Member of Parliament for Lumezi Constituency.

10. On the basis of these allegations, the Appellants asserted that the election was not free and fair and that the corrupt practices and electoral malpractices attributed to the 1st Respondent were widespread and prevented the majority of voters in Lumezi Constituency from voting for a candidate whom they preferred.

The Answer

11. In response to the consolidated petitions, the 1st Respondent filed an answer and affidavit in opposition. The affidavit was sworn by the 1st Respondent where he deposed that he conducted his campaigns in a peaceful manner and in accordance with the law governing elections. He averred that he was not aware of any irregularities or malpractices perpetuated by any of his agents before, during or after the elections. The 1st Respondent alleged that the 1st Appellant and the PF engaged in massive vote buying, corruption, bribery and other electoral malpractices in breach of the Constitution and the EPA.

12. In its combined answer to the consolidated petitions, the 2nd Respondent asserted that it had no knowledge of any electoral malpractice and therefore, the election was validly conducted.

Consideration of evidence and decision of the trial court

13. The learned trial Judge, subsequently consolidated the two petitions. In the consolidated petition, the 1st Appellant was the 1st petitioner, the 2nd Appellant was the 2nd petitioner and the 3rd Appellant was the 3rd petitioner. The 1st Respondent and the 2nd

Respondent were also the 1st and 2nd Respondents respectively in the trial court.

14. At the trial of the consolidated petition, the Appellants testified as PW1, PW17 and PW18, respectively. The Appellants also called seventeen (17) other witnesses to the stand. The 1st Respondent on the other hand, testified on his own behalf and took to the stand as RW1. The 2nd Respondent called one (01) witness.

15. The learned trial Judge identified and summarized the allegations against the 1st Respondent as follows:

15.1. Bribery in the form of donations made by the 1st Respondent during the campaign period;

15.2. Use of the PF election campaign material and campaigning for the PF Presidential Candidate;

15.3. Alleged threats and acts of violence perpetrated by the 1st Respondent and his agents during the campaign period; and

15.4. An allegation that the 1st Respondent did not possess a full grade twelve certificate or its equivalent.

16. In respect of the allegation that the 1st Respondent committed bribery by making donations, the learned trial Judge observed that the evidence pertaining to this allegation was given by PW1, PW2, PW3, PW4, PW5, PW6, PW7, PW8, PW9, PW10, PW11, PW12, PW13 and PW14. She framed the issue to be whether or not the donations were made with the consent and full knowledge of the 1st Respondent or his electoral agents, and if so, whether the impact of the donations was so widespread that it influenced the outcome of the election.

17. The learned trial Judge found that the evidence on record showed that the 1st Respondent did not personally deliver any of the donated materials. She also found that there was no evidence to the effect that the donations were made with the knowledge and consent or approval of the 1st Respondent or his election or polling agents. She further found that the Appellants did not show, with certainty, the connection between the persons delivering the donations and the 1st Respondent.

18. The learned trial Judge reasoned that the standard of proof is not met by merely mentioning that some unknown people delivered the items and then told them that they were from the 1st Respondent. She opined that she could not be left to speculate the identity of the

people who delivered the donations or the extent of the 1st Respondent's alleged knowledge and consent or approval. She further found that the Appellants did not demonstrate that the donations were made by the 1st Respondent or his election or polling agents. The learned trial Judge concluded that the allegations that the 1st Respondent made donations that influenced the electorate to vote for him had not been proved to the required standard and that it had not been shown that the donations were so widespread that they influenced the voters in Lumezi Constituency. This allegation was therefore, dismissed.

19. Regarding the allegation that the 1st Respondent campaigned for the PF presidential candidate and used PF campaign materials, the learned trial Judge found that it was not in dispute that the 1st Respondent had two vehicles in his campaign fleet that had the registration plate "ECL 2021". She also found that it was not in dispute that the 2nd Respondent guided independent candidates that they must relinquish any political affiliation at least two months before the election. She further found that save for the two vehicles, there was no other evidence presented to show, not only that the 1st Respondent campaigned for the PF but also that he used the PF's campaign material. She found that all the witnesses were

unequivocal in their evidence that they knew that the 1st Appellant was standing on the PF ticket, therefore, even in the event that the 1st Respondent did campaign for the PF presidential candidate, there was no confusion in the minds of the electorate who stood on the PF ticket for the position of Member of Parliament. The learned trial Judge concluded that this allegation was not supported by sufficient evidence to warrant a finding that the electorate were confused as to who was standing on the PF ticket. Thus, this allegation was dismissed.

20. On the 1st Appellant's allegation that the 1st Respondent attempted to cause a head-on car collision on the Lundazi-Chipata road, causing the 1st Appellant's motor vehicle to veer off the road, the learned trial Judge observed that there was no other witness that was called to substantiate the 1st Appellant's evidence regarding this allegations of threats and actual violence. The trial Judge reasoned that evidence on record did not show that it was the 1st Respondent or his election or polling agent who was in the motor vehicle or that the attempted head-on car collision was sanctioned by the 1st Respondent or with his knowledge and consent or approval.

21. In respect of the second allegation of threats and violence, the learned trial Judge observed that the 3rd Appellant relied on the

evidence of PW19 and an exhibited photograph of the 1st Respondent holding a firearm. She reasoned that the 3rd Appellant's own evidence showed that the exhibited photograph was not contemporaneous and was not relevant to the petition. She found that the 1st and 3rd Appellants did not show the effect of the alleged threats and violence on the electorate and concluded that the conduct of the 1st Respondent was not widespread. The allegation was therefore, dismissed.

22. In regard to the allegation that the 1st Respondent did not have a grade twelve certificate or its equivalent, the learned trial Judge reasoned that the fact that the 1st Respondent was declared and duly nominated and entered on the ballot was *prima facie* evidence that he was qualified to participate in the elections. She observed that the 2nd and 3rd Appellants produced a document that suggested that the 1st Respondent acquired a grade twelve certificate one year after his birth and thus argued that he could not have taken a grade twelve exam one year after he was born and therefore his grade twelve certificate was a forgery. She also observed that the 3rd Appellant testified that she retrieved the 1st Respondent's alleged forged grade twelve certificate from a WhatsApp group. She further observed that the 1st Respondent had produced correspondence

from the Examinations Council of Zambia stating that he possessed the equivalent of a grade twelve certificate.

23. The learned trial Judge was not convinced to a fairly high degree of convincing clarity as to the authenticity of the purported grade 12 certificate produced by the 3rd Appellants. She found that the 3rd Appellant's evidence regarding the 1st Respondent's grade twelve certificate to be hearsay evidence as such she could not rely on it. She also reasoned that the 1st Respondent produced evidence that demonstrated that the Examinations Council of Zambia assessed his grade twelve certificate and issued correspondence that confirmed that he possessed the equivalent of a grade twelve certificate, which evidence was not rebutted by the Appellants.

24. Ultimately, the learned trial Judge found that the Appellants did not discharge their burden to prove the allegation that the 1st Respondent did not have a valid grade twelve certificate or its equivalent and that there were therefore, no grounds upon which the 1st Respondent's eligibility could be questioned. Thus, this allegation was dismissed.

25. The learned trial judge dismissed the Appellants' petition and found that the 1st Respondent was duly elected Member of Parliament for Lumezi Constituency.

The Appeal

26. Aggrieved by the decision of the learned trial Judge, the Appellants appealed to this Court. In their Memorandum of Appeal, the Appellants advanced four (04) grounds of appeal as follows:

1) **The learned trial judge misdirected herself both in law and in fact when she ruled that the allegations that the 1st Respondent's activities in the constituency influenced the electorate to vote for her has not been proven to the required standard and that there was no demonstration by the Petitioners that the donations were made by the 1st Respondent or his election or polling agents or with their knowledge.**

2) **The learned trial judge erred both in law and in fact when she held that it had not been shown that the conduct of making donations by the 1st Respondent was too widespread as to influence the voters in the constituency.**

3) **The learned trial judge misdirected herself both in law and in fact when she ruled that the fact that the 1st Respondent was declared duly nominated and was even entered on the ballot is *prima facie* evidence that he was qualified to participate in the elections.**

4) **The learned trial judge erred in law and in fact when she ruled that the 1st Respondent possessed a grade twelve certificate or its equivalent to warrant him qualify to participate in the parliamentary**

election for the Lumezi Constituency when the 1st Respondent failed, refused and or neglected to rebut the Petitioners' evidence that he did not possess a grade 12 certificate.

The 1st and 2nd Appellants' arguments

27. The 1st and 2nd Appellants did not file any written heads of argument.

The 3rd Appellant's arguments

28. In support of the appeal, the 3rd Appellant filed heads of argument on 21st March, 2022. At the hearing of the appeal, Counsel for the 3rd Appellant augmented the heads of argument with oral submissions. Grounds one and two were argued separately while grounds three and four were argued together.

29. In arguing ground one of the appeal, the 3rd Appellant relied on the case of **Nkandu Luo and Electoral Commission of Zambia v Doreen Sefuke Mwamba and Attorney General**[1] and submitted that the burden to prove the allegations against the 1st Respondent lay on the Appellants. It was submitted that there was overwhelming evidence on record of the meetings that the 1st Respondent held during the campaign period where he made promises indicating that the electorate should not vote for him if he did not deliver on the promises he made. It was argued that this presented a condition

32. Thus, the 3rd Appellant submitted that the 1st Respondent possessed the requisite knowledge and consent or approval to the donations being made as stipulated by section 97 (2) (a) (ii) of the EPA and the case of **Stephen Masumba v Elliot Kamondo[2].** It was further submitted that it could not be said that the conduct of the 1st Respondent may not have influenced the outcome of the election.

33. The 3rd Appellant submitted that the conduct of the 1st Respondent amounted to bribery and as such he contravened section 81(1)(c) of the EPA which reads that:

> **81. (1) A person shall not, either directly or indirectly, by oneself or with any other person corruptly –**
>
> **(c) make any gift, loan, offer, promise, procurement or agreement to or for the benefit of any person in order to induce the person to procure or to endeavor to procure the return of any candidate at any election or the vote of any voter at any election;**

34. The 3rd Appellant contended that, at page J62 of the judgment, the trial Judge observed that the 1st Respondent's motor vehicle was involved in a road traffic accident on 8th August, 2021, on the Chikomeni-Suzi Road, and that the 1st Respondent went to the scene of the accident as part of a rescue team and he confirmed that the motor vehicle in question was part of a fleet of vehicles used

by his campaign team. It was therefore, argued that the 1st Respondent was always aware of the acts done by his campaign team and that it was not plausible that his campaign team made donations without his consent or approval. We were urged to uphold this appeal on account that the Appellants had proved that the 1st Respondent used donations to win votes across Lumezi Constituency.

35. In arguing ground two of the appeal, the 3rd Appellant submitted that the actions of the 1st Respondent and his campaign team potentially influenced the outcome of the election. In particular, it was argued that the Appellants' failure to show the exact number of people that attended the meetings held by the 1st Respondent did not take away the risk that the 1st Respondent's conduct may have had on the electorate because all the witnesses testified that they voted for him based on the donations he made.

36. The 3rd Appellant cited the case of **Austin C. Liato v Sitwala Sitwala**[3] where we said that :

> **It is not sufficient for a Petitioner to prove only that a candidate committed an illegal or corrupt practice or engaged in other misconduct in relation to the election without proof that the illegal or corrupt practice or misconduct was widespread and prevented**

or may have prevented the majority of the voters in the constituency, district or ward from electing a candidate of their choice.

37. The 3rd Appellant, therefore, argued that it was proved in the trial court that the 1st Respondent's misconduct was widespread and it prevented or may have prevented the majority of the voters in Lumezi Constituency to vote for their preferred candidate. Alternatively, the 3rd Appellant submitted that the requirement to satisfy that the misconduct was widespread does not arise in cases where bribery or corrupt practices are alleged. The 3rd Appellant referred us to the case of **Reuben Mtolo Phiri v Lameck Mangani**[4] where the Supreme Court stated that:

> **On the authority of the Mabenga case and on the evidence on record, we hold that the Appellant's conduct in donating the money to the church congregation, when he was introduced as a Parliamentary candidate and expressly asking for votes, went beyond philanthropic activity. We uphold the holding by the learned trial Judge that the Appellant's conduct amounted to a corrupt or illegal practice, under section 79(1)(c) and 93(2)(c) of the Electoral Act, 2006. It warranted nullification of his election to the National Assembly.**

38. The 3rd Appellant also referred us to the Supreme Court cases of **Josephat Mlewa v Eric Wightman**[5] and **Michael Mabenga v Sikota Wina, Mafo Wallace Mafiyo and George Samulela**[6] and submitted that satisfactory proof of any one corrupt or illegal practice or misconduct in an election petition is sufficient to nullify any election. On the basis of the foregoing authorities, the 3rd Appellant argued that acts of misconduct attributed to the 1st Respondent were widespread and that alternatively, this Court must find that the 1st Respondent committed bribery which requires proof of a single act to justify the nullification of the 1st Respondent's election as Member of Parliament for Lumezi Constituency.

39. In arguing grounds three and four of the appeal, the 3rd Appellant submitted that it was a serious misdirection for the trial Judge to find that the mere successful filing in of the 1st Respondent's nomination was *prima facie* evidence of his qualification to contest the election in the absence of any legal backing. It was argued that if that were the position, the law would not provide for avenues to challenge a candidate's qualification post the election. It was argued that section 97 (2) (c) of the EPA allows that a candidate who participated in an election could be subject to challenge on the basis that at the time

of the election that person was not qualified to take part in the election or was a person disqualified for election.

40. The 3rd Appellant submitted that Article 70 of the Constitution provides that a person is eligible to be elected as a Member of Parliament if, *inter alia*, that person has obtained, as a minimum academic qualification, a grade twelve certificate or its equivalent. It was argued that the 1st Respondent failed to give a satisfactory answer as to why he had not presented his grade twelve certificate. That the learned trial Judge solely relied on a letter from the Examinations Council of Zambia as conclusive evidence of the 1st Respondent's possessing a grade twelve certificate which was a serious misdirection. It was further argued that the 1st Respondent left the trial court in doubt as to whether he has a grade twelve certificate or its equivalent.

41. The 3rd Appellant argued that the testimony of RW2 to the effect that the 2nd Respondent only received a letter from the Examinations Council of Zambia was highly misleading and a deliberate attempt to mislead the court. It was submitted that the Electoral Process (General) Regulations Statutory Instrument No. 63 of 2016, essentially provides that an actual certified copy of a grade twelve certificate or its equivalent is required by the 2nd Respondent for

purposes of filing one's nomination for Member of Parliament. It was argued that the holding by the trial Judge that the role of the 2nd Respondent is to merely receive an affidavit without stating the nature and content of the said affidavit was a serious misdirection at law. The 3rd Appellant argued that the trial Judge ought to have gone further and considered what the affidavit demanded of the candidates, she would have arrived at a different conclusion and would not have taken the position that a mere verification letter from the Examinations Council of Zambia was *prima facie* evidence of one's eligibility. It was contended that the Appellants' duty to prove the 1st Respondent's non-possession of a grade twelve certificate or its equivalent was sufficiently discharged.

42. At the hearing of the appeal, Counsel for the Appellant submitted that the 1st Respondent did not have a grade twelve certificate or it's equivalent at the time of the election, and therefore, he was not eligible to participate in the said election. Counsel argued that the finding by the trial Judge that the 1st Respondent qualified for the election on account that he had successfully filed in his nomination, was a misdirection. It was submitted therefore, that the mere fact that a nomination is successful does not preclude a candidate's election from being challenged as per section 97(2) of the EPA.

Counsel submitted that a candidate for Member of Parliament must submit a grade twelve certificate when filing a nomination, and the allegation that 1st Respondent did not do so was not rebutted before the trial Judge. Counsel urged us to uphold this appeal.

The 1st and 2nd Respondents arguments

43. The 1st and 2nd Respondents did not file any heads of argument.

Analysis and decision

44. We have considered the grounds of appeal, the 3rd appellant's written and oral arguments, the authorities cited and the judgment of the trial court. It is our considered view that the main issue in this appeal is whether or not the trial Judge was on *terra firma* when she dismissed the Appellants' consolidated election petition and declared that the 1st Respondent was duly elected Member of Parliament for Lumezi Constituency.

45. Before we delve into determining this appeal, we consider it imperative that we remain mindful as to the applicable burden and standard of proof in election petitions. The burden of proof in election petitions, as in any other civil matter, lies on the petitioner. It is therefore, incumbent on the petitioner to establish the corrupt or illegal practice, electoral malpractice or misconduct alleged to the

requisite standard of proof. In several of our judgments, we have approved the view pronounced in the case of **Brelsford James Gondwe v Catherine Namugala**[7] where the Supreme Court stated that:

> **The burden of establishing the grounds lies on the person making the allegation and in election petitions, it is the petitioner in keeping with the well settled principle of law in civil matters that he who alleges must prove.**

46. In terms of the standard of proof in election petitions, it is trite that it is higher than the standard required in a civil matter of a mere balance of probabilities. In the case of **Austin C. Liato v Sitwala Sitwala**[3] we stated that:

> **In the persuasive authority of Lewanika and Others v Chiluba the Supreme Court said this regarding the standard of proof: As part of the preliminary remarks which we make in this matter, we wish to assert that it cannot be seriously disputed that parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probability.... It follows also that the issues raised are required to be established to a fairly high degree of convincing clarity.**

47. We also consider that it is essential that we outline section 97(2) of the EPA as it provides for the grounds upon which the election of a

candidate as a Member of Parliament may be nullified or voided. Section 97(2) of the EPA provides that:

> **The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that-**
>
> **(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election –**
>
> **(i) by a candidate; or**
>
> **(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and**
>
> **the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;**
>
> **(b) subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of the elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such**

provision and that such non-compliance affected the result of the election; or

(c) the candidate was at the time of the election a person not qualified or a person disqualified for election.

48. It is apparent from the grounds of appeal, that the consolidated petition before the learned trial Judge and this appeal are anchored on section 97(2) (a) and (c) of the EPA. In essence, section 97(2) (a) of the EPA entails that the election of a candidate as, *inter alia*, Member of Parliament can only be nullified if the person challenging the election proves to the satisfaction of the Court that the candidate in question personally committed a corrupt practice or illegal practice or other misconduct in relation to the election or that the corrupt practice or illegal practice or misconduct was committed by another person with the candidate's knowledge and consent or approval or that of the candidate's election or polling agent. Furthermore, it must also be proved that that the corrupt practice, illegal practice, electoral malpractice or misconduct was so widespread that it prevented or may have prevented the majority of the electorate from electing the candidate of their choice.

49. We have, on numerous occasions interpreted section 97(2) (a) of the EPA. In the case of **Nkandu Luo and Electoral Commission**

of Zambia v Doreen Sefuke Mwamba and Attorney General[1] we stated that:

> **In order for a petitioner to successfully have an election annulled pursuant to section 97(2) (a), there is a threshold to surmount. The first requirement is for the petitioner to prove to the satisfaction of the court, that the person whose election is challenged personally or through his duly appointed election or polling agents, committed a corrupt practice or illegal practice or other misconduct in connection with the election; or that such malpractice was committed with the knowledge and consent or approval of the candidate or his or her election or polling agent.**

50. We went on to add that:

> **In addition to proving the electoral malpractice or misconduct alleged, the petitioner has the further task of adducing cogent evidence that the electoral malpractice or misconduct was so widespread that it swayed or may have swayed the majority of the electorate from electing the candidate of their choice.**

51. Section 97(2) (c) of the EPA, on the other hand, provides a process for nullifying or voiding an election where it is proved that a candidate was not qualified to be elected or the candidate was disqualified for election as *inter alia*, Member of Parliament at the time of the election.

52. What we discern from the foregoing authorities is that, having alleged a number of electoral malpractices on the part of the 1st Respondent, the Appellants must prove to a fairly high degree of convincing clarity that:

52.1. The 1st Respondent personally or through his duly appointed election or polling agents committed the electoral malpractices alleged or that such malpractices were committed with the knowledge and consent or approval of the 1st Respondent or his appointed election or polling agents; and

52.2. The electoral malpractice was so widespread that it prevented or may have prevented the majority of the electorate in Lumezi Constituency from electing the candidate of their choice; or

52.3. The 1st Respondent was at the time of the election a person not qualified to be elected as Member of Parliament or a person disqualified for election as Member of Parliament.

53. In determining this appeal we shall consider the grounds of appeal in the order in which they were argued, that is to say, grounds one and two shall be considered separately whereas grounds three and four shall be considered together.

54. There were four main allegations that were identified and subsequently dismissed by the learned trial Judge namely, bribery in the form of donations, the wrongful use of PF campaign materials, threats and acts of violence and ineligibility to be elected as a Member of Parliament on account of a lack of a valid grade twelve certificate or its equivalent. The grounds of appeal, however, only challenge the allegations pertaining to the making of donations and ineligibility due to lack of a valid grade twelve certificate or its equivalent.

55. In particular, grounds one and two of the appeal challenge the trial Judge's findings regarding bribery in the form of donations and grounds three and four of the appeal challenge the learned trial Judges' findings regarding the alleged lack of a valid grade twelve certificate or its equivalent. The learned trial Judge's findings concerning the allegations of wrongful use of PF campaign materials and the threats and acts of violence were not challenged and therefore, do not form part of this appeal.

56. The issue, therefore for consideration in grounds one and two of the appeal is whether or not the learned trial Judge misdirected herself when she found that the allegation that the 1st Respondent committed bribery in the form of donations that influenced the

majority of the electorate in Lumezi Constituency to vote for him had not been proved to the required standard.

57. In ground one of the appeal, the 3rd Appellant contends that the 1st Respondent was the architect of a scheme under which he made donations to the electorate in return for a vote in his favour. It was argued that it was not a mere coincidence that in all wards where the 1st Respondent had previously made promises to distribute assorted materials, donations were subsequently made in line with the said promises. That, therefore, the 1st Respondent had knowledge of and consented to the donations being made. It was further argued that the donations amounted to bribery and they influenced the outcome of the election.

58. The evidence concerning the allegation of bribery in the form of donations was adduced by PW1, PW2, PW3, PW4, PW5, PW6, PW7, PW8, PW9, PW10, PW11, PW12, PW13, PW14, PW15 and PW16. The evidence of the aforementioned witnesses was identical in the sense that they all testified that the 1st Respondent held meetings in their respective Wards where he promised to donate assorted materials in exchange for their vote. The witnesses testified that other persons on behalf of the 1st Respondent delivered the assorted materials, and consequently they voted for the 1st

Respondent. It was their testimony that the 1st Respondent's donations during the campaign period influenced who they voted for at the election. None of the witnesses, however, testified that the 1st Respondent personally made the donations.

59. The learned trial Judge, found that all the witnesses who were called to testify regarding the donations confirmed that the 1st Respondent did not personally deliver any of the donated items. Thus, the learned trial Judge identified the issue to be whether the donations were made with the knowledge and consent of the 1st Respondent or by his appointed election or polling agents. The trial Judge found that the Appellants' witnesses did not adduce any evidence that identified the persons that delivered the donations. She opined that the identity of such persons was important, as it would at the very least show with certainty the connection between the persons delivering the donations and the 1st Respondent. She further opined that she could not be left to speculate the identity of the people who delivered the donations or the extent of the 1st Respondent's knowledge and consent in respect of the donations. In view of the foregoing, the learned trial Judge found that the Appellants did not demonstrate that the donations were made by the 1st Respondent

or by his appointed election or polling agents or with their knowledge and consent or approval.

60. The learned trial Judge also found that evidence concerning the numbers, precise or estimated, of the people that attended the meetings allegedly held by the 1st Respondent was not adduced by the Appellants. She reasoned that without this evidence she would be left to guess the extent of the influence of the donations on the electorate. Thus, that it was necessary for the Appellants to demonstrate, by adducing evidence, the number of people that attended the meetings held by the 1st Respondent. She opined that this evidence would allow an inference to be drawn regarding the influence of the donations on the electorate. In view of this, the trial Judge found that the allegation that the 1st Respondent's donations influenced the electorate to vote for him had not been proved to the required standard.

61. We have examined the record of appeal, we find that PW1 to PW16 all testified that the 1st Respondent held meetings in their respective Wards and he promised to make donations of mostly building materials in exchange for a vote. PW1 to PW16 all testified that shortly after the meetings aforesaid, building materials were delivered to their Wards, and that it is the donations that influenced

them to vote for the 1st Respondent. In his evidence, the 1st Respondent (RW1) testified that during the campaign period, he held meetings that were attended by about one hundred (100) people in different Wards of Lumezi Constituency. We therefore, find that it is not in dispute that the 1st Respondent convened meetings throughout the different Wards in Lumezi Constituency. It is at these meetings, that the Appellants allege that the 1st Respondent committed bribery in the form of donations and that the donations influenced the electorate to vote for the 1st Respondent.

62. The question therefore, is whether or not the 1st Respondent personally made the donations or whether they were made by the 1st Respondent's appointed election or polling agents or with his knowledge and consent or approval.

63. The record shows that, under cross examination, as shown on pages 352 and 353 of the record of appeal, PW1 testified that she saw the 1st Respondent distribute money but that she had no pictorial or video evidence that showed the 1st Respondent distributing money or building materials. On page 379 of the record of appeal, PW2 testified that he did not see the 1st Respondent distributing any money or roofing sheets. On page 384 of the record of appeal, PW3 testified that on 2nd July,

2021, cement and iron sheets were delivered to Kamusalo School in Lumezi District but he did not know the persons that delivered the cement and iron sheets. On page 384 of the record of appeal, PW4 testified that he did not see the 1st Respondent deliver cement but that the cement was delivered by people he did not know but were sent by the 1st Respondent. On pages 401 and 407 of the record of appeal, PW5 testified that iron sheets were delivered to Katope School in Lumezi District but that he did not know the people that delivered the iron sheets and he did not confirm if the iron sheets were caused to be delivered by the 1st Respondent.

64. At page 413 of the record of appeal, PW6 testified that on 8th August, 2021, bed sheets, jik (disinfectant liquid) and a battery were delivered to Wachitangachi Ward by the 1st Respondent's agents. On pages 422 and 423 of the record of appeal, PW7 testified that bed sheets, beddings and jik were delivered to Zumwanda clinic by a driver whom he did not know. On page 431 of the record of appeal, PW8 testified that on 9th August, 2021, twenty (20) bags of cement were delivered to Luamphamba School in Lumezi District by Mr. Patson Mphunda. On pages 443 and 454 of the record of appeal, PW9 and PW10 also testified that twenty (20) bags of cement were

delivered to Luamphamba School in Lumezi District by persons who they only knew to be agents of the 1st Respondent.

65. On pages 467 and 471 of the record of appeal, PW11 testified that thirty five (35) iron sheets were delivered to Chanyalubwe School in Lumezi District. It was PW11's evidence that he did not see the 1st Respondent deliver the iron sheets, neither did he know the 1st Respondent's campaign agents. On pages 481 and 484 of the record of appeal, PW12 testified that twenty (20) bags of cement were delivered to Morombo village, but he did not see the 1st Respondent delivering them and he did not know the 1st Respondent's agents. On page 491 of the record of appeal, PW13 testified that cement was delivered to Kalindi School in Lumezi District on 7th August, 2021, by people he did not know.

66. On pages 504 and 507 of the record of appeal, PW14 testified that cement was delivered to Chafisi School in Lumezi District on 7th August, 2021 by Mr. Mphunda, the 1st Respondent's campaign manager. PW14 confirmed that he did not see the 1st Respondent delivering the cement. On page 512 of the record of appeal, PW15 testified that thirty (30) iron sheets were delivered to Kasasa Community School in Lumezi District on 7th August, 2021, by people the 1st Respondent worked with. PW15 confirmed that it was

not the 1st Respondent who delivered the iron sheets. On pages 522 and 524 of the record of appeal, PW16 testified that twenty (20) iron sheets and ten (10) bags of cement were delivered to Mr. Sylvester Ngwira, the Parents Teachers Association Chairperson at Chavuma School in Lumezi District, on 11th August, 2021. PW16 confirmed that he was not present during the delivery of the iron sheets and cement and so he did not know who delivered them.

67. This evidence clearly shows that none of the witnesses testified to the effect that the 1st Respondent personally delivered the donated materials. There being no evidence that the 1st Respondent personally delivered the donated materials we find that the learned trial Judge was on firm ground when she found in her judgment at page 98 of the record of appeal that the 1st Respondent did not personally deliver any of the donated materials.

68. Under section 97(2)(a) of the EPA, an election may be annulled where it is shown that the alleged corrupt or electoral malpractice or misconduct was committed in connection with the election by a candidate's appointed election or polling agents. In this case, the next question therefore, is whether or not the 1st Respondent's appointed election or polling agents donated the materials in the various Wards of Lumezi Constituency. In their testimony, PW1 to

PW16 described the persons who delivered the donated materials as follows:

68.1. Mr. Patson Mphunda, who it was alleged was the 1st Respondent's campaign manager;

68.2. Agents and Workers of the 1st Respondent; and

68.3. Unknown persons.

69. We remain mindful of our decision in **Nkandu Luo and Electoral Commission of Zambia v Doreen Sefuke Mwamba and Attorney General**[1] where we stated that a candidate cannot be held liable for acts of other members of the candidate's political party or other persons who are not the candidate's election or polling agent. The exception to this, is where it is shown that the persons did so with the candidate's knowledge and approval.

70. By virtue of regulation 55 (1) of the Electoral Process (General) Regulations, Statutory Instrument No. 63 of 2016, a candidate is mandated to name an election agent in the National Assembly nomination paper (Form GEN7). Form GEN 7 is therefore, the best evidence that would prove the identity of the 1st Respondent's appointed election and polling agents.

71. A careful examination of the record of appeal shows that the Appellants did not adduce any evidence to show the identity of the 1st Respondent's appointed election agents. There is therefore, no Form GEN 7 on the record of appeal to show the 1st Respondent's appointed election or polling agents. Mr. Patson Mphunda was singled out by PW8 and PW14 as being the person who delivered the donations in their respective Wards in Lumezi Constituency. PW8 and PW14 also testified that Mr. Patson Mphunda was the 1st Respondent's campaign manager. Section 97(2) (a) (ii) of the EPA, however, restricts culpability of electoral malpractice to a candidate, his appointed election or polling agent or with their knowledge and consent or approval. In view of the foregoing, we find that, there being no proof of knowledge and consent or approval, the 1st Respondent cannot be held liable for the donations made by Mr. Patson Mphunda.

72. The other persons that were alleged to have delivered the donations, were described as agents and workers of the 1st Respondent and persons unknown to PW1 to PW16. The Appellants' evidence does not even attempt to provide the names of the said agents and workers of the 1st Respondent and the unknown persons that made the donations to the various Wards of

Lumezi Constituency. Since there was no evidence to the effect that the said unknown persons, agents and workers of the 1st Respondent were the appointed election or polling agents, the 1st Respondent cannot be held liable for the donations.

73. The next question is whether the persons that made the donations identified in the Appellants' evidence as Mr. Patson Mphunda, the purported agents and workers of the 1st Respondent and the unknown persons, made the donations with the knowledge and consent or approval of the 1st Respondent or his appointed election or polling agents.

74. The Appellants argued that the mere fact that the 1st Respondent promised to provide the various Wards of Lumezi Constituency, with assorted materials meant that he had knowledge of and consented to or approved of the donations being made.

75. In our considered view, there is a gap in the Appellants' evidence, between the making of the alleged promises by the1st Respondent and the distribution and delivery of the donations by Mr. Patson Mphunda, the purported agents and workers of the 1st Respondent and the unknown persons. In other words, the Appellants did not demonstrate, with convincing evidence, what occurred between the time the promises were made and the time the donations were

actually distributed, that would warrant an inference that the 1st Respondent had knowledge of and consented to or approved of the donations being made.

76. It is our considered view that making an inference that there was a connection or a link between the 1st Respondent's promises and the distribution of donations by persons who were not the 1st Respondent nor his election or polling agents, in the absence of cogent evidence clearly establishing that link to a fairly high degree of convincing clarity, amounts to speculation.

77. As per our decisions in **Nkandu Luo and Electoral Commission of Zambia v Doreen Sefuke Mwamba and Attorney General**[1] and **Richwell Siamunene v Gift Sialubalo**[8] the Court will not make inferences that are based on speculation. Further, in line with our decisions in the cases of **Margaret Mwanakatwe v Charlotte Scott and Attorney General**[9] and **Mutotwe Kafwaya v Chasaya Katongo, Justine Chongo and Electoral Commission of Zambia**[10] it is not the Court's duty to fill up gaps in the Appellants' evidence.

78. We, therefore, find that the Appellants have not adduced cogent evidence to prove that the 1st Respondent had knowledge of and consented to or approved of the donations that were made by Mr.

Patson Mphunda, the purported agents and workers of the 1st Respondent and the unknown persons in various Wards of Lumezi Constituency. To this end, we cannot fault the learned trial Judge's finding that the Appellants did not demonstrate that the donations were made by the 1st Respondent or his election or polling agents or with their knowledge and consent or approval.

79. We find that the Appellants did not prove the allegation that the 1st Respondent committed bribery in the form of donations. Thus, it follows that the donations could not possibly have influenced the electorate to vote for the 1st Respondent. We therefore, find that ground one of the appeal has no merit and it is accordingly dismissed.

80. In ground two of the appeal, the 3rd Appellant contended that the learned trial Judge erred both in law and fact when she held that it had not been shown that the conduct of making donations by the 1st Respondent was so widespread as to influence the voters in the Constituency. The 3rd Appellant submitted that in making donations, the conduct of the 1st Respondent amounted to bribery and contravened section 81(1) (c) of the EPA. It was submitted that the Appellants proved that the donations were widespread.

81. In her judgment, the learned trial Judge observed that the Appellants did not adduce evidence that showed numbers of the people that attended the meetings held by the 1st Respondent. She reasoned that without this evidence the trial Court would be left to guess the extent of the influence on the electorate. She, therefore, found that the Appellants did not show that the donations alleged were so widespread so as to influence the voters in Lumezi Constituency.

82. In the case of **Jonathan Kapaipi v Newton Samakayi**[11] we stated that:

> **It is clear that when facts alleging misconduct are proved and fall into the prohibited category of conduct, it must be shown that the prohibited conduct was widespread in the constituency to the level where registered voters in greater numbers were influenced as to change their selection of a candidate for that particular election in that constituency; only then can it be said that a great number of registered voters were prevented or might have been prevented from electing their preferred candidate.**

83. In the present case, we have already found that the allegations of misconduct of bribery, which is a prohibited conduct, had not been proved. We find that ground two has no merit and it is accordingly dismissed.

84. We need however, to comment on the 3rd Appellant's arguments in the alternative in ground two of the appeal that proof of one single act of bribery justifies the nullification of the 1st Respondent's election as Member of Parliament for Lumezi Constituency. It was further argued that the requirement to satisfy that the misconduct was widespread does not arise in cases alleging bribery. The 3rd appellant cited the cases of **Michael Mabenga v Sikota Wina, Mafo Wallace Mafiyo and George Samulela**[6] and **Josephat Mlewa v Eric Wightman**[5] to support his arguments.

85. In our decision in the case of **Kufuka Kufuka v Mundia Ndalamei**[12] we stated that:

> **We wish to state that proof of one corrupt or illegal practice or misconduct by the candidate is generally enough to nullify an election only if that one act is also proved to have been so widespread or that it affected or may have affected the majority of the electorate. It is to this extent only, that the case of Josephat Mlewa v Eric Wightman is distinguishable from the current provisions of section 97(2)(a) of the Act.**

86. In light of the foregoing, we reiterate that since the coming into effect of the EPA, an election can only be nullified by satisfying two requirements under section 97 (2)(a) of the Act. Firstly, it must be proved that corrupt practice or illegal practice or misconduct was

committed by a candidate or his election or polling agents or with their knowledge and consent or approval. Secondly, after proving the first requirement, it must also be proved that the corrupt practice or illegal practice or misconduct was so widespread that it prevented or may have prevented the electorate from choosing a candidate of their choice. It is only when these two requirements are satisfied to a fairly high degree of convincing clarity that an election can be nullified or voided under section 97(2)(a) of the EPA.

87. In view of this, it is imperative for the Appellants to prove that a single act of bribery was committed and that it was so widespread that it affected or may have affected the majority of the electorate. In the absence of convincing evidence that the single act of bribery in the form of donations was widespread, we find that the 3rd Appellant's argument based on the cases of **Michael Mabenga v Sikota Wina, Mafo Wallace Mafiyo and George Samulela**[6] and **Josephat Mlewa v Eric Wightman**[5] has no basis in light of the provisions of section 97(2) (a) of the EPA.

88. In ground three, the 3rd Appellant contended that the learned trial Judge misdirected herself when she ruled that the fact that the 1st Respondent was declared duly nominated and was even entered on the ballot is *prima facie* evidence that he was qualified to participate

in the elections. In ground four, the 3rd Appellant contended that the learned trial Judge erred in law and fact when she ruled that the 1st Respondent possessed a grade twelve certificate or its equivalent to warrant him to qualify and participate in the parliamentary election for Lumezi Constituency when the 1st Respondent failed, refused and or neglected to rebut the petitioner's evidence that he did not possess a grade twelve certificate or its equivalent.

89. The evidence concerning the 1st Respondent's possession of grade twelve certificate or its equivalent or lack thereof, was provided by PW18 (3rd Appellant), RW1 (1st Respondent) and RW2 (Michael Ngulube, the 2nd Respondent's returning officer for Lumezi District). Under cross examination, PW18 testified that the document that the 1st Respondent filed together with his nomination was a forgery and not a full grade twelve certificate. PW18 produced two documents shown at pages 219 and 221 of the record of appeal. The first document suggested that the 1st Respondent obtained an equivalent of a grade twelve certificate in 1988. The second document suggested that the 1st Respondent obtained an equivalent of a grade twelve certificate in 2009. PW18 testified that she retrieved these two documents from the 1st Respondent's facebook page and a WhatsApp group. PW18 confirmed that she

did not verify the authenticity of the two documents with the 1st Respondent or 2nd Respondent nor the Examinations Council of Zambia. PW18 further confirmed that a grade twelve certificate or its equivalent was certified by the Examinations Council of Zambia.

90. Under cross examination, the 1st Respondent (RW1) confirmed that he was born in 1987 and he completed his grade twelve in 2008 at LICEF School in Lusaka. He also confirmed that he did not produce his actual grade twelve certificate as part of his evidence. His evidence was that the Examinations Council of Zambia confirmed his grade twelve results and issued him with a letter confirming the said results. RW2 testified that the 2nd Respondent does not verify grade twelve results and that it is the Examinations Council of Zambia that verifies a candidates grade twelve results. His evidence was that the 2nd Respondent receives a letter from the Examinations Council of Zambia confirming whether or not a candidate possesses a grade twelve certificate or its equivalent for purposes of an election.

91. In her judgment, the learned trial Judge observed that the allegation that the 1st Respondent did not possess a grade twelve certificate or its equivalent was supported by documents that were obtained from Facebook and WhatsApp. She found the authenticity of the

documents obtained from Facebook and WhatsApp and produced by the 3rd Appellant to support this allegation to be highly questionable. She further found that the Examinations Council of Zambia is the institution that is charged with certification of grade twelve results and that the role of the Electoral Commission of Zambia was to receive an affidavit from a candidate and not to verify the grade twelve results presented by a candidate. The learned trial Judge reasoned that the fact that the 1st Respondent was declared duly nominated and was entered on the ballot was *prima facie* evidence that he was qualified to participate in the elections.

92. The learned trial Judge also observed that the 1st Respondent exhibited a copy of a certificate that indicated that he had retaken his mathematics exam and he had also exhibited correspondence from the Examinations Council of Zambia stating that he possessed the equivalent of grade twelve certificate and that this evidence had not been rebutted by the Appellants. She found that the evidence in support of the allegation that the 1st Respondent did not possess a grade twelve certificate or its equivalent amounted to hearsay evidence. The learned trial Judge therefore, found that the Appellants did not provide sufficient grounds upon which she could question the eligibility of the 1st Respondent.

93. We have carefully examined the record of appeal in relation to grounds three and four of the appeal. We are of the considered view that the issue for consideration in grounds three and four of the appeal is whether or not the trial Judge misdirected herself when she found that the allegation that the 1st Respondent did not possess a valid grade twelve certificate or its equivalent, was not proved to the required standard by the Appellants.

94. Ground three of the appeal attacks the finding of the learned trial Judge that the fact that the 1st Respondent was declared duly nominated and was entered on the ballot was *prima facie* evidence that he was qualified to participate in the elections. We wish to reiterate, that the burden to prove the allegation that the 1st Respondent did not possess a valid grade twelve certificate or its equivalent falls squarely on the Appellants. To put it another way, it is the obligation of the Appellants, being the parties that seek to have the allegation to be decided in their favour, to adduce cogent evidence to support their contention that the 1st Respondent did not possess a valid grade twelve certificate or its equivalent.

95. We have addressed our minds to the provisions of Article 70 (1) (d) of the Constitution and regulation 12 (2) and Form GEN 8 of the Electoral Process (General) Regulations Statutory Instrument No.

63 of 2016. We are of the considered view that where it is established as a matter of fact that a candidate is successfully nominated for election as Member of Parliament, a reasonable inference can be drawn from those established set of facts that a candidate is, *prima facie*, eligible to be elected as Member of Parliament. This, however, is an inference that is drawn on a *prima facie* basis and it is therefore, subject to challenge and can be displaced by contradictory evidence. It is for this reason that section 97(2)(c) of the EPA provides an avenue under which an election can be nullified or voided if it is proved that the candidate was at the time of the election a person not qualified or a person disqualified for election, despite that candidate having been successfully nominated for election.

96. To say, as the learned trial Judge did in this case, that a candidate who has successfully filed a nomination is *prima facie* qualified for election, simply means that a person challenging that candidate's election must adduce evidence to prove that the candidate was not qualified for election. The duty, therefore, invariably remains on the person alleging that a candidate was not qualified for election, to adduce cogent evidence to prove that allegation. Once the allegation is proved to the required standard, the inference drawn

on a *prima facie* basis disappears and an election can then be nullified or voided.

97. In the case of **Mutotwe Kafwaya v Chasaya Katongo, Justine Chongo and Electoral Commission of Zambia**[10] we stated as follows:

> **...the nullification of an election is a weighty matter and the decision to do so must be based on clear and cogent evidence to justify the nullification.**

98. In the present case, the 3rd Appellant's evidence suggested that the 1st Respondent completed his grade twelve in 1988 which would have made him one (01) year old at the time of completing his grade twelve. Under cross-examination, the 3rd Appellant confirmed that she obtained the information regarding the 1st Respondent's grade twelve certificate from Facebook and WhatsApp and that she did not verify the authenticity of this information with neither the 1st and 2nd Respondents nor the Examinations Council of Zambia.

99. A closer analysis of the documents relied on by the 3rd Appellant on pages 219 and 221 of the record of appeal, only shows that the 1st Respondent's mathematics results are equivalent to the Zambian School Certificate and General Certificate of Education results. The documents aforesaid do not prove that the 1st Respondent does not

possess a valid grade twelve certificate or its equivalent and thus, do not justify the nullification 1st Respondent's election.

100. In our view, the 3rd Appellant's evidence falls short of the standard required to nullify an election on the basis of section 97 (2) (c) of the EPA. As already stated the standard required to void an election is, to a fairly high degree of convincing clarity. We are therefore, not convinced by the evidence adduced by the 3rd Appellant to prove that the 1st Respondent did not possess a grade twelve certificate or its equivalent at the time of nomination.

101. Thus, we cannot fault the learned trial Judge for finding that the fact that the 1st Respondent was successfully nominated for election was *prima facie* evidence that he was qualified to participate in the elections because the Appellants did not adduce convincing evidence to discharge their burden of proof.

102. As shown on page 228 of the record of appeal, the 1st Respondent on the other hand, exhibited a letter from the Examinations Council of Zambia and addressed to the 2nd Respondent confirming that he possessed the equivalent of a grade twelve certificate. The 1st Respondent also confirmed at page 648 of the record of appeal that he personally collected the said letter from the Examinations Council of Zambia. The letter was not challenged by the Appellants.

In our view, even assuming the evidential burden in this case shifted to the 1st Respondent to adduce evidence of the existence of his grade twelve certificate or its equivalent as we held in the case of **Joseph Malanji v Charles Abel Mulenga and The Electoral Commission of Zambia**[13], he discharged his duty to the required standard in election petitions to a high degree of convincing clarity when he produced a letter from the Examinations Council of Zambia confirming that he was in possession of a qualification equivalent to the grade 12 certificate. To ask him to do more is tantamount to asking him to adduce evidence to a standard of beyond reasonable doubt which is higher than the standard of proof to a fairly high degree of convincing clarity in election petition matters. On a totality of the evidence before us, this piece of evidence is in our considered view, adequate to rebut the 3rd Appellant's allegation that the 1st Respondent did not possess a grade twelve certificate or its equivalent.

103. In light of this, the 3rd Appellant's contention that the 1st Respondent failed, refused and or neglected to rebut the petitioner's evidence that he did not possess a grade twelve certificate is not supported by the evidence on record. This contention is therefore, without merit.

104. In view of the foregoing, we find that the learned trial Judge did not misdirect herself when she found that the allegation that the 1st Respondent did not possess a valid grade twelve certificate or its equivalent was not proved to the required standard by the Appellants. Grounds three and four of the appeal have no merit and are dismissed.

105. On the whole, we find that the learned trial Judge was on firm ground when she dismissed the Appellants' consolidated election petition and declared that the 1st Respondent was duly elected as Member of Parliament for the Lumezi Constituency.

106. We therefore, dismiss the appeal and uphold the decision of the learned trial Judge to declare the 1st Respondent, Munir Zulu, as the duly elected Member of Parliament for Lumezi Constituency.

107. We order that each party shall bear their own costs of this appeal.

P. MULONDA
CONSTITUTIONAL COURT JUDGE

M. S. MULENGA
CONSTITUTIONAL COURT JUDGE

M. MUSALUKE
CONSTITUTIONAL COURT JUDGE

J. Z. MULONGOTI
CONSTITUTIONAL COURT JUDGE

IN THE CONSTITUTIONAL COURT OF ZAMBIA — APPEAL NO. 14 OF 2016
HOLDEN AT LUSAKA — 2016/CC/A018
(Constitutional Jurisdiction) — SELECTED JUDGMENT NO. 50 OF 2018

IN THE MATTER OF: THE PARLIAMENTARY ELECTION PETITON RELATING TO THE PARLIAMENTARY ELECTIONS HELD ON 11TH AUGUST, 2016

AND

IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA, THE CONSTITUTION OF ZAMBIA ACT, CHAPTER 1 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: ARTICLES 1, 2, 5, 8, 9, 45, 46, 47, 48, 49, 50, 54, 70, 71, 72 AND 73 OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: SECTIONS 29, 37, 38, 51, 52, 55, 58, 59, 60, 66, 68, 69, 70, 71, 72, 75, 76, 77, 81, 82, 83, 86, 87 AND 89 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016

AND

IN THE MATTER OF: THE ELECTORAL CODE OF CONDUCT

BETWEEN:

MARGARET MWANAKATWE — APPELLANT

AND

CHARLOTTE SCOTT — 1ST RESPONDENT

ATTORNEY GENERAL — 2ND RESPONDENT

CORAM: **Chibomba, PC, Sitali, Mulenga, Mulembe and Musaluke, JJC on 11th April, 2018 and 31st October, 2018**

For the Appellant:	Mr. B. Mutale, SC, Ellis and Company
	Mr. E. S. Silwamba SC and Mr J. Jalasi, Eric Silwamba, Jalasi and Linyama Legal Practitioners
	Mr. K.F. Bwalya and Miss Natalie Liswaniso, KBF and Partners
	Mr. Milingo Lungu, Lungu Simwanza and Company
For the 1st Respondent:	Mr. M.H. Haimbe, Malambo and Company
	Mr. K. Mweemba, Keith Mweemba Advocates
	Mr. G. Phiri, PNP Advocates
For the 2nd Respondent:	Miss L. Shula, Senior State Advocate

JUDGMENT

Sitali, JC, delivered the judgment of the Court.

Cases cited:

1. Chizonde v. The People (1975) Z.R. 66.
2. Mulondwe Muzungu v. Eliot Kamondo 2010/EP/001 unreported.
3. Priscilla Kamanga v. Peter Ng'andu Magande and Attorney-General (2008) Z.R. 7 volume 2.
4. Michael Mabenga v. Sikota Wina and Others (2003) Z.R. 110.
5. Steven Katuka and Law Association of Zambia v. The Attorney-General and 64 others, Selected Judgment No. 29 of 2016.
6. Mubita Mwangala v. Inonge Mutukwa Wina Appeal No. 80 of 2007.
7. Subramanian v. Public Prosecutor (1956) 1WLR 965.
8. Nkhata and Others v. Attorney-General (1966) Z.R. 124.
9. John Wamundila v. The People (1978) Z.R. 151.
10. Anderson Kambela Mazoka and Others v. Levy Patrick Mwanawasa and Others (2005) Z.R. 138.
11. Chizu v. The People (1979) Z.R. 225.
12. Austin Liato v. Sitwala Sitwala Selected Judgment No. 23 of 2018
13. Chrispin Siingwa v.. Stanley Kakubo Appeal No.7 of 2017
14. Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba (1998) Z.R. 49.

15. **Brelsford James Gondwe v. Catherine Namugala SCZ Appeal No. 129 of 2012**
16. **Giles Chomba Yamba Yamba v. Kapembwa Simbao and others, Selected Judgment No. 6 of 2018**
17. **Zulu v. Avondale Housing Project (1982) Z.R. 172**
18. **Leonard Banda v Dora Siliya SCZ Judgment No. 127 of 2012**
19. **Examination Council of Zambia v. Reliance Technology Limited SCZ Judgment No. 46 of 2014**
20. **Sibongile Mwamba v. Kelvin M. Sampa and Electoral Commission of Zambia Selected Judgment No. 57 of 2017**
21. **Boniface Chanda Chola and two others v. The People (1988/89) Z.R. 163**

Legislation referred to:

1. **The Constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 229.**
2. **The Electoral Process Act No. 35 of 2016, section 97 (2) (a) and (b).**

The Appellant, Margaret Dudu Mwanakatwe, who was the 1st Respondent in the Court below, appeals against the decision of the High Court to nullify her election as Member of Parliament for Lusaka Central Constituency. The Appellant and the 1st Respondent, Charlotte Scott, were two of five contenders for the Lusaka Central Constituency seat in the parliamentary election held on 11th August, 2016.

The Appellant was the candidate for the Patriotic Front Party (PF) in the election while the 1st Respondent was the candidate for the United Party for National Development (UPND). Three other candidates contested the election on the Forum for Democracy and

Development (FDD) Party ticket, the Rainbow Party ticket and as independent candidate, respectively.

The Appellant was declared as the duly elected Member of Parliament for Lusaka Central Constituency having received thirty thousand, two hundred and twenty-three (30,223) votes while the 1st Respondent was runner-up having received eighteen thousand, two hundred and ninety-five (18,295) votes. The other three candidates shared the remaining votes which were cast.

The 1st Respondent filed a petition seeking, inter alia, a declaration that the Appellant was not validly elected as Member of Parliament for Lusaka Central Constituency and that the election was void. In her amended petition, the 1st Respondent alleged that the Appellant used Government resources during her campaign; that she engaged in acts of bribery involving the purchase and distribution to congregants of two hundred pieces of chitenge material for a fundraising event at St Matthias Mulumba Catholic Church in Bauleni compound; a promise of one hundred bags of cement to Word of Life Church; and the procurement and commission of two boreholes in the State Lodge area; and that she

used racial arguments on the ZNBC Race to Manda Hill programme implying that the 1st Respondent was not a Zambian and, throughout her campaign, appealed to voters to vote for her as she was of their colour and was born at the University Teaching Hospital (UTH) where her umbilical cord was buried.

Further, that the Appellant's agents were openly campaigning by distributing their party regalia on polling day; that the Appellant's agents perpetrated acts of violence against the 1st Respondent and her supporters at the town centre; that the 1st Respondent's party's campaign materials were being pulled down. Lastly, that the Zambia police officers blocked the 1st Respondent from conducting door to door campaigns in Northmead and in Rhodespark residential area, because she failed to give prior notice to the police of the door-to-door campaign.

The trial Judge reviewed the evidence and held that the allegation regarding the pulling down of UPND campaign materials by the Appellant's agents had been abandoned as no witness had testified regarding it and dismissed it. The trial Judge found that five of the remaining six allegations had been proved to the required

standard except for the allegation that the Appellant's agents were campaigning on polling day. He, therefore, upheld the petition and accordingly declared the election void. He further declared that the Appellant was not duly elected as Member of Parliament for Lusaka Central Constituency.

Aggrieved by the decision of the lower Court, the Appellant appealed to this Court and advanced eleven grounds of appeal as follows:

1) **The Court erred in law and fact when it held that the 1st Respondent was unjustifiably barred from campaigning in Rhodespark and Northmead by the police despite not giving the prescribed seven days' notice of the meeting, assembly or procession to the police and that such a bar materially affected the outcome of the election.**

2) **The Court below erred in fact and law when it found in favour of the 1st Respondent on the bribery allegations relating to the sinking of the boreholes, purchasing of chitenge materials for a fundraising event and the purchase of cement without making adverse findings against the Appellant's witnesses who rebutted the 1st Respondent's evidence.**

3) **The Court below erred in fact and law when it held that the bribery allegations relating to the sinking of the boreholes and purchasing of chitenge materials for a fundraising event materially affected the outcome of the election.**

4) **The Court below misdirected itself when it held that the acts of procuring the sinking of a borehole for the community, purchase of chitenge materials for a fundraising event and purchase of cement for the church fell within the ambit and scope of bribery or vote buying contrary to section 81 of the Electoral Process Act.**

5) **The Court below misdirected itself when it held that an act or acts of violence fell within the ambit and scope of section 97 (2) (b) of the Electoral Process Act No. 35 of 2016 to the effect that the**

election was not conducted in substantial conformity with the Electoral Process Act.

6) **The Court below fell into error when it generalised that the incidents of violence were of such a widespread nature so as to materially affect the outcome of the elections without evidence to the effect that the majority of the voters were prevented from voting for their preferred candidate.**

7) **The Court below erred in fact and law when it took into account events that occurred before the campaign period, namely, a donation of 100 bags of cement as an inducement that materially affected the outcome of the elections.**

8) **The lower Court fell into error when it held that the statements by the Appellant to the effect that she is a Zambian born at the University Teaching Hospital and understands the Zambian culture amounted to racial discrimination without evidence of any unfair prejudice occasioned by the said utterances or remarks to affect the outcome of the election.**

9) **The Court below erred in law and fact when it held that the Appellant's continued stay in office as Minister of Commerce created an irrefutable presumption that the Appellant abused Government resources during the campaign period and that such alleged abuse materially affected the outcome of the election.**

10) **The Court below misdirected itself when it relied on inadmissible hearsay evidence in the form of TV recordings and Facebook postings attributed to the Appellant without proper authentication.**

11) **The Court below misdirected itself when it took into consideration matters that were not pleaded or canvassed at trial, namely that violence by unidentified cadres amounted to non-compliance with the principles of the conduct of elections in the Electoral Process Act No. 35 of 2016, in nullifying the election.**

At the hearing of the appeal, learned counsel for the Appellant, Mr. Milingo Lungu relied on the written heads of argument and orally augmented some of the arguments. The eleven grounds of appeal were argued as follows: ground one was argued on its own, grounds two, three, four and seven were argued together, grounds

five, six and eleven were also argued together while grounds eight, nine and ten were argued individually.

In ground one, the Appellant submitted that the 1st Respondent alleged in her amended petition that she was prevented from campaigning on two occasions during the campaign period. The first being in July, 2016 when her campaign team decided to drop off leaflets in Northmead area. The second occasion being in Rhodespark when she attempted to conduct door to door campaign meetings.

The Appellant submitted that the lower Court held that the actions by the police breached rules 3 (1) (f) and (h) and 6 (c) of the Electoral Code of Conduct and that the elections were not conducted in a free and fair manner. Further, that the non-compliance with these rules by the police materially affected the outcome of the elections because "anything that prevents a candidate from campaigning or communicating with the electorate in a particular area affects the result of the election."

The Appellant submitted that the findings and decision of the lower Court were a gross misdirection as the 1st Respondent did not

give the requisite notice to hold the meeting or procession on both occasions. That the meetings therefore were not legally convened and there was consequently no non-compliance by the police as alleged. The Appellant, therefore, submitted that the finding should be set aside.

In arguing grounds two, three, four and seven, the Appellant submitted that the 1st Respondent in her petition alleged bribery or vote buying contrary to section 81 of the Act and cited three incidents namely, the buying of chitenge pieces by the Appellant at Saint Matthias Mulumba Catholic Church in Bauleni, a cash donation of K6,400 by the Appellant to the Word of Life Church at Bauleni and the sinking of two boreholes in State Lodge.

It was submitted that regarding the purchase of the chitenge, two versions of events were given. One version was given by PW3 for the 1st Respondent and the other version was given in rebuttal by the Appellant and her witness, RW4. The Appellant submitted that the trial Judge chose PW3's version of events and discounted the Appellant and RW4's version without making any adverse finding against the Appellant and RW4 which was against the

principle in the case of **Chizonde v The People**[1]. The Appellant contended that the trial Court disbelieved the Appellant's evidence merely because she was a politician and that less weight should have been attached to PW3's evidence because she was a partisan witness according to the persuasive case of **Mulondwe Muzungu v Eliot Kamondo**[2]. The Appellant further submitted that no evidence was led to prove the widespread nature of the incident.

Regarding the sinking of the boreholes, the Appellant submitted that the lower Court found as a fact that the boreholes were sunk by the Muslim Society Trust at the request of the Chongwe District Medical Office and that the Appellant did not donate or finance the boreholes. That the lower Court, however, found that the Appellant's friends helped her to have the boreholes sunk and that she was personally involved in the borehole project. That the Court further found that the sinking of the boreholes was a corrupt act committed by the Appellant's friends with her knowledge and consent and fell within section 97 (2) (a) of the Act.

The Appellant submitted that the sinking of the boreholes by the Muslim Welfare Society was a philanthropic act which is

permitted by the electoral law as held in the case of **Priscilla Mwenya Kamanga v Peter Ng'andu Magande and Attorney-General**[3]. That even if it were to be deemed a corrupt or illegal act, no evidence was led to prove that the number of voters in the State Lodge area persuaded to vote for the Appellant, on account of the donation, was material to the outcome of the election.

The Appellant contended that the lower Court misdirected itself in holding that the Appellant committed a corrupt act when she and her election agents did not donate the boreholes.

On the donation of K6,400 for cement, the Appellant submitted that the uncontroverted evidence was that the donation was made on 8th May, 2016 before the campaign period, which fact the lower Court acknowledged in its judgment at page 73 of the record of appeal. That the lower Court, however, held that the donation was made with the election in mind to induce the congregants and that the act satisfied the requirements of section 97 (2) (a) of the Act. The Appellant contended that this was wrong as section 97 (2) (a) of the Act applies to candidates and their

election agents. That on 8th May, 2016 the Appellant was not a candidate for any election as defined by section 2 of the Act.

The Appellant further submitted that the 1st Respondent should have proved that the alleged corrupt act influenced the voters against voting for their preferred candidate.

It was submitted that the lower Court did not find that the alleged acts of bribery were widespread but relied on the case of **Michael Mabenga v Sikota Wina and Others**[4] wherein it was held that satisfactory proof of any corrupt or illegal practice or misconduct in an election petition is sufficient to nullify an election. That following the repeal of section 93 (2) of the Electoral Act 2006 which was replaced by section 97 (2) of the Electoral Process Act 2016, the **Mabenga**[4] case is no longer good law because section 97 (2) (a) requires the petitioner to prove the commission of the impugned electoral offence by the candidate or with the candidate's knowledge and consent or approval or that of the election agent and proof that the effect of the act was widespread.

In grounds five, six and seven, the Appellant submitted that although the 1st Respondent alleged in the petition that the

Appellant through her agents perpetrated acts of violence in the town centre twice during the campaign period, she failed to identify the youths who attacked her campaign team and conceded that the Appellant and her election agents were not present on both occasions. The Appellant submitted that the trial Judge found that the Appellant and her agents were not involved in the violence and did not consent to or approve of it and that she was out of town on the date of the second attack.

The Appellant submitted that the trial Court abandoned the allegation in the petition and substituted his own allegation by stating that the allegation did not fall to be considered under section 97 (2) (a) but under section 97 (2) (b) of the Act because it related to the general conduct of the election as to compliance or non-compliance with specific provisions of the Act.

The Appellant contended that the approach taken by the lower Court was unfair as there was no allegation at the trial that the violence amounted to non-compliance with the electoral law, and the parties did not have an opportunity to address the case alleged. That the lower Court erred by going beyond the pleadings and

considering matters that were not pleaded by the parties. That the trial Judge's reliance on section 97 (2) (b) of the Act in considering the allegation of violence was a gross misdirection.

The Appellant further impugned the lower Court's reasoning and reliance on the Code of Conduct and argued that section 97 (2) (b) is concerned with the conduct of elections by the Electoral Commission of Zambia and not with the actions of political actors. That the principles referred to in that section are set out in section 3 of the Act and not in the Code of Conduct, which principles only apply to the Electoral Commission of Zambia.

The Appellant submitted that the issues on violence raised by the trial Court on his own should be set aside.

In arguing ground eight, the Appellant submitted that although the 1st Respondent alleged that the Appellant used racist arguments against her, during the "Race to Manda Hill" television programme, when she said she was a Zambian born at the University Teaching Hospital where her umbilical cord was buried, and that she understood the Zambian culture, the statements did not refer to the 1st Respondent. She disputed PW4's allegation that

he heard her say the 1st Respondent would not perform because she was a white person.

The Appellant submitted that although the trial Court held that her statements contravened clause 15 (1) (m) of the Code of Conduct, there was no evidence that she discriminated against the 1st Respondent due to her race and further, that the words she uttered were discriminatory. That with regard to the alleged racial remarks made at a rally, the lower Court presumed that she would have no difficulties in using similar language in her campaign within the constituency, as alleged by PW4, because of her statements on the television program.

The Appellant contended that by assuming that she repeated the remarks, the lower Court released the 1st Respondent from the burden to prove the allegation. She reiterated that it was not open for the trial Court to find for one party without making findings on credibility and submitted that less weight should have been attached to the evidence of PW4 as he was a UPND official and therefore had a possible interest to serve.

In conclusion on this ground, the Appellant argued that even if the Court were to find that PW4's allegation was true, there was no evidence regarding how many people attended the rally and how the number compared to the overall electoral college of Lusaka Central Constituency. She submitted that the allegation by PW4 was not proved to the requisite standard.

In arguing ground nine, the Appellant submitted that whereas the 1st Respondent alleged that she held herself out as a Minister throughout her campaign, and that she used Government resources and a Government vehicle when she went to attend an interview on the ZNBC television programme, "Race to Manda Hill," on 20th June, 2016, the motor vehicle which was alleged to be a Government motor vehicle was a personal vehicle which she had purchased from the Government on 30th May, 2016, as evidenced by the exhibited receipt to that effect.

The Appellant submitted that the trial Judge disregarded her evidence without giving reasons and, instead, found that she had used a Government motor vehicle although the 1st Respondent did not state the make and registration number of the motor vehicle the

Appellant used to prove that it was a Government motor vehicle. The Appellant submitted that the lower Court held that her use of a Government motor vehicle and, inevitably, Government fuel and a Government driver to attend a campaign programme was a violation of clause 15 (1) (k) of the Code of Conduct.

The Appellant further submitted that the lower Court's finding that throughout the campaign period, she illegally held herself out as a Cabinet Minister was a misapprehension of the holding in the **Stephen Katuka and Law Association of Zambia v the Attorney-General and others**[5] case. She contended that the trial Judge's finding that her continued stay in office as a Minister constituted an illegal practice under the Act was a grave misdirection.

The Appellant submitted that the lower Court misdirected itself in holding that the 1st Respondent had discharged the burden of proof on the allegation that she used a Government motor vehicle for her campaign, as less weight should have been attached to her evidence because of her failure to recollect the registration number of the alleged Government motor vehicle.

The Appellant submitted that no evidence was led by the 1st Respondent to support the allegation that the Appellant used Government funds in her campaign and further, that the finding that she used her salary, as a Minister, in her campaign was perverse because the 1st Respondent conceded in cross-examination that she had no information that the Appellant used her ministerial salary in her campaign.

In the alternative, the Appellant submitted that even if the allegation that she used a Government motor vehicle and resources were proved, the lower Court could not nullify the election on this ground because no evidence was led as to how the use of the Government resources influenced the majority of the voters not to vote for their preferred candidate, in terms of section 97 (2) (a) (ii) of the Act. The case of **Mubita Mwangala v Inonge Mutukwa Wina**[6] was cited in support. The Appellant submitted that this allegation, too, was not proved to the high standard of convincing clarity.

Lastly, in arguing ground ten, the Appellant contended that the Court below misdirected itself when it relied on inadmissible hearsay evidence in the form of TV recordings and Facebook

postings, attributed to the Appellant, without proper authentication. She submitted that as proof of the matters alleged, the Court relied on Compact Discs (CDs) containing pictures downloaded from Facebook pages allegedly belonging to the Appellant and on recordings from television footage of an interview and of acts of violence. That the lower Court received the CDs as containing proof of the matters alleged without addressing its mind to whether or not the contents of the CDs were inadmissible hearsay.

The Appellant submitted that in terms of section 2 and 5 of the Electronic Communications and Transactions Act No. 21 of 2009, the record stored on the CDs is considered as a document and that the rule against hearsay applies equally to documents and to oral statements. She cited the case of **Subramanian v Public Prosecutor**[7] where the Privy Council stated that:

> **"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in a statement."**

The Appellant contended that in this case, the person who created the Facebook pages from which the documents were

downloaded; the person or persons who took the pictures relied on as proof of the contents therein; and the persons who took the video recordings, ought to have testified in order to prove the matters contained in the CDs as there was no way of authenticating the pictures or recordings without calling these persons as witnesses. That the Court did not consider the issue of the admissibility of the CDs in its judgment. In sum, the Appellant argued that it was unsafe to rely on the pictures and recordings as they were not properly authenticated.

In conclusion, the Appellant submitted that the findings by the lower Court that the Appellant abused Government resources, and that her campaign was tainted with acts of bribery and corruption, that there was widespread violence in Lusaka Central Constituency, and that such acts materially affected the outcome of the election, were based on an unbalanced evaluation of the evidence and on extraneous and irrelevant evidence, and were a misdirection in law. Citing the case of **Nkhata and Others v Attorney-General**[8], the Appellant urged us to interfere with the trial Judge's findings of fact and set aside the declaration that her election as Member of

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Parliament for Lusaka Central Constituency was null and void. She further urged us to uphold her election as Member of Parliament and to award her costs in this Court and in the Court below.

In his oral submissions in support of the written arguments, Mr. Lungu more or less reiterated the written arguments. We will therefore not repeat them.

In opposing the appeal, the 1st Respondent filed heads of argument which Mr. Haimbe and Mr. Mweemba, Counsel for the 1st Respondent, relied upon and augmented with brief oral submissions. In opposing ground one, the 1st Respondent contended that the Appellant's argument that the failure by the 1st Respondent and her team to give the notice required under section 5 (4) of the Public Order Act, before embarking on their campaign activities in Northmead and NIPA, meant that the campaign activities were not legally organised and that, therefore, the police were entitled to disband them, and in doing so, did not violate the Act, did not aid her case. She argued that the distribution of campaign leaflets to the electorate during a campaign period falls outside the ambit of activities for which prior notice is required to

be given to the police under section 5 (4) of the Act. The 1st Respondent contended that the basis for the lower Court's decision under this ground was that the police failed to act professionally and impartially in the execution of their duties, contrary to the requirements of the Act.

That the conduct of the police fell short of conduct expected of them under rules 3 (1) (f) and (h) and rule 6 (c) of the Code of Conduct and that the learned trial Judge cannot be faulted for holding that the police conduct was a violation of section 97 (2) (b) of the Act and warranted the annulment of the election of the Appellant as Member of Parliament. That the lower Court made findings of fact regarding the conduct of the police based on the evidence before it and that, on the authority of **Nkhata and Others v. The Attorney-General**[8], this Court cannot interfere with those findings in the absence of any misdirection on the part of the trial Judge.

The 1st Respondent further submitted that section 97 (2) (b) states that the election of an MP will be declared void where the High Court is satisfied that there has been non-compliance with the

provisions of the Act, which provisions include the Code of Conduct contained in the Schedule to the Act.

That rules 3 (1) (h) and 6 (c) of the Code of Conduct enjoin the Zambia Police to be professional and impartial during the electoral process and not to use the office to oppress any political party, candidate or supporter. That the police violated these rules in this case. The 1st Respondent argued that ground one lacks merit and should be dismissed.

In opposing grounds two, three, four and seven, the 1st Respondent submitted regarding the donation of boreholes in the State Lodge area, that the learned trial Judge found that the Appellant could be linked to the boreholes by the letter written by RW2 in March, 2016 and by the evidence of PW2, regarding the involvement of PF youths in the clearance of the sites for the boreholes; that the timing of the sinking of the boreholes, being one month after the letter requesting the Appellant to find suitable sites for the boreholes was written, was curious, since the boreholes were intended to contain the emergency cholera outbreak in January, 2016; that the Appellant used the boreholes to enhance

her prospects of being elected by referring to the water projects undertaken in the State Lodge area, during the Race to Manda Hill programme, and by a posting on her Facebook page that the boreholes had just been completed and would soon be commissioned; and that RW2 expressly stated in cross examination, that the Appellant was personally involved with the boreholes even though she did not finance the donation.

The 1st Respondent submitted that the trial Judge based his findings on the evidence before him and that the findings were not perverse according to the plethora of authorities on the principles upon which findings of fact by a lower Court can be reversed.

In response to the Appellant's argument that the trial Judge erred when he accepted the 1st Respondent's version of events over her own version, without making specific adverse findings against the Appellant's witnesses, when the 1st Respondent's witnesses had an interest to serve, the 1st Respondent submitted that the lower Court properly discharged its duty in line with the case of **John Wamundila v. The People**[9] where it was held that a court is entitled to accept evidence of a witness with an interest to serve

where there is "something more" upon which the Court may rely to satisfy it of the truth of the evidence.

That in the present case, the lower Court relied, inter alia, on the letter of 24th March 2016; on the fact that PF youths were involved in clearing the site of the boreholes; and on the Appellant's own utterances during the Race to Manda Hill television programme. The 1st Respondent submitted that the question this Court must consider is whether or not the lower Court erred when it determined that the election could be annulled on the basis of this and other allegations.

The 1st Respondent submitted that the Appellant argued first that she could not be held accountable for the misdeeds of others; secondly, that in any event, there was nothing wrong with making a philanthropic donation; and thirdly, that there was no evidence that the donation affected the majority of voters in accordance with section 97 (2) (a) (ii) of the Act. In response to the first argument, the 1st Respondent submitted that given the evidence on record, and the findings of fact by the lower Court it could not seriously be argued that the Appellant was unaware of, and consented to, the

sinking of the boreholes, as shown by the letter of 24th March, 2016 and that the evidence of RW2 attested to this fact. She contended that the Appellant was caught up under the provisions of section 97 (2) (a) (ii) as rightly observed by the learned trial Judge.

The 1st Respondent argued that the donation of boreholes was not philanthropic in nature because the Appellant associated herself with the borehole project in her campaign to enhance her chances of being elected.

In response to the assertion that there was no evidence that the sinking of the boreholes had a widespread effect, the 1st Respondent invited us to consider the evidence before us, that Bauleni compound, where the boreholes were sunk, has the largest catchment area of the whole Constituency. She contended that the Appellant used the boreholes to campaign to a larger audience on both national television, during the Race to Manda Hill programme, and on her Facebook page which had a following of not less than 17,000 people. That in those circumstances, the trial Judge rightly held that the majority of voters were affected by the sinking of the boreholes since section 97 (2) (a) (ii) only required the 1st

Respondent to prove that the majority of voters may have been prevented from electing a candidate of their choice, due to the conduct complained of. The 1st Respondent submitted that the arguments under this limb, therefore, lack merit and must be dismissed.

The 1st Respondent further argued that the trial Judge was correct in finding that the sinking of the boreholes rendered the election of the Appellant void because section 97 (3) of the Act empowers the Court to nullify an election based on a single act of corruption or illegal practice and does not require proof that the corrupt or illegal action affected the majority of voters in the Constituency.

The 1st Respondent submitted that while section 97 (2) (b) of the Act is subject to the provisions of section 97 (4), subsection (4) only applies where the non-compliance is alleged to have been committed by an election officer in breach of that officer's official duty. That where the non-compliance is not alleged to have been committed by an election officer, the natural unqualified meaning of section 97 (2) (b) should be applied. The 1st Respondent contended

that the interpretation given to section 97 (2) (b) by the learned trial Judge was correct.

Regarding the submission that the learned trial Judge strayed from the pleadings when he determined that the violent conduct complained of violated section 97 (2) (b), and not section 97 (2) (a), the 1st Respondent submitted that this argument was misconceived because the Appellant was effectively saying that a Court cannot apply the law where it is confronted with facts that arise which, while establishing a legal position, fall short of the facts as pleaded.

It was submitted that the Appellant's assertion contradicts the holding in the case of **Mazoka and Others v Mwanawasa and Others**[10] that a Judge is not precluded from considering a matter that is not pleaded, if such matter is let into the evidence without objection. The 1st Respondent submitted that in the present case, the trial Judge was faced with uncontroverted evidence that violence took place in the Constituency. That the trial Judge was therefore not precluded from considering the facts before him against the law as contained in section 97 (2) (b) of the Act,

notwithstanding that, as it turned out, the violence was not attributable to the Appellant as alleged in the pleadings.

The 1st Respondent further submitted that contrary to the Appellant's allegations of unfairness, by properly applying the law to the facts, the trial Judge simply discharged his duty to deal with matters in controversy within his judgment. That he, therefore, cannot be faulted in any way. The 1st Respondent argued that grounds two, three, four and seven lack merit and should to be dismissed.

In opposing ground eight, the 1st Respondent submitted that the issues raised in support of this ground were practically the same issues that were canvassed in the Court below. That for that reason, she would rely on her submissions regarding the allegations of discrimination which she made in the Court below as set out in paragraphs 49 to 73 at pages 151 to 155 and on the video evidence submitted in the Court below, and annexed to the record of appeal marked CS1 and CS2.

The 1st Respondent added, in augmenting her submissions before the lower Court, that regarding the effect of the racial

discrimination she suffered, the evidence of PW4 was cardinal, especially when considered from the perspective of the trite principle of law that the evidence of a single witness is sufficient to prove a fact. That the case of **Chizu v the People**[11] is instructive on the point.

The 1st Respondent submitted that the lower Court accepted PW4's evidence on the strength of the Appellant's own admission that she used public address systems in her campaign and on the televised broadcast on the Race to Manda Hill programme which the Court took as corroboration. She submitted that the trial Court established the "something more" that was required for it to accept PW4's evidence as per authority of **John Wamundila v the People**[9].

The 1st Respondent contended that it was self-defeating for the Appellant to argue that the 1st Respondent's witnesses' evidence should not have been readily accepted by the Court below when the Appellant's own witnesses were similarly circumstanced. The 1st Respondent submitted that ground eight equally lacks merit and ought to be dismissed with costs.

In opposing ground nine, the 1st Respondent relied on her submissions in the lower Court at pages 146 to 151 of the record of appeal. She submitted that contrary to the Appellant's assertion that there was no evidence in the lower Court that she used a Government vehicle and resources during her campaign, the Appellant admitted, under cross examination, to using a Government pool vehicle and to drawing a salary in the sum of K25,000 and privileges, all of which, the 1st Respondent submitted, placed her at an advantage over the 1st Respondent in the campaign as a whole.

The 1st Respondent submitted that the Appellant's campaign was therefore inextricably tainted and that the learned trial Judge was in order to hold as he did. She submitted that ground nine lacks merit and ought to be dismissed with costs.

In opposing ground ten, the 1st Respondent submitted that although the Appellant attacked the trial Judge for relying on Compact Discs containing video and photographic footage, alleging that the same was inadmissible, the said CDs were admitted onto the Court's record by consent and, as such, the Appellant cannot

now be heard to raise any objection to them. The 1st Respondent submitted, in conclusion, that ground ten lacks merit and ought equally to be dismissed with costs.

Learned counsel for the 1st Respondent more or less reiterated the written arguments at the hearing. We shall, therefore, not recast them here.

The 2nd Respondent did not file any submissions and similarly made no oral submissions at the hearing.

We have considered the grounds of appeal, the respective parties' heads of argument and their oral submissions as well as the judgment of the lower Court. The main issue we have to determine in this appeal, is whether the lower Court was on firm ground when he nullified the election of the Appellant, in light of the law and the facts.

The law regarding the circumstances in which an election may be declared void is set out in section 97 (2) of the Electoral Process Act No. 35 of 2016 (henceforth referred to as the Act). Section 97 (2) (a) of the Act on which the petition in this case was based provides as follows:

"(2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councilor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that-

(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election –

(i) by a candidate; or

(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and

the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;

A consideration of the above section of the Act reveals that the election of a candidate can only be nullified if the petitioner proves to the satisfaction of the Court that the candidate personally committed a corrupt or illegal practice or other misconduct in relation to the election or that the act in issue was committed with the candidate's knowledge and consent or approval or that of the candidate's election or polling agent.

Having proved the commission of the assailed electoral offence, the petitioner must further prove that, as a result of that offence, the majority of the voters in the constituency, district or ward were or may have been prevented from electing their preferred

candidate. As we held in **Austin Liato v Sitwala Sitwala**[12] and in **Chrispin Siingwa v Stanley Kakubo**[13], it is not sufficient for a petitioner to prove only that a candidate committed an electoral offence in relation to the election without further proving that the electoral offence was widespread and prevented or may have prevented the majority of the voters from electing a candidate of their choice.

We reiterate that as in all other civil cases, the petitioner bears the burden of proof in an election petition but the standard to which the electoral offence complained of must be proved is higher than proof on a balance of probabilities which is required in an ordinary civil action. The evidence adduced in support of allegations in an election petition must establish the issues raised to a fairly high degree of convincing clarity. We find authority for this in the persuasive case of **Akashambatwa Mbikusita Lewanika and others v Fredrick Jacob Titus Chiluba**[14] wherein the Supreme Court said:

> **"...that parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probability... the issues raised are required to be established to a fairly high degree of convincing clarity."**

This was reiterated in **Brelsford James Gondwe v Catherine Namugala**[15] when the Supreme Court said:

> **"The burden of establishing the grounds lies on the person making the allegation and in election petitions, it is the petitioner in keeping with the well settled principle of law in civil matters that he who alleges must prove. The grounds must be established to the required standard in election petitions namely fairly high degree of convincing clarity."**

In the present case, it was incumbent upon the 1st Respondent (as the petitioner) to prove her allegations against the Appellant with cogent evidence to a fairly high degree of convincing clarity and to demonstrate that any electoral offences proven to have been committed by the Appellant or her election agents were widespread and that the majority of voters in the constituency were or may have been prevented from electing their preferred candidate.

We are guided by these principles and the law in determining this appeal.

In determining the appeal, we shall first consider ground ten as it relates to a procedural issue. Thereafter, for convenience, we shall follow the order in which the remaining grounds of appeal were argued by the parties.

In ground ten the Appellant challenges the lower Court's reliance on the television recording and the Facebook postings attributed to the Appellant on the ground that they were inadmissible hearsay evidence and were not properly authenticated. In considering this ground we note from the record of appeal that the DVD and CD containing the television recording of the Race to Manda Hill programme and the Facebook postings attributed to the Appellant were admitted into evidence without objection from the Appellant after the initial objection by counsel for the Appellant was waived. Mr. Bwalya as counsel for the Appellant in the lower Court in that regard said to the trial Judge at page 208 of the record of appeal:

> **"My Lord my instructions are quite clear. My instructions my Lord is to allow the introduction of the DVD and the CD in the interest of justice."**(sic)

That being the case, the Appellant cannot on appeal challenge the lower Court's reliance on that evidence for not being properly authenticated when she consented to the introduction of the evidence onto the lower Court's record. Having received the said evidence, the trial Judge was entitled to consider it in determining

the matter before him and he cannot be faulted for doing so. Ground ten therefore lacks merit and is dismissed.

In ground one of the appeal, the Appellant challenges the trial Court's findings that the 1st Respondent was unjustifiably barred from campaigning in Rhodespark and Northmead by the police and that the bar materially affected the outcome of the election. Although the Appellant took issue with the lower Court's finding that the police unjustifiably prevented the 1st Respondent from campaigning in Rhodespark and Northmead, the real issue we have to determine under this ground is whether there was non-compliance with the electoral law in the conduct of the election, which non-compliance affected the result of the election so as to warrant nullifying the election under section 97 (2) (b) of the Act.

The allegation to which ground one relates has to do with the conduct of the Zambia Police. In her evidence in support of the allegation, the 1st Respondent stated that during the campaign period in July 2016, she and her team decided to drop leaflets in the Northmead area. Before proceeding with their programme, they approached the Police to inform them of their presence in the area.

However, the officer-in-charge at Northmead Police Post refused to permit them to proceed with the programme as they had not made a prior written application to the police. The 1st Respondent said she then made the application to proceed but the officer-in-charge refused to permit them to proceed at short notice.

The second incident happened in the NIPA area in Rhodespark when she and her team were stopped from dropping leaflets under the doors of the flats by armed police officers who said their meeting was illegal.

In rebuttal, the Appellant denied the 1st Respondent's allegation that she used her ministerial position to influence the police to stop her door-to-door campaign in Northmead and Rhodespark. She asserted that Ministers did not possess power to influence police action.

The learned trial Judge considered the allegation and held that the police had breached rule 6 (c) of the Code of Conduct which directs them to refrain from disrupting a legally convened campaign, rally or meeting by a political party and consequently, that there had been non-compliance with the provisions of the law

in the conduct of the election by the Zambia Police in terms of section 97 (2) (b) of the Act.

The Appellant submitted that the learned trial Judge erred by holding that the police breached rule 6 (c) of the Code of Conduct when the 1st Respondent's evidence revealed that in both instances she did not give the requisite notice to hold the meeting to the police under section 5 (4) of the Public Order Act and that the meetings were therefore not legally convened. The Appellant contended that there was no non-compliance with the electoral law as alleged and that there was no evidence that the alleged non-compliance with rule 6 (c) of the Code of Conduct materially affected the outcome of the election. She urged us to set aside the lower Court's findings of fact.

The 1st Respondent, on the other hand, contended that the distribution of campaign materials did not require prior notice of the activity to be given to the police under section 5 (4) of the Public Order Act and that the trial Judge was right to hold that the police by their conduct breached rule 6 (c) of the Code of Conduct. She further contended that their conduct amounted to a violation of

section 97 (2) (b) of the Act, which violation warranted the annulment of the election of the Appellant as Member of Parliament. The 1st Respondent submitted that based on the principle in the case of **Nkhata and Others v The Attorney-General**[8], we as an appellate Court, cannot interfere with the findings of fact as the trial Judge did not misdirect himself. The 1st Respondent contended that ground one lacks merit and should be dismissed.

We have considered the submissions relating to ground one. As the learned trial Judge rightly stated, the allegation to which ground one relates is not provided for under Part VIII of the Act, which provides for electoral offences. The learned trial Judge therefore considered and determined the allegation in light of the duties of the police as set out in paragraph 6 (c) of the Code of Conduct in the Schedule to the Act. Paragraph 6 (c) of the Code of Conduct reads:

> **"6. The Zambia Police Service shall-**
> **(c) refrain from disrupting any campaign, rally or meeting which is legally convened by any political party;"**

The lower Court accepted the 1st Respondent's testimony and held that the police prevented the 1st Respondent and her team from campaigning in two areas within Lusaka Central Constituency in violation of rule 6 (c) of the Code of Conduct and thus violated the principles laid down for the conduct of free and fair elections.

The trial Judge observed that in terms of section 97 (2) (b) of the Act, an election can be declared void where there is non-compliance with the provisions of the Act. He acknowledged that section 97 (2) (b) requires the petitioner to prove that the non-compliance with the provisions of the Act affected the result of the elections. However, the trial Judge proceeded to say:

> **"In my considered view, anything that prevents a candidate from campaigning or communicating with the electorate in a particular area affects the result of the election."**

The learned Judge further said:

> **"Unlike under paragraph (a) of section 97 (2) of the Act, non-compliance with the provisions of the Act under paragraph (b) need not be by the candidate or that candidate's agent. All that is required is evidence of non-compliance by the relevant player, in this case, the Zambia Police. In dealing with this allegation, I have considered subsection (4) of section 97 of the Act and find that it does not apply because the subsection relates to an election officer's act or omission. The allegation in this case relates to the conduct of the Zambia Police."**

Section 97 (2) (b) of the Act which the learned trial Judge relied upon in determining the allegation against the Zambia Police

provides for the nullification of an election where there has been non-compliance with the law in the conduct of elections. The provision reads:

> "97 (2) **The election of a candidate as a Member of Parliament, mayor, council chairperson or councilor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be that -**
>
> (a) ....
>
> (b) **Subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election.**" (Emphasis added.)

It is clear to us that section 97 (2) (b) which is set out above, relates to non-compliance with the provisions of the Act in the conduct of elections. It provides for the voiding of an election where it is established that there has been non-compliance with the provisions of the Act in the conduct of the election in issue and that the non-compliance has affected the election result.

The question that arises in view of the provisions of section 97 (2) (b) of the Act is, which institution has the mandate to conduct elections? The answer is found in Article 229 (2) (b) of the Constitution as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution as amended)

which vests the power to conduct elections in the Electoral Commission of Zambia. Article 229 (2) (b) provides as follows:

> **"(2) The Electoral Commission shall –**
>
> **(b) conduct elections and referenda;"**

The Constitution does not vest the power to conduct elections in any other institution or person.

Further, the long title to the Electoral Process Act No. 35 of 2016 clearly states that the object of the Act is, inter alia, to provide for the conduct of elections by the Electoral Commission of Zambia and to empower the Commission to make regulations in matters relating to elections. The function of the Commission to conduct elections is further clearly illustrated by section 56 (1) of the Act which provides that:

> **"(1) If it is not possible to conduct a free and fair election at a polling station on a prescribed polling day, the Commission may, at any time before voting at the polling station has commenced, postpone voting at that polling station."** (Emphasis added.)

In the case of **Giles Chomba Yamba Yamba v Kapembwa Simbao and others**[16], we held that:

> **"...the Constitution expressly gives the function to conduct elections to the Electoral Commission of Zambia ... The ECZ must fulfill this function by ensuring that the requirements of the Electoral Process Act are respected and observed in the electoral process. Section 97 (2) (b), therefore, concerns non-compliance to the provisions of the Act by the ECZ, the body charged with the**

conduct of elections under Article 229 (2) (b) of the Constitution, and not the candidates to an election or their agents."

We restate that position in this case.

In order for non-compliance with the law to result in the invalidation of an election under section 97 (2) (b), it must be established that the non-compliance affected the result of the election and must be attributable to the ECZ as the conductor of elections. This is evident from the fact that section 97 (2) (b) of the Act is made subject to section 97 (4) of the Act which reads:

> "(4) **An election shall not be declared void by reason of <u>any act or omission by an election officer</u> in breach of that officer's official duty <u>in connection with an election</u> if it appears to the High Court or a tribunal that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such act or omission did not affect the result of that election."** (Emphasis added.)

In the present case, the trial Judge clearly said that the non-compliance with the law was not attributable to any election officer and that section 97 (4) therefore did not apply.

Given the clear provisions of the law which we have cited, the learned trial Judge misinterpreted the law when he held that all that is required for an election to be nullified under section 97 (2) (b) is evidence of non-compliance with the law in the conduct of

elections "by the relevant player, being the Zambia Police, in this case."

The role of the Zambia Police in the electoral process is restricted to enforcing the law and maintaining peace and order during campaign meetings and processions and on polling day. This role is clearly stated in section 4 (6) of the Act and in paragraph 6 (a) of the Code of Conduct. Section 4 (6) of the Act as relevant reads:

> **"4 (6) The Zambia Police Service shall enforce law and order at polling stations..."**

Paragraph 6 (a) of the Code of Conduct reads:

> **"6. The Zambia Police Service shall-**
>
> **(a) enforce law and order at campaign meetings and processions in order to maintain peace and order."**

The learned trial Judge thus misdirected himself when he said the police breached the electoral laws because, as we already stated above, the mandate to conduct elections is exclusively vested in the Electoral Commission of Zambia.

Whether or not there was non-compliance with the electoral law in the conduct of elections and whether or not such non-compliance affected the result of the election, in the present case,

were matters that needed to be proved with cogent evidence by the 1st Respondent and were not matters to be left to the conjecture of the trial Court.

We have examined the 1st Respondent's evidence before the lower Court on the record of appeal and observe that she did not adduce any evidence to prove that the result of the election was affected by the refusal by the police to permit her to carry out door to door campaigns in Northmead and Rhodespark.

We are mindful of the plethora of case authorities which state that an appellate court ought not to interfere with the findings of fact made by a trial court except on very clear grounds. In **Zulu v Avondale Housing Project**[17] it was held that:

> **"An appellate court will not reverse the findings of fact made by a trial Judge unless it is satisfied that the findings in question were either perverse or were made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court, acting correctly, could reasonably make."**

In the present case, the trial Judge's finding that there was non-compliance with the provisions of the Act relating to the conduct of elections by the Zambia police, rendering the election of the Appellant liable to be nullified was not supported by the

evidence on record and was premised on an erroneous interpretation of the provisions of section 97 (2) (b) of the Act.

In the absence of evidence that the result of the election was affected by the Police action against the 1st Respondent, we find that this is a proper case for us to interfere with the trial Judge's findings of fact related to the allegation against the police. We reverse them accordingly. Ground one therefore succeeds.

Grounds two, three, four and seven were argued together. In ground two the Appellant contends that the lower Court was wrong to find in favour of the 1st Respondent regarding the bribery allegations relating to the sinking of the boreholes, the purchase of chitenge materials and the purchase of cement without making adverse findings against the Appellant and her witnesses. In ground three she attacks the lower Court's finding that the bribery allegations affected the outcome of the election. In ground four, the Appellant challenges the lower Court's findings that the alleged bribery allegations were acts of bribery or vote buying contrary to section 81 of the Act. Lastly, in ground seven, the Appellant contends that the trial Judge erred when he took into account the

donation of 100 bags of cement which occurred before the campaign period as an inducement that materially affected the outcome of the elections.

The first issue we shall consider is whether the sinking of the boreholes, the purchase of the chitenges and the purchase of the cement were acts of bribery or vote buying in terms of section 81 of the Act. We shall further consider whether there was any evidence that the alleged acts of bribery were so widespread that they prevented or may have prevented the electorate from voting for their preferred candidate. Section 81 (1) (c) reads:

> **(1) A person shall not, either directly or indirectly, by oneself or with any other person corruptly –**
> **(c) make any gift, loan, offer, promise, procurement or agreement to or for the benefit of any person in order to induce the person to procure or to endeavor to procure the return of any candidate at any election or the vote of any voter at any election.**

The above section prohibits, among others, the giving or procurement of gifts by any person in order to obtain the vote of a voter in an election. In this case, the 1st Respondent alleged that the Appellant procured the sinking of two boreholes in the State Lodge area so that voters in the area could vote for her. The evidence in support of the allegation was adduced by the 1st

Respondent and PW2. The 1st Respondent did not witness the sinking of the borcholes. However, she said PW2 informed her of the sinking and commissioning of the boreholes and further that members of the community told her that they would vote for the Appellant because of the boreholes. She alleged that the Appellant used the boreholes to her advantage in her campaign. The 1st Respondent conceded that making campaign promises is not illegal.

The evidence of PW2, Stephen Mafunga, a UPND official, was that on a date towards the end of June, 2016 he found youths in PF regalia clearing a bush in the State Lodge area. They informed him that a borehole was to be sunk at that site. The first borehole was drilled on 10th July, 2016 while the second one was drilled on 18th July, 2016. PW2 identified two young men in the public gallery in Court as Musonda and Zayelo who were among the PF youths who cleared the bush.

PW2 asserted that after the boreholes were drilled and put in use, he heard the Appellant whilst campaigning in the State Lodge area in July 2016 inform the electorate through a public address system that she had procured the two boreholes for them and that

they should vote for her. PW2 denied that he informed the 1st Respondent about the drilling of the two boreholes in the State Lodge area as alleged by the 1st Respondent. He conceded that he was not aware that the two boreholes were drilled by the Muslim community or that their progamme to sink boreholes was nation-wide. PW2 said that he pointed out the two young men in Court because they were active in campaigning for the Appellant.

The evidence in rebuttal regarding the sinking of the boreholes was given by RW2, RW3 and the Appellant. RW2, Dr. Charles Msiska, the District Medical Officer for Chongwe, testified that following an outbreak of cholera in some areas of Lusaka, including Bauleni, in January 2016, a provincial committee decided to sink boreholes in Bauleni and at State Lodge area. They identified the Appellant to work with them as they had previously worked with her when they constructed a clinic and school in Nachitete area. RW2 said he therefore wrote a letter to the Appellant on 24th March, 2016. He said the boreholes were drilled by a drilling company engaged by the Muslim Welfare Trust on 26th and 29th May, 2016.

He also said the Appellant did not make any monetary contribution to the drilling of the boreholes.

RW3 Mubasshir Mehta's evidence was that he was a Coordinator at the Muslim Social and Welfare Trust which undertakes projects for the provision of clean and safe water and helps health institutions in Zambia. In early May, 2016, RW2 informed him about the need for a borehole to be sunk in the State Lodge area. He visited the area and decided that two boreholes were needed instead of the one that was requested for. He mobilized resources from donors and the first borehole was drilled by the Muslim Society on 28th May, 2016 while the second one was drilled on 29th May, 2016. The sites were cleared by the community. RW3 denied that the boreholes were sunk on 8th and 18th June, 2016. He further said that he did not know the Appellant at the time the boreholes were drilled and that he first met her in September, 2016. He conceded that he would not know if PF youths were involved in clearing the borehole site.

The Appellant testified that the two boreholes were sunk by the Muslim Society under the Muslim Welfare Trust on 28th and

29th May, 2016. She denied that the boreholes were sunk on 10th and 18th July, 2016 as alleged by PW2. She further denied that she commissioned the boreholes or that she took advantage of the sinking of the boreholes in her campaign. She said her campaign promises regarding water were futuristic.

The trial Judge reviewed the evidence and found as a fact that the evidence did not clearly demonstrate the Appellant's role in the drilling of the boreholes and that the Appellant did not donate or finance the drilling of the two boreholes. The trial Judge, however, held that the Appellant was linked to the boreholes by the letter written to her by RW2 asking her to help identify two sites for the boreholes to be sunk in State Lodge area and Bauleni Compound. He stated that the Appellant's friends helped her by drilling the boreholes close to the polling day and she confirmed her personal involvement in the project when she spoke passionately about the need to resolve the water problem in Bauleni on the Race to Manda Hill programme in a quest to endear herself to the voters and to enhance her prospects of being elected and when she wrote about commissioning the boreholes on her facebook page.

The lower Court found that the involvement of the two youths identified by PW2 in the clearing of the sites confirmed that the Appellant helped to identify the sites as requested by RW2 and mobilized the PF youths to clear the sites. The trial Judge found that the drilling of the boreholes was a corrupt act committed by the Appellant's friends with her full knowledge and consent, which act prevented the majority of the voters from electing a candidate of their choice. After citing the case of **Leonard Banda v Dora Siliya**,[18] the lower Court stated that an election will be nullified under section 97 (2) (a) (ii) even though a malpractice is committed by someone else so long as the candidate or his election agent was aware of it and approved of it. The Court held for that reason that the allegation was proved.

In arguing this appeal, the Appellant submitted that since the Court found that the Appellant did not donate or finance the boreholes and that the persons who donated the boreholes to the community were not her election agents, the lower Court was wrong to hold that the Appellant committed a corrupt act. The Appellant further submitted that the drilling of the boreholes was a

philanthropic act which benefited the entire community and that even if it were to be considered a corrupt or illegal act, evidence should have been led regarding the number of voters in the State Lodge area who were swayed from electing their preferred candidate. The Appellant contended that that was not done and therefore the allegation was not proved.

The 1st Respondent on the other hand, submitted that the trial Judge was right to find that the Appellant was aware of and consented to the sinking of the boreholes as evidenced by the letter from RW2. She contended that the sinking of the boreholes was not a philanthropic activity because the Appellant associated herself with the borehole project in order to enhance her chances of being elected. That her comments on the Race to Manda Hill programme and her posting on her face book page attested to the fact that the Appellant campaigned on the back of the boreholes as alleged by PW2.

Regarding whether or not the sinking of the boreholes had a widespread effect, the 1st Respondent invited us to consider the evidence that Bauleni compound where the boreholes were sunk

has the largest number of voters in the whole constituency and that the Appellant used the boreholes to campaign to a larger audience on the ZNBC "Race to Manda Hill" programme and on her face book page with a following of more than 17,000 people.

The 1st Respondent thus argued that the trial Judge was right to hold that the majority of the voters were affected hy the sinking of the boreholes because, under section 97 (2) (a) (ii) of the Act, the burden of proof is satisfied by the petitioner merely demonstrating that the majority of voters may have been prevented from electing a candidate of their choice due to the conduct complained of.

The 1st Respondent further contended that under section 97 (3) of the Act, the Court can nullify an election based on a single act of corruption as there is no requirement under that section that the corrupt or illegal act should affect the majority of voters in the constituency for an election to be nullified.

We have considered the above submissions. We note that the allegation in paragraph 8 of the petition was that the Appellant resolved the long standing water problem in the State Lodge area by having two boreholes sunk during the campaign period, that she

commissioned the boreholes and campaigned to the people during the event promising that if they voted for her, she would continue the works she was already doing.

The evidence on record however, proved that the boreholes were drilled by the Muslim Welfare Society and that the Appellant did not procure the drilling of the two boreholes. No evidence was led to prove that the Appellant commissioned the boreholes.

A careful examination of the letter which was written to the Appellant by RW2, Dr. Msiska, which letter is exhibited at pages 131 to 132 of the record of appeal revealed that the sinking of the boreholes arose from a need to improve water and sanitation in the State Lodge and Bauleni areas in the wake of a cholera outbreak in Lusaka Province in February, 2016. This was a nationwide programme according to paragraph 5 of the letter on page 131 of the record of appeal which reads:

> **"Chongwe District has been working in collaboration with the Muslim Welfare Society to install Bore Holes not only in Lusaka Province but in other provinces where there is been need.(sic) The Bore Holes have been installed at Public Institutions like Schools, Clinics, Hospitals and also in the Community."** (Emphasis added).

The reason the Appellant was approached by RW2 regarding the boreholes is clearly explained in the second paragraph of the letter at page 132 of the record, which reads:

> **"We have opted to approach you having worked with you and observed your enthusiasm in creating health awareness and demand for health services in Nachitete which has led into the construction of Nachitete Health Post."**

The boreholes were meant "to improve the well-being of the people" in State Lodge and Bauleni as stated in the last paragraph of the letter at page 132 of the record of appeal. The sinking of the boreholes was therefore intended as a philanthropic activity, which fact did not change by their subsequent drilling during the campaign period.

It is significant to note that the Appellant was not a candidate in any election in March, 2016 when the letter was written to her nor had she been adopted by the PF party as their candidate for Lusaka Central Constituency. This fact was acknowledged by the trial Judge in his judgment at page 70 of the record of appeal when he said:

> **"The fact that she had not yet been officially nominated as a candidate did not diminish her interest as she was hoping to be adopted by her party and officially nominated...."**

The lower Court's findings that the Appellant was personally involved in the drilling of the boreholes and that the boreholes were drilled by her friends are not supported by the evidence on record. The Muslim Welfare Trust were not the Appellant's friends as RW3 clearly said he did not know the Appellant at the time the boreholes were drilled and only met her in September 2016. This evidence was not discredited in cross-examination. Further, there was no evidence that the two PF youths Musonda and Zayelo, who were identified by PW2 in Court and whom he alleged participated in clearing the site for the borehole in State Lodge, were the Appellant's election agents or that they did so with the Appellant's knowledge and consent. There is further no evidence that the Appellant mobilised PF youths to clear the site as stated by the lower Court in his judgment at page 71 of the record. It is settled law that not everyone in a candidate's political party is his election agent as an election agent has to be specifically appointed in terms of the law. Section 2 of the Act defines an election agent as:

> **"a person appointed as an agent of a candidate for the purpose of an election and who is specified in the candidate's nomination paper."**

A candidate is responsible only for illegal or corrupt acts or other misconduct which the candidate commits or which are committed with the candidate's knowledge and consent or approval or that of his election agent. In **Lewanika and Others v Chiluba**,[14] the Supreme Court observed thus:

> **"We are mindful of the provisions of the Electoral Act that a candidate is only answerable to those things which he has done or which are done by his election agent or with his consent. In this regard, we note that not everyone in one's political party is one's political agent since under regulation 67, an election agent has to be specifically so appointed."**

We agree with these observations.

The lower Court accepted the evidence of PW2 that he heard the Appellant ask the voters in State Lodge area to vote for her as she had procured the boreholes for them. PW2 was a partisan witness as he was an official in the UPND party. His evidence therefore required to be corroborated as a matter of law as he was a witness with a possible interest to serve. No corroborating evidence however was adduced by the 1st Respondent as we have not seen any such evidence on the record of appeal. In our view, the evidence of RW2 and RW3 was independent evidence regarding the date of sinking of the boreholes and yet the lower Court rejected the evidence on the ground that they were not eye witnesses to the

sinking of the boreholes. And further that the Appellant did not produce a borehole completion report. We are perplexed to note that the trial Judge accepted the evidence of RW2 and RW3 that the two boreholes were drilled by the Muslim Welfare Society and yet he rejected their testimony regarding the dates when they were drilled.

Having carefully examined the evidence on record, we observe that the drilling of the boreholes by the Muslim society to improve the water and sanitation situation for the benefit of the people of Bauleni and State Lodge area was not a corrupt act as held by the lower Court. The finding that the act of drilling the boreholes in State Lodge area and Bauleni was a corrupt act done by the friends of the Appellant with her knowledge and consent is not supported by the evidence on record. As the trial Judge clearly stated in his judgment at page 69 of the record that the evidence did not clearly demonstrate what role the Appellant played in the drilling of the boreholes, the allegation that she donated the boreholes was not proven to the requisite standard in terms of the requirements of section 97 (2) (a) of the Act. We accordingly reverse the trial Judge's finding that the allegation was proved.

Turning to the allegation of bribery regarding the purchase of chitenge materials, the evidence was given on behalf of the 1st Respondent by PW3 Victoria Chipende a UPND member and an employee of the 1st Respondent. She testified that on a date she could not recall in June or July, 2016 she attended the 07:00 hours Sunday mass at St. Matthias Mulumba Catholic Church in Bauleni Compound. As she left the church at the end of the service, she saw people scrambling for chitenge materials which were meant for fundraising by the church. PW3 alleged that the Appellant had bought about 200 pieces of chitenge which she was distributing to the public and that she heard her assure the crowd, when the chitenge material ran out, that she would buy some more. PW3, however, conceded that she did not see the Appellant buy 200 pieces of chitenge materials and further that she did not see her pay for the chitenge material.

The evidence in rebuttal was adduced by the Appellant and RW4. The Appellant testified that she attended the 09.00 hours service at St. Matthias Mulumba Catholic Church with her entourage on 12th June, 2016 at the invitation of the parish priest

to participate in the unveiling of the chitenge material to be used on 26th June, 2016 in commemoration of the Saint Matthias Mulumba day. The chitenge was unveiled towards the end of the service. After the service, women in her entourage requested her to buy them the chitenge for the celebrations.

She bought twenty pieces of chitenge, distributed twelve to her entourage and remained with eight. She denied that she bought two hundred pieces of chitenge and distributed it to the women at the church after the 07:00 hours mass as alleged by PW3. She further denied assuring the women that she would buy them more chitenge pieces. She stated that it would have been against protocol for her to have engaged the women of the church before she was formally received by her host, the parish priest. She further said the church had only bought three thousand five hundred metres of chitenge material and that only 35 x 2 metre pieces were cut out by the church on that day. The rest were sent out to the sections. She said she got this information from the church chairman.

The Appellant conceded that she distributed some of the chitenge materials to her entourage on 12th June, 2016 during the campaign period.

RW4, Ireen Kasonde, a PF member testified that on 12th June 2016 she attended the 09.00 hours mass at Matthias Mulumba Catholic Church with the Appellant. After the service, the women in the Appellant's entourage requested the Appellant to buy for them the chitenge material which had been launched by the church for the St. Matthias Mulumba celebration. The Appellant bought twenty (20) pieces of the chitenge material and gave some to members of her entourage before she left.

RW4 denied that the Appellant bought two hundred (200) pieces of chitenge material and distributed them to the women in the church premises before mass commenced. She admitted that there was chitenge material on sale in the church grounds when she arrived before the 09:00 hours mass commenced although she did not specify the specific chitenge material on sale.

The trial Judge considered the evidence and held that the purchase of the chitenge by the Appellant within the church

premises was not disputed. That what was disputed was the number of pieces purchased as PW3 alleged that the Appellant purchased about 200 pieces while the Appellant said she bought only 20 pieces at the request of members of her entourage after the 09.00 hours mass.

The trial Court accepted PW3's evidence and dismissed the Appellant and RW4's evidence. The lower Court said RW4's testimony that the chitenge material was being sold before the second service started corroborated PW3's testimony that she found a commotion outside the church after the first service as women jostled for chitenges. The learned trial Judge dismissed the Appellant's assertion that she could not have engaged the women before her host, the parish priest, officially received her, because in the trial Judge's view, there was nothing to stop her from doing so since she was a politician.

The lower Court found as a fact that the number of chitenge materials the Appellant bought was unknown but that the Appellant did buy some chitenge pieces; that she distributed them in full view of the congregants, thereby making it a public donation

and not a philanthropic act. That since this happened in the campaign period, in a densely populated part of the constituency, it was an act of inducement proscribed by the Act. He held that the act was an illegality committed by the Appellant and that it fell within section 97 (2) (a) of the Act.

We have considered the evidence on record on this issue. We note that PW3 was not present when the Appellant allegedly bought the chitenge as she said she came out of the church only to find women scrambling for the chitenge pieces. She admitted that she was not certain that the number of chitenge pieces the Appellant allegedly bought was 200 pieces. As PW3 was not an eye witness to the alleged purchase of chitenge, there was need for the 1st Respondent to have adduced cogent evidence to support the assertion that 200 pieces of chitenge were bought. Further, no independent evidence was adduced from any of the women who allegedly received the chitenge pieces to corroborate the evidence of PW3. The reason stated by the lower Court for choosing to believe the version of events given by PW3 who was not only partisan but also an employee of the 1st Respondent was that there was nothing

to stop the Appellant from engaging the women in the church grounds and purchasing chitenge materials for them, as it were, because she was a politician. That reason was clearly not based on the evidence before the lower Court.

The lower Court therefore took extraneous matters into account in accepting PW3's evidence. Further, since PW3's evidence was not corroborated, the evidence clearly did not meet the high standard required to prove the allegation in terms of section 97 (2) (a) of the Act. We also note that the lower Court found that the Appellant committed an illegal act in terms of section 97 (2) (a) by purchasing 20 pieces of chitenge and distributing 12 pieces to members of her own entourage because it was done in full view of the public. This reasoning was clearly faulty as there is no law against a candidate giving a gift of that nature which was for a specific event to members of her own team. We do not see how the purchase of chitenge material for the Appellant's team could be an inducement to voters in those circumstances as no independent witness testified to that effect. There was also no evidence to support a finding that the purchase of the chitenge materials

influenced or may have influenced the voters from voting for the 1st Respondent. As the Appellant submitted, and we agree with her, if indeed 200 people benefited from the purchase of the chitenge as alleged by RW3, evidence should have been led to show how that number affected the outcome of the election.

In the absence of supporting evidence to that effect, we cannot support the lower Court's finding that the purchase of chitenge for her entourage by the Appellant was an act of inducement falling within the ambit of section 81 (1) (c) of the Act or that it influenced the voters from choosing their preferred candidate so as to warrant nullifying the election. In the circumstances, the findings were at odds with the evidence on record and we accordingly reverse them.

Regarding the cash donation of K6,400.00 for 100 pockets of cement, the 1st Respondent testified that the Appellant made the donation of 100 pockets of cement to the Word of Life Church congregation towards the construction of the church building during the campaign period. No other witness testified on behalf of the 1st Respondent regarding the donation of K6,400.00 cash.

RW1, the Pastor of the Word of Life Church, testified in rebuttal that the cash donation of K6,400 was made by the Appellant on 8th May, 2016 and not during the campaign period as alleged by the 1st Respondent.

The trial Judge found as a fact that the donation was made on 8th May, 2016 which was outside the campaign period and further that the Appellant had not yet been adopted as a candidate at that time. However, he stated that his task was to determine whether illegal practices committed outside the official campaign period can affect the election. The trial Judge held that the Appellant made the donation with elections in mind to induce the congregants to vote for her. That since 8th May, 2016, was just a few days before the dissolution of Parliament when the official campaign period would commence, the act satisfied the requirements of section 97 (2) (a) of the Act.

The Appellant has contended that the lower Court misdirected itself in finding that the act was within section 97 (2) (a) because section 97 (2) (a) of the Act applies to candidates or their election agents. That in this case, the Appellant had not been adopted by

her party nor was she a candidate for any election as defined by section 2 of the Act.

The Appellant submitted with regard to the alleged corrupt act that the petitioner was required to demonstrate that the act complained of prevented or may have prevented voters from voting for their preferred candidate. That in this case, no evidence was adduced regarding the number of congregants who witnessed the donation of K6,400 for the purchase of cement. That the lower Court made no effort to find that the act was widespread due to his reliance on the case of **Michael Mabenga v Sikota Wina and Others**[4] which is no longer good law after the repeal of section 93 (2) of the Electoral Act of 2006.

To start with, we wish to reiterate that an election will be nullified under section 97 (2) (a) of the Act where cogent evidence is provided to show that a candidate or the candidate's election or polling agent committed an electoral offence or that the offence was committed with their knowledge and consent or approval. Further, that the offence prevented the electorate from choosing a candidate of their choice. In this case, the donation of money for cement was

made before the commencement of the campaign period. It therefore could not be an inducement for voters or an electoral offence in terms of section 81 (c) of the Act and was therefore not proved in terms of section 97 (2) (a).

Regarding whether or not the alleged bribery allegations had a widespread effect, we note that the 1st Respondent did not adduce any evidence to prove that that was the case. We find that in the absence of evidence as to the widespread nature of the alleged acts of bribery. all the allegations of bribery were not proven to the required standard in terms of section 97 (2) (a) of the Act. Grounds two, three, four and seven therefore succeed and are upheld.

In grounds five, six and eleven, the Appellant challenges the lower Court's findings that the acts of violence fell within section 97 (2) (b) of the Act so that the election was not conducted in substantial conformity with the Act; that the acts of violence were widespread and affected the outcome of the elections; and that violence by unidentified cadres amounted to non-compliance with the principles for the conduct of elections and warranted nullifying the election. The Appellant submitted that the lower Court was

wrong to consider matters which were not pleaded and cited the case of **Mazoka and others v Mwanawasa and others**[10] wherein the Supreme Court stated that pleadings give fair notice of the case to be met and define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties. That once pleadings are closed, the parties are bound by their pleadings and the Court must adhere to them as such.

In support of the allegations of violence, the 1st Respondent said the first incident occurred when she and her team went to the town centre to campaign. They were confronted by aggressive youths clad in PF regalia and were forced to abandon their campaign.

The second attack occurred when they were distributing UPND campaign materials in the town centre. They were attacked and two of the team's motor vehicles were damaged in the incident. A member of her team was nearly stabbed with a screw driver and so the team abandoned their campaign.

The 1st Respondent conceded that she did not know any of the youths who attacked her campaign team and that the Appellant was not present on both occasions.

PW5's testimony was that on the second occasion, he was with the 1st Respondent on a campaign trail in the town centre in a convoy of motor vehicles. They were suddenly confronted by a group of young men clad in PF regalia who came in two mini buses. One youth approached the Land Cruiser and attempted to stab him with a screw driver but missed him. The men smashed the rear windscreen of the Land cruiser with stones. The matter was reported to the police. PW5 conceded that the Appellant was not present when they were attacked.

The Appellant, on the other hand, denied that she or any member of her team was involved in any act of violence. She explained that she was at the Trade Fair in Ndola on 4th July, 2016 when the 1st Respondent's campaign team was allegedly attacked in the town centre.

The learned trial Judge found as a fact that the Appellant and her agents were not responsible for the violence and that she was

out of town on the date of the second attack which was more serious than the first. Nonetheless, the trial Judge held that the allegation fell to be considered under section 97 (2) (b) of the Act, and not section 97 (2) (a) because, in his view, it spoke to the general conduct of the election regarding compliance or non-compliance with specific provisions of the Act.

The trial Judge cited clause 4 (2) (d) of the Code of Conduct which prohibits a member or supporter of a political party or a candidate from disrupting another political party's meeting or rally and stated that the provision of the Code is meant to ensure a free and level playing field for all political parties. The lower Court held that:

> **"... any act by supporters of a political party intended to prevent members of another political party from exercising their right to solicit for votes from the general public, offends against the spirit of section 97 (2) (b) of the Act."**

He reiterated that the candidate against whom the petition is brought need not be involved or have knowledge of such actions by a political party and stated that the subsection is not concerned with who the actual perpetrator is but whether or not the election was conducted in accordance with the principles in the cited

provisions of the Act. He concluded that the allegation had succeeded.

The Appellant has submitted that the lower Court abandoned the allegation on violence in the amended petition and substituted his own allegation when he considered the allegation under section 97 (2) (b) of the Act. The Appellant contended that there was no allegation at trial that the violence amounted to non-compliance with electoral rules and that the lower Court was not entitled to go beyond the matters pleaded by the parties.

The Appellant argued that the principles referred to in section 97 (2) (b) of the Act are those found in section 3 of the Act which dictate how the ECZ is to conduct elections. The Appellant urged us to set aside the issues introduced by the lower Court in relation to the allegation on violence.

The 1st Respondent endorsed the lower Court's approach regarding the allegation of violence and contended that the interpretation given by the lower Court to section 97 (2) (b) was correct in the circumstances. She argued that the learned trial Judge was not precluded from considering the facts before him

against the law contained in section 97 (2) (b) although, as it turned out, the violence was not attributed to the Appellant as alleged in the pleadings.

We have duly considered the above submissions.

In considering grounds five, six and eleven, we note that the 1st Respondent's allegation in paragraph 12 of the amended petition set out on pages 97 to 106 of the record of appeal reads as follows:

> **"12. Your Petitioner also states that on 4th June, 2016 whilst doing door to door campaigns, the Petitioner's campaign team was attacked by the Patriotic Front (PF) cadres at town centre. Further, in the same occurrences of the events the Petitioner's Land cruiser was damaged and one of the Petitioner's party member was stabbed (sic) with a screw driver in the aforementioned attacks."**

The manner in which the above allegation was pleaded does not suggest that there was non-compliance with the provisions of the law in the conduct of elections. As we stated under ground one, section 97 (2) (b) of the Act which the lower Court applied in determining the allegation on violence relates to the conduct of elections by the Electoral Commission of Zambia.

Since the lower Court found that the allegation relating to violence fell to be determined under section 97 (2) (b) of the Act, the question we have to consider is, did the 1st Respondent's evidence

prove to the required standard that there was widespread violence in the Constituency during the campaign period, which violence affected the conduct of elections by the ECZ and ultimately the result of the election to justify the nullification of the election? To answer that question, we have carefully examined the evidence on record on the issue of violence. We note that the 1st Respondent's evidence reveals that there were two incidents of violence which were confined to the town centre. That the violence was quickly brought to an end and did not escalate beyond the town centre because the 1st Respondent and her team immediately abandoned their planned campaign and left the town centre. There is no cogent evidence on record that the two incidents of violence in the town centre had a widespread effect or that they affected the result of the election. Nor did the evidence link the Appellant or her agents to the alleged violence.

As a Court, we repeat our strong disapproval of violence as we have previously done, regardless of who the perpetrator is. In this case, however the 1st Respondent did not prove that the violence was widespread, as we have already said.

We, therefore, reverse the lower Court's finding that the allegation of violence was proved to the requisite standard of convincing clarity in accordance with section 97 (2) (b) of the Act. Grounds five, six and eleven of the appeal therefore succeed.

In ground eight, the Appellant attacks the learned trial Judge's finding that the statements by the Appellant that she was a Zambian born at the University Teaching Hospital and understood the Zambian culture amounted to racial discrimination. The 1st Respondent and PW4 testified in support of the allegation that the Appellant used racist arguments and uttered racist statements against the 1st Respondent.

In the main, the 1st Respondent alleged that the Appellant's remarks on the "Race to Manda Hill" programme on ZNBC television that she was a Zambian born at the University Teaching Hospital (UTH) where her umbilical cord was buried, that she understood the Zambian culture and that the electorate wanted their own person who would understand them were meant to inform the viewers that she (1st Respondent) was not a proper Zambian as her umbilical cord was not buried in Zambia.

PW4 on the other hand, testified that he heard the Appellant say during her campaign in Bauleni that the 1st Respondent was a white person who would not do anything just as the previous Member of Parliament who was white had failed to do anything. He further alleged that the Appellant said she was one of them as she was born at the UTH.

In rebuttal, the Appellant denied that her remarks that she was born at the UTH and that her umbilical cord was at the UTH were racist or discriminatory against the 1st Respondent.

The trial Judge analysed the evidence and stated that the words which were alleged to be discriminatory and racial and attributed to the Appellant on the televised programme, "Race to Manda Hill" were not disputed. That what was disputed was whether or not she made similar remarks during a campaign meeting in Bauleni and whether or not the words had a racial connotation.

The trial Judge stated that the issue to be determined was not what the Appellant intended to convey to the electorate by those words but what an ordinary person who watched the television

programme or heard the utterances would understand the words to mean.

The trial Judge held that the remarks targeted the 1st Respondent and were intended to appeal directly to the electorate against the 1st Respondent who failed the indigenous test as espoused by the Appellant. That the remarks appealed to the voters' sense of indigenousness rather than to the attributes that qualify a candidate for office as Member of Parliament.

The lower Court held that this offended clause 15 (1) (m) of the Code of Conduct and therefore fell within the contemplation of section 97 (2) (a) of the Act for which an election was liable to be voided. The trial Judge stated that in view of his observations, the Appellant was placed in a position where she would have no difficulties in using similar language in her campaigns within the Constituency. He, therefore, accepted PW4's evidence that the Appellant and her agents uttered racially discriminatory remarks during a campaign rally in Bauleni. He added that PW4's testimony was corroborated by the televised broadcast. He therefore found that the allegation was proved.

In considering this ground of appeal, the issue we have to determine is whether the lower Court was right in finding that the Appellant's comments on the television programme were racial and discriminatory against the 1st Respondent. We are alive to the plethora of authorities that guide appellate Courts on the parameters within which findings of fact made by a trial Judge must be dealt with. In **Examination Council of Zambia v. Reliance Technology Limited**[19] which we cited with approval in the case of **Sibongile Mwamba v Kelvin M. Sampa and Electoral Commission of Zambia**[20], the Supreme Court held that an appellate Court will not lightly interfere with findings of fact of the trial Judge who had the benefit of seeing and evaluating the witnesses unless it is shown that the findings of fact were either perverse or were made in the absence of any relevant evidence or were premised on a misapprehension of the facts.

As the lower Court found that the key evidence in support of the allegations was the Appellant's statements during the "Race to Manda Hill" television programme, we took time to view the DVD which was produced by the 1st Respondent before the lower Court

and was availed to us as part of the record of appeal. We note that the Appellant first referred to her birth place in her introductory statements at the beginning of the programme in response to the moderator's invitation to her to introduce herself and state where she was born as other aspiring candidates on the programme had done before her. Her response was that she was born and bred in Lusaka. She added in Chibemba language that her umbilical cord was at UTH. The second time she referred to her birth place was in response to the question, "understanding the demographics of the voters of Lusaka Central Constituency, why should the residents of Lusaka Central Constituency vote for you?" This question was asked by the moderator of the programme to all the five candidates. The Appellant then said, among other things, that she was a Zambian born at the UTH and understood the Zambian culture.

Given the context in which the words were spoken and having heard her full response to the question asked, we do not agree that the words spoken by the Appellant had racial under tones or that they were discriminatory against the 1st Respondent. To borrow the trial Judge's words there was nothing sinister in the words the

Appellant spoke regarding her place of birth on both occasions. Neither do we find that the words were targeted at the 1st Respondent as the order in which the candidates spoke on the television programme was determined by the moderator.

In making a finding in favour of the 1st Respondent in relation to this allegation, the lower Court ought to have determined whether the uttering of the alleged racial and discriminatory remarks by the Appellant amounted to misconduct in terms of section 97 (2) (a) of the Act and if so, whether the remarks were so widespread that they influenced the electorate or may have influenced the electorate in the Constituency from voting for a candidate of their choice.

The lower Court, however, did not make any such connection between section 97 (2) (a) of the Act and clause 15 (1) (m) of the Code of Conduct. Further, since the lower Court said the issue was not what message the Appellant meant to convey by her words, but what she was understood to mean by an ordinary person who watched the programme and heard the utterances, in order for the Court to have got the answer to that question, there was need for

the 1st Respondent to have adduced evidence from independent witnesses that they heard the Appellant's remarks on the programme, that they understood the words to have been directed at the 1st Respondent and further, that they were swayed from voting for the 1st Respondent and voted instead for the Appellant because of her utterances.

Considering that the standard of proof in election petitions is above the balance of probabilities, it was incumbent upon the 1st Respondent to prove her allegations against the Appellant to that high standard. That she did not do. Instead, the lower Court resorted to making assumptions in order to fill out the gaps in the evidence in support of the allegation. The trial Judge stated with regard to RW4's evidence that the Appellant uttered racial remarks at the rally, that the Appellant was prone to do so because of her comments on the television programme. That approach was erroneous as by assuming that the Appellant repeated the alleged racial remarks, at the rally, the lower Court absolved the 1st Respondent of the burden to prove her case against the Appellant to the required standard. Further, PW4 whose evidence the lower

Court chose to believe was a partisan witness whose evidence required corroborating evidence to support it. In taking this position, we rely on the persuasive criminal case of **Boniface Chanda Chola and two others v The People** [21] wherein it was stated that:

> **"The critical consideration is not whether the witnesses did in fact have interests or purposes of their own to serve, but whether they were witnesses who, because of the category into which they fell or because of the particular circumstances of the case, may have had a motive to give false evidence."**

In this case, the lower Court found that the evidence of PW4 was corroborated by the televised broadcast. Having reviewed the evidence on this allegation in total, our view is that the allegation that the Appellant used racial arguments on the ZNBC Race to Manda Hill programme is not supported by the video or any other evidence on record. In our view, the evidence adduced fell far short of the requirements of section 97 (2) (a) of the Act as the 1st Respondent did not prove the commission of an electoral offence by the Appellant or her election agents or with their consent and

approval in relation to the remarks. Further, there was no evidence that the alleged offence had a widespread effect.

We accordingly reverse the lower Court's finding that the Appellant made racial remarks against the 1st Respondent during her campaign as it is not supported by any evidence on record to that effect. Ground eight of the appeal is meritorious and therefore succeeds.

In ground nine, the Appellant impugns the lower Court's finding that by her continued stay in office as Minister of Commerce, Trade and Industry, the Appellant abused Government resources during the campaign period and that the abuse of Government resources materially affected the result of the election. The issue we have to determine under this ground is whether the 1st Respondent proved the allegation to the required standard under section 97 (2) (a) of the Act.

In her evidence in support of the allegation, the 1st Respondent said that during the campaign period, the Appellant was presenting herself to the electorate as a Minister in contravention of the Constitution and thereby creating a perception in the electorate's

mind that she was a Minister. That the Appellant associated her ministerial position to the campaign on her Facebook page which was being constantly updated with the Appellant's current activities and her campaign programmes. She further said the Appellant used Government resources in her campaign. One incident she cited was that on the day of the recording of the Race to Manda Hill programme at the Mass Media Complex, the Appellant used a motor vehicle bearing a GRZ number and flying the Zambian flag as a Cabinet Minister. That she also introduced herself on the programme as the Minister of Commerce, Trade and Industry. The 1st Respondent said the status gave her undue advantage in her campaign.

She conceded that she did not know whether the vehicle the Appellant used during her campaign was offered to her by the Ministry of Works and Supply but said the vehicle flew the Zambian flag. The 1st Respondent insisted that the Appellant was not entitled to use a GRZ vehicle flying the flag as she was not a Minister at that time.

The Appellant denied using Government resources in her campaign and produced a receipt for the purchase of the GRZ motor vehicle she used in her campaign and which she said had been offered to her by the Ministry of Works and Supply. She said she paid the full price for the motor vehicle and was only awaiting change of ownership. The Appellant, however, conceded in cross examination at page 442 of the record of appeal that she used a Government pool vehicle to get to ZNBC for the Race to Manda Hill programme.

The trial Judge considered the evidence and said that it was not disputed that Cabinet Ministers and other Ministers remained in office after the dissolution of Parliament. The trial Judge found as a fact that the Appellant used Government transport and facilities during the campaign period as demonstrated by her use of a Government vehicle to attend to a campaign programme Race to Manda Hill. He held that this was a violation of clause 15 (1) (k) of the Code of Conduct which prohibits the use of Government transportation or facilities for campaign purposes except for the

President and Vice-President. He further held that an election could be rendered void pursuant to this provision.

The trial Judge further held that the Appellant's holding of herself out as Minister of Commerce, Trade and Industry during the campaign period was not only illegal but was also influential to the voters. That she used her status to entice voters to vote for her and therefore disadvantaged other candidates and particularly, the 1st Respondent. He cited the case of **Michael Mabenga v Sikota Wina and 2 Others**[4] wherein the Supreme Court upheld the nullification of the Appellant's election for, among other reasons, use of Government transport during campaigns contrary to regulation 7 (1) (i) of the Electoral Code of Conduct 1996.

We have reviewed the evidence on record and the lower Court's judgment on this aspect. Paragraph 15 (1) (k) of the Code of Conduct provides that:

> "(1) **A person shall not-**
>
> **(k) use Government or parastatal transportation or facilities for campaign purposes, except that this paragraph shall not apply to the President and the Vice-President in connection with their respective offices."**

This provision clearly prohibits the use of Government transport and facilities for campaign purposes. In this case, the 1st Respondent alleged that the Appellant was using a Government motor vehicle throughout her campaign. She, however, cited only one incident when she said the Appellant used a Government motor vehicle with a Zambian flag on the day of the recording of the Race to Manda Hill programme.

The Appellant denied that she used a Government motor vehicle throughout her campaign and said the motor vehicle she used was her personal to holder motor vehicle which she purchased from the Ministry of Works and Supply. As we have already observed, she admitted that she used a Government pool vehicle to get to ZNBC for the Race to Manda Hill television programme.

It is settled law that allegations in election petitions must be proven to a higher standard than a balance of probabilities. In this case, the allegation was that the Appellant used a Government motor vehicle throughout her campaign. However, the 1st Respondent only proved the use of the Government vehicle on the day of the Race to Manda Hill programme.

Bearing in mind that section 97 (2) (a) of the Act requires that both the commission of the illegal practice by the candidate or the candidate's election agent or by someone else with their knowledge and consent or approval and the effect of the illegal practice on the electorate, that is, that it prevented or may have prevented the majority of voters from electing their preferred candidate, be proved, the question which we have to consider is, did the 1st Respondent's evidence (as Petitioner) in the lower Court satisfy these two requirements? In other words, did the 1st Respondent's evidence prove that the use of the Government pool vehicle by the Appellant to get to a campaign programme on ZNBC prevented or may have prevented the majority of voters from electing their preferred candidate to warrant the nullification of the election?

Our examination of the 1st Respondent's evidence on record reveals that apart from alleging that the Appellant used a Government motor vehicle to get to ZNBC for the Race to Manda Hill programme, the 1st Respondent did not adduce any evidence to prove that the prohibited act was widespread and affected the result of the election by preventing the majority of the electorate from

electing their preferred candidate and so rendered the election a nullity. Based on the evidence on record, we find that this allegation was not proven to the required high standard of convincing clarity in terms of section 97 (2) (a) of the Act.

Further, the 1st Respondent did not adduce any evidence to prove that the Appellant used Government resources in her campaign. The allegation was therefore not proved.

The finding by the lower Court that the Appellant used the salary she earned from her position as a Cabinet Minister in her campaign was not supported by any evidence. In the circumstances, the findings of fact to which this ground relates cannot stand. We accordingly reverse them. Ground nine has merit and succeeds.

As the Appellant has succeeded in ten of the eleven grounds she raised, the appeal succeeds. We set aside the lower Court's decision to nullify the election and declare that the Appellant, Margaret Dudu Mwanakatwe, was duly elected as Member of Parliament for Lusaka Central Constituency.

Each party shall bear their own costs of this appeal and before the lower Court.

H. Chibomba
PRESIDENT
CONSTITUTIONAL COURT

A.M. Sitali
CONSTITUTIONAL COURT JUDGE

M.S. Mulenga
CONSTITUTIONAL COURT JUDGE

E. Mulembe
CONSTITUTIONAL COURT JUDGE

M. Musaluke
CONSTITUTIONAL COURT JUDGE

SELECTED JUDGMENT NO. 51 OF 2018

IN THE CONSTITUTIONAL COURT OF ZAMBIA	Appeal No. 10/2016
AT THE CONSTITUTIONAL REGISTRY	2016/CC/A016
HOLDEN AT LUSAKA	2016/CC/A042

(Constitutional Jurisdiction)

IN THE MATTER OF:	ARTICLE 47(2), 51, 54, 72(2)(c) AND 73(1) OF THE CONSTITUTION OF ZAMBIA CHAPTER 1 VOLUME 1 OF THE LAWS OF ZAMBIA
AND	
IN THE MATTER OF:	SECTION 81, 89, 97(1), 98(c), 99 AND 100(2) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016
IN THE MATTER OF:	CODE OF CONDUCT RULES 12, 15(a)(h)(k)
AND	
IN THE MATTER OF:	MUNALI CONSTITUENCY ELECTIONS HELD IN ZAMBIA ON THE 11TH AUGUST 2016

REPUBLIC OF ZAMBIA
CONSTITUTIONAL COURT OF ZAMBIA
16 NOV 2017
REGISTRY 2
P O BOX 50067 LUSAKA

BETWEEN:

NKANDU LUO (PROF)	1ST APPELLANT
THE ELECTORAL COMMISSION OF ZAMBIA	2ND APPELLANT
AND	
DOREEN SEFUKE MWAMBA	1ST RESPONDENT
ATTORNEY GENERAL	2ND RESPONDENT

Coram: Sitali, Mulenga, Mulembe, Munalula and Musaluke, JJC

On 20th April, 2018 and 16th November, 2018

For the 1st Appellant:	Mr. B. Mutale, SC, and Ms. M. Mukuka of Messrs. Ellis & Company
	Mr. E. Silwamba, SC, of Messrs. Eric Silwamba, Jalasi and Linyama Legal Practitioners

	Mr. M. Lungu of Messrs. Lungu Simwanza & Company
For the 2nd Appellant:	Mr. R. Mwala and Mr. K. Wishimanga of Messrs. A.M. Wood & Company
For the 1st Respondent:	Dr. H. Mbushi of Messrs. HBM Advocates
	Mr. K. Mweemba of Messrs. Keith Mweemba Advocates
	Mr. G. Phiri of Messrs. PNP Advocates
For the 2nd Respondent:	Ms. T. Nkunika, State Advocate

JUDGMENT

Mulembe, JC, delivered the Judgment of the Court.

Cases referred to:

1. Michael Mabenga v Sikota Wina and others (2003) Z.R. 110
2. Brelsford James Gondwe v Catherine Namugala Appeal No. 175 of 2012
3. Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa and others (2005) Z.R. 138
4. Steven Katuka and Law Association of Zambia v The Attorney General and 64 Others, selected Judgment No. 29 of 2016
5. Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba (1998) Z.R. 79
6. Mubika Mubika v Poniso Njeulu, SCZ Appeal No. 114 of 2007
7. Mulondwe Muzungu v Elliot Kamondo 2010/EP/001
8. Chizonde v The People (1975) Z.R. 85
9. Mubita Mwangala v Inonge Mutukwa Wina, Appeal No. 80 of 2007
10. Nakbukeera Hussein Hanifa v Kibule Ronald and another (2011) UGHC 64
11. Giles Chomba Yamba Yamba v Kapembwa Simbao, Selected Judgment No.6 of 2018
12. Abiud Kawangu v Elijah Muchima, Appeal No. 8 of 2017

13. Valsamos Koufou v Anthon Greenberg (1982) Z.R. 30
14. Mlewa v Wightman (1995/1997) Z.R. 171
15. August v Electoral Commission and others [1999] ZACC 3
16. Augustine Kapembwa and another v Attorney General (1981) Z.R. 127
17. Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and 2 others Petition No. 1 of 2017
18. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172
19. Austin Liato v Sitwala Sitwala, Selected Judgment No. 23 of 2018
20. Saul Zulu v Victoria Kalima (2014) Z.R. 14
21. Chrispin Silingwa v Stanley Kakubo, Appeal No. 7 of 2016
22. Richwell Siamunene v Sialubalo Gift, Selected Judgment No. 58 of 2017
23. Thorp v Holdsworth [1876] 3 Ch D 637
24. British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd (1994) 45 Con. L.R. 1
25. Christopher Lubasi Mundia v Sentor Motors Limited (1982) Z.R. 66
26. London Passenger Transport Board v Moscorp [1942] A.C. 332

Legislation referred to:

1. Electoral Process Act No. 35 of 2016
2. Electoral Process (General) Regulations 2016
3. Constitution of Zambia (Amendment) Act No. 2 of 2016

Other works referred to:

1. Phipson on Evidence, 18th edition
2. Concise Oxford English Dictionary, 12th Edition, Oxford University Press
3. Pocket Oxford Dictionary & Thesaurus, 2nd Edition, Oxford University Press
4. Halsbury's Laws of England, 5th Edition, Volume 38A, LexisNexis
5. Zambian Civil Procedure: Commentary and Cases, Volume 1, Lexis Nexis

This is an appeal against the Judgment of the High Court which nullified the election of the 1st Appellant, Nkandu Luo, who

to view the video clip in the presence of all the parties and give a ruling stating whether or not the video was the same video viewed during the trial. In his ruling, availed to this Court in Supplementary Record of Appeal filed on 29th March, 2018, the learned Judge in the court below confirmed the authenticity of the video. In addition, during this process the video was misplaced within the High Court. The appeal was finally heard on 20th April, 2018.

We, therefore, wish to guide the High Court and the local government election tribunals that where a piece of evidence is tendered and viewed during the trial of an election petition, the same should be properly marked and admitted in evidence and placed in the custody of the court or tribunal. This will avoid unnecessary delays as encountered in this case.

We now turn back to this appeal. The background of this appeal is that the 1st Appellant and the 1st Respondent, Doreen Sefuke Mwamba, stood as candidates for Member of Parliament for Munali Constituency in the 11th August, 2016 general elections. The 1st Appellant contested the seat on a Patriotic Front Party (PF) ticket. The 1st Respondent participated as a

candidate for the United Party for National Development (UPND). There were six other contestants. Five stood on various political parties' tickets while one was independent. The 1st Appellant emerged victorious with 37,935 votes and was declared duly elected Member of Parliament for Munali Constituency. The 1st Respondent came in second having polled 24,628 votes. The six other candidates shared the remaining valid votes cast as follows: Mike Mposha, MMD – 11, 122; Antonio M. Mwanza, FDD – 4,651; Sydney P. Kaweme, Independent – 893; Vincent Chaile, RRP – 831; Mutale Mwila, UNIP – 373; Boston G. Chifita, Rainbow – 294.

Aggrieved by the outcome of the election, the 1st Respondent filed a petition seeking, among other things, a declaration that the 1st Appellant's election as Member of Parliament for Munali Constituency was null and void. In her petition, the 1st Respondent alleged that prior to the election, the 1st Appellant held herself out as Cabinet Minister and used public resources towards her campaign. Further allegations were that on 8th August 2016, the 1st Appellant sponsored violent cadres who attacked the 1st Respondent's campaign bus in Mtendere and

that on 11th August, 2016 a PF councillor, in PF regalia, campaigned in a polling station in full view of the police and the 2nd Appellant's officials. It was also alleged that PF polling agents were allowed to wear PF regalia inside the polling station and that on 11th August, 2016 the 1st Respondent was refused entry to Vera Chiluba School polling station by the 1st Appellant and one Kaizer Zulu, who closed the gate. It was also alleged that the 2nd Appellant refused to provide Form GEN12 to the 1st Respondent's polling agents, resulting in their inability to submit the correct total of the results she obtained at each polling station.

The 1st Respondent claimed that as a consequence of the alleged illegal practices committed by the 1st Appellant and her agents and the failure of the 2nd Appellant to conduct the election fairly, the majority of voters were prevented from electing their preferred candidate.

The learned trial Judge, in his verdict, pointed out that the provisions of the law in section 97(2)(a) of the Electoral Process Act No. 35 of 2016 (henceforth "the Act") were very clear in providing circumstances under which a parliamentary election may be nullified. The trial Judge reminded himself that the

burden of proof rested on the petitioner and that the standard of proof required is that allegations raised must be proved to a fairly high degree of convincing clarity, citing **Michael Mabenga v Sikota Wina and others**[1], **Brelsford James Gondwe v Catherine Namugala**[2] and **Anderson Kambela Mazoka v Levy Patrick Mwanawasa**[3] for authority. In this regard, the learned trial Judge noted that the allegations in the petition were outlined in paragraph 5 under seven sub-heads and proceeded to consider the same seriatim.

In regard to the allegation of the 1st Appellant holding herself out as Cabinet Minister, the court below found that it was not in dispute that during the campaign for the Munali seat, the 1st Appellant was a Cabinet Minister. That this was only stopped by the decision of this Court in **Steven Katuka and Law Association of Zambia v The Attorney General and 63 others**[4]. The court below found that this part of the allegation in paragraph 5(i) of the petition was proved. And on the alleged abuse of public resources, the court below stated that it was not in dispute that Cabinet Ministers were entitled to a Government motor vehicle, public fuel and public driver, but what was in

dispute was that the 1st Appellant used the said public resources in her campaign. Though the trial Judge acknowledged that the 1st Appellant had her personal motor vehicles which she used during her campaign, he stated that he had not seen evidence to show that she truly did not use a Government vehicle as well. The trial Judge was of the view that the lacuna in the 1st Appellant's testimony was that he had not seen any Government guideline to preclude a minister from using Government resources during campaign.

The court below noted that the 1st Appellant was seen being driven in a Government vehicle with a Zambian flag accompanied by a Toyota Noah branded in PF colours and that PW5 saw the 1st Appellant distributing PF campaign materials at a house in Kaunda Square. Although the trial Judge noted that the 1st Respondent's witnesses had difficulties in describing the Government vehicle, he was satisfied that they were describing the same motor vehicle and that the allegation was proved. The court below also found that to the extent that the 1st Appellant held the office of minister illegally, her salary was paid to her

illegally and that she used it to the disadvantage of the 1st Respondent who did not have access to Government funds.

In regard to the allegation that the 1st Appellant sponsored violent cadres who attacked the UPND campaign bus in Mtendere on 8th August, 2016, the learned trial Judge held that he had seen no evidence to show or even to suggest that the 1st Appellant sponsored cadres to attack the UPND campaign bus. However, as the 1st Appellant was not at the scene of the attack, the Court below disagreed with her position that the attackers were not PF cadres and found that the allegation had succeeded.

On the allegation that a PF Councillor was campaigning in a polling station dressed in PF regalia in full view of the police and the 2nd Appellant's officials, the court below found that this allegation was not sufficiently supported by evidence and dismissed it. The court below also found no credible evidence to support the allegation of persons wearing PF regalia inside the polling station at Chainda Catholic Church.

In respect of the allegation that the 1st Respondent was refused entry to Vera Chiluba School Polling Station, the Court below noted that there were two disputes to this allegation. First,

that the 1st Appellant was in the company of one Kaizer Zulu. Secondly, that the 1st Respondent was denied entry. After reviewing the evidence on this aspect, the trial Judge stated that it was immaterial whether or not the 1st Appellant was in the company of Kaizer Zulu. That the material fact was, in the view of the learned trial Judge, a demonstration of double standards where the 1st Appellant was allowed entry into the polling station and the 1st Respondent was denied entry. The court below dismissed the testimony of RW12, the returning officer for Munali Constituency, who testified that it was not possible for the 1st Appellant and Kaizer Zulu to close the gate to the polling station. According to the court below, RW12 was untruthful on account that he purported to testify to events which happened in his absence. Thus, the trial court adjudged that the 1st Respondent was not allowed to monitor the elections in which she was a participant and found that the allegation was proved.

The allegation against the 2nd Appellant was that it refused to provide Form GEN12 to UPND polling agents. That this caused the polling agents not to submit the correct number of votes the 1st Respondent obtained at each polling station. The

court below found that the inadequacy of Form GEN12 affected all participants and found that the failure by the 2nd Appellant to avail the GEN 12 forms did not help to build confidence in the Munali Constituency election. That it was a lapse on the part of the 2nd Appellant and no one could positively ascertain whether or not the votes cast in favour of the 1st Respondent were fully accounted for. Thus, the court below found that the allegation had been proved.

The next allegation was that the 1st Respondent managed to provide her polling agents at Kalikiliki Polling Station with GEN12 forms but the presiding officer was stopped from signing the same by PF cadres. The trial court held that for reasons already given in regard to the allegation of refusal to provide Form GEN12, the allegation succeeded.

The learned trial Judge summed up his findings by stating that the elections in Munali Constituency were not contested on level ground. That the 1st Appellant abused Government resources in her campaigns and that the campaigns in Munali Constituency were marred by violence, which reached a crescendo on 8th August, 2016 and was capable of influencing

abuse of Government resources and that such abuse materially affected the outcome of the polls in Munali Constituency.

Ground Two

The court below erred in law and fact when it annulled the poll in Munali Constituency based on the attack of a UPND bus in Mtendere on 8th August 2016 without evidence linking the appellant or her campaign agent to the said act.

Ground Three

The court below misdirected itself in law and fact when it held that the first respondent was denied entry into Vera Chiluba School Polling Station and such denial materially affected the outcome of the poll in Munali Constituency.

Ground Four

The lower Court erred in law and fact when it held that the non-provision of GEN 12 forms to all the candidates' polling agents materially affected the outcome of the polls.

The 2nd Appellant advanced five grounds of appeal as follows:

Ground One

The learned trial Judge misdirected himself in law and in fact when he nullified the Munali Parliamentary seat on the basis of the alleged illegal and unfair practices committed by the Appellant without establishing that the alleged illegal and unfair practices affected the parliamentary election results, contrary to the law.

Ground Two

The learned trial Judge misdirected himself in law and in fact when he held that the 1st Respondent had proved her allegations as contained in paragraph 5(v) of the Petition, contrary to the evidence on the record.

Ground Three

The learned trial Judge misdirected himself in law and in fact when he found that paragraph 5(vi) of the Petition had been proved without any evidence to support such finding.

Ground Four

The learned trial Judge misdirected himself in law and in fact when he held that the 1st Respondent's allegation as contained in paragraph 5(vii) of the Petition had been proved, contrary to the law and evidence on the record.

Ground Five

The learned trial Judge misdirected himself in law and in fact when he held that the Appellant failed to conduct transparent, free and fair elections contrary to the provisions of the law and evidence on the record.

In the interests of brevity and orderliness, we propose to address some of the 1st Appellant's and 2nd Appellant's grounds of appeal together. In this regard, we first address the 1st Appellant's grounds one and two of the appeal separately. We then proceed to consider the 1st Appellant's ground 3 together with the 2nd Appellant's ground two. Ground four of the 1st Appellant's appeal is considered together with the 2nd Appellant's grounds one, three, four and five.

In support of the appeal, the 1st Appellant filed detailed and lengthy heads of argument on 25th January, 2017. Ground one of the appeal challenges the finding of the court below that the continued stay of the 1st Appellant in office created an irrebutable presumption of abuse of Government resources and that such abuse materially affected the outcome of the election in Munali Constituency. The 1st Appellant began by giving a detailed

outline of the applicable legal principles in election petitions. Calling in aid various case authorities, including **Lewanika v Chiluba,**[5] **Mubika Mubika v Poniso Njeulu**[6] and **Mazoka v Mwanawasa,**[3] the 1st Appellant submitted, *inter alia*, that the burden of proof lies upon the party who substantially asserts the affirmative of the issue and that it must be established, with convincing clarity, that the malpractice complained of was widespread and affected the outcome of the election. It was the 1st Appellant's position that cogent evidence must support the discharge of the burden of proof under section 97(2) of the Act. It was contended that while the learned trial Judge reminded himself on the burden and standard of proof in election petitions, he did not apply the law accordingly.

Further, that even though the trial Judge reminded himself that the petitioner was not allowed to bring in evidence other than evidence connected to and supporting the pleadings, he still relied on extraneous and irrelevant matters to arrive at some findings. That the trial Judge relied on the use of presumptions in finding that the allegations were proved. The 1st Appellant submitted that though the law of evidence in certain instances

allows presumptions, authorities on the burden and standard of proof in election petitions clearly point to the fact that any matter alleged had to be proved to a high standard of convincing clarity.

The 1st Appellant asserted that the finding of the court below that she illegally held herself out as a Cabinet Minister throughout the campaign period was a misapprehension of the holding of this Court in **Steven Katuka**[4] and that the misapprehension informed most parts of the lower court's judgment and tainted its reasoning.

On the allegation that the 1st Appellant used her official car in the campaigns, it was the 1st Appellant's position that the approach the learned trial Judge adopted in resolving the conflicting evidence given by the 1st Appellant on one hand and the 1st Respondent on the other, in which different descriptions of the 1st Appellant's car were given, shows that he did not apply the correct standard of proof. That the trial Judge's finding that he had not seen any evidence to show that the 1st Appellant truly did not use a Government vehicle showed that he placed the burden of proof on the 1st Appellant to lead evidence that she did not use a Government vehicle. The 1st Appellant contended that

the finding was a clear misdirection and that the allegation should be found not to have been proved as the 1st Respondent had not discharged the burden of proof. It was the 1st Appellant's contention that the 1st Respondent merely saw her being driven to inspect a Government project, which did not constitute campaigning. It was contended that there were discrepancies in the evidence as to the make of the vehicle and the witnesses could not recall the vehicle registration number. The 1st Appellant further asserted that PW5 was a partisan witness with an interest to serve, citing **Mulondwe Muzungu v Eliot Kamondo**[7] and **Chizonde v The People**[8] for support. It was submitted that the court below made no adverse finding against the 1st Appellant and, therefore, that there was no basis upon which it could have resolved the dispute in favour of the 1st Respondent.

In regard to the alleged use of Government funds, the 1st Appellant contended that there was no evidence in support led by the 1st Respondent; that the money the 1st Appellant used in the campaigns came from her gratuity and well-wishers and that the finding that she had used her salary for campaigns was perverse as there was no evidence to support such a finding. Further,

that the finding by the court below to the effect that the alleged use of government funds by the 1st Appellant affected the 1st Respondent who had no access to such funding was a misdirection as the act complained of ought to affect the outcome of the election and not a contestant. The 1st Appellant argued that the court below was not entitled to use presumptions or make adverse inferences without specific evidence being led on an allegation.

The 1st Appellant submitted, in the alternative, that even if it was proved to the requisite standard that she used a Government vehicle and funds, the court below was still not entitled to nullify the election on this ground because it was not proved that the use of a Government vehicle and funds affected the outcome of the election. It was contended that in terms of section 97(2)(a) of the Act, evidence must be led to prove that the majority of voters were or may have been prevented from electing their preferred candidate, citing **Mubita Mwangala v Inonge Mutukwa Wina**[9] for support. It was the 1st Appellant's further contention that the court below relied on the PF's use of the slogan *"boma ni boma"* as proof that she used her ministerial

position to intimidate her opponents; but that there were no witnesses called to testify that they were intimated or did not vote for their preferred candidate on account of the slogan.

In ground two, the 1st Appellant challenged the lower court's annulment of the election in Munali Constituency based on the attack of the UPND bus in Mtendere on the 8th August, 2016 without evidence linking the 1st Appellant or her election agent to the said attack. It was submitted that under section 97(2)(a) of the Act, the first test to apply for nullification of an election is proof that either the candidate or her election agent committed the act complained of; that it was a clear departure from section 93(2)(a) of the Electoral Act 2006 which required proof of any malpractice that affected the outcome of the election. The 1st Appellant submitted that the court below found that there was no evidence to show, or even to suggest, that she sponsored cadres to attack the UPND bus but it still proceeded to find that the allegation was proved. It was argued that the finding was not only contradictory but perverse and that it was a misdirection to proceed to examine the matter further after the court had found that the 1st Appellant was not connected to the attack.

Citing **Mazoka v Mwanawasa**[3] and **Mabenga v Wina**[1] to support the point, it was submitted that the finding that the 1st Appellant had not sufficiently shown what measures she took to control her supporters illustrated the lower court's misapprehension of the burden and standard of proof in an election petition. The 1st Appellant argued that the burden to prove that she sponsored the violent cadres lay with the 1st Respondent who had made the allegation; that the 1st Appellant could not be expected to demonstrate measures taken to "cage" supporters as she had no burden of proof to discharge. We were referred to the case of **Brelsford James Gondwe v Catherine Namugala**[2], where the Supreme Court said:

> **"The appellant having failed to prove his case no reasonable court would call upon the respondent to adduce evidence in rebuttal. In any event there was nothing to be rebutted and only courts where injustice is practiced would brave calling the respondent to adduce evidence in rebuttal in these circumstances."**

The 1st Appellant maintained that the finding of the court below fell outside the ambit of the pleading and the law. And citing **Lewanika v Chiluba**[5] it was further submitted that even if the violent cadres were PF members, a candidate was not responsible for the actions of all their party members. Further, that the finding by the court below that the attack was widely

reported by the media thereby spreading fear and leading to a low turnout at a UPND rally on 10th August, 2016 was not supported by evidence.

The combined submissions on ground three of the 1st Appellant's appeal and ground two of the 2nd Appellant's appeal were to the effect that the court below misdirected itself in law and fact when it held that the 1st Respondent's allegation that she was denied entry into Vera Chiluba polling station was proved and that such denial materially affected the outcome of the election.

The 1st Appellant submitted that the objection to the finding of the court below on this aspect was twofold. First, that the court below did not address itself to the pleadings but merely discredited RW12 on the ground that he was untruthful. The 1st Appellant contended that there was no evidence to prove the allegation that the 1st Appellant, acting with one Kaizer Zulu, closed the gate and prevented the 1st Respondent from entering Vera Chiluba polling station to see her polling agents. It was contended that the finding of unfair treatment was irrelevant as it was not pleaded.

Secondly, it was submitted that under section 97(4) of the Act, it has to be demonstrated, through evidence, that the misfeasance by an electoral officer affected the outcome of the election, which the 1st Respondent failed to do. We were referred to pages 60, 61, 62 and 70 of the record of appeal to support the point that the court below failed to consider the 1st Appellant's evidence that she had not been allowed into Vera Chiluba polling station, contrary to the 1st Respondent's claim. We were also referred to page 881 of the record to show that the 1st Appellant never admitted to having been allowed entry into the said polling station and that it was for the 1st Respondent (as petitioner) to prove all allegations to a fairly high degree of convincing clarity.

On its part, the 2nd Appellant submitted that no evidence was adduced at trial to support the allegation that the 1st Appellant and Kaizer Zulu closed the gate and refused the 1st Respondent access to her polling agents. It was further submitted that since in cross-examination the 1st Respondent conceded that the allegation was not true, the matter should have ended there and the allegation dismissed. The 2nd Appellant impugned the finding of the court below that the allegation in the

pleadings had been proved, arguing that the court below misdirected itself as it is trite that evidence must support the pleadings. It was the 2nd Appellant's contention that in arriving at his conclusion, the trial Judge wrongfully accepted and applied the 1st Respondent's testimony to the effect that she was locked out of the polling station by a police officer while the 1st Appellant was allowed to go in. That the court below erred in its finding that there was a demonstration of double standards, thereby resulting in unfairness on the part of the 2nd Appellant's conduct of the elections. It was submitted that at Vera Chiluba polling station, there was an incident where a group of individuals wanted to vote after the close of the poll; that, as testified by RW12, all voters on the queue were instructed to get inside the polling station and the presiding officer closed the gate. That the learned trial Judge's conclusion that RW12 was untruthful had no basis and RW12's testimony ought to have been considered by the court in making its finding.

As indicated earlier, ground four of the 1st Appellant's appeal and grounds one, three, four and five raised in the 2nd Appellant's appeal are related. Submissions on ground four of the

1st Appellant's appeal were to the effect that the court below erred in law and in fact when it held that the non-provision of Form GEN12 to all the candidates' polling agents materially affected the outcome of the polls. The 1st Appellant submitted that the 1st Respondent's allegation was that the 2nd Appellant refused to provide Form GEN12 to UPND polling agents and, as such, the 1st Respondent was unable to ascertain the correct number of votes she received at each polling station. Citing section 49 of the Electoral Process (General) Regulations, it was the 1st Appellant's contention that, in the instant case, failure to countersign Form GEN12 could not be the ground or basis to nullify the election if the court below found that each candidate was affected. That there is a high threshold to be surmounted where misfeasance on the part of electoral officers is alleged pursuant to section 97(2)(b) of the Act.

The 2nd Appellant, in its third ground of the appeal, contended that the learned trial Judge misdirected himself in law and in fact when he found that the allegation that the 2nd Appellant refused to provide Form GEN12 to the 1st Respondent's polling agents was proved and also, in ground four, that the

presiding officer at Kalikiliki polling station was stopped from signing copies of Form GEN12 by PF agents. And in its ground one, the 2nd Appellant contended that the trial Judge misdirected himself in law and in fact when he nullified the election in Munali on the basis of the alleged illegal and unfair practices without establishing that the same affected the election results.

The 2nd Appellant submitted that Form GEN12 refers to the Announcement of the Result of the Poll and is in fact Form GEN20 in the Electoral Process (General) Regulations and is used at a polling station to indicate the total number of votes obtained by a candidate at the polling station. Further, that as the 1st Respondent testified, Form GEN12 is important as it is used to convey information to the totaling centre. And as RW12 testified, the 2nd Appellant provides the document to the presiding officer, who must prepare the document and validate it by signing it and then it is made available to polling agents to countersign. The 2nd Appellant emphasised that it is copies of authenticated documents that are made available to the polling agents.

It was contended that the crux of the matter was whether or not the 2nd Appellant refused to provide Form GEN 12 to the

UPND polling agents. It was the 2nd Appellant's view that the learned trial Judge glossed over the 2nd Appellant's evidence with the result that the full significance of certain aspects of the evidence was not appreciated. It was submitted that the trial Judge ought to have considered the evidence of the 1st Respondent and PW5 cautiously. That the 1st Respondent was a UPND candidate and PW5 was a UPND polling agent and the trial Judge relied on their evidence without caution as to the self-interest of the witnesses. The case of **Nakbukeera Hussein Hanifa v Kibule Ronald and another**[10] was cited for support.

It was the 2nd Appellant's further submission that the trial Judge erred when he accepted and relied on the evidence in collateral matters and that the finding of the court below was based on an unbalanced evaluation of evidence. It was the 2nd Appellant's contention that PW5 was not a credible witness as her testimony contained various untruths on collateral matters and the court below ought not to have believed and accepted her evidence. The 2nd Appellant maintained that it did not refuse to provide Form GEN12 to the 1st Respondent's polling agents as the form was readily available to polling agents who were present at

the polling station after voting, counting and totaling of votes was done.

The 2nd Appellant submitted that, faced with two conflicting versions of events, the court below, in its finding, merely relied on the evidence of the 1st Respondent's witnesses. That had the trial Judge taken into consideration the evidence of RW12, that winning and losing candidates alike left the polling stations before the GEN12 forms were compiled by the 2nd Appellant, he would not have concluded as he did. It was submitted that the non-availability of polling agents at completion of the election process could not possibly be regarded as refusal by the 2nd Appellant to provide copies of Form GEN12.

The 2nd Appellant maintained that the lower court's finding that the 1st Respondent was unable to have the correct total of the results due to failure by the 2nd Appellant to provide Form GEN12 was not supported by evidence. It was submitted that the court below did not take into account the 2nd Appellant's evidence to the effect that there were alternative sources of information that were provided. It was also submitted that RW12 testified that aside from the provision of Form GEN12 to the

polling agents present, the presiding officer announced the results publicly, which gave an opportunity to the parties to hear and record the correct totals. Further, that the "Zero Form", a larger version of Form GEN12 was posted outside the polling station. It was the 2nd Appellant's contention that the 1st Respondent and her agents had numerous sources provided by the 2nd Appellant to obtain the total results received by each candidate at each polling station. The 2nd Appellant maintained, therefore, that there was nothing wrong with the presiding officer refusing to sign a document that was provided or prepared by the 1st Respondent's agents as the agents could not authenticate the results endorsed thereon.

It was the 2nd Appellant's contention that even assuming the allegations of procedural irregularities or non-compliance with the law were true, the acts complained of affected all the candidates. That this was acknowledged by the trial Judge himself when he noted that both winners and the losers did not sign the Form GEN 12. The case of **Mazoka v Mwanawasa**[3] was cited for authority. In addition, the 2nd Appellant relied on its submissions filed in the court below appearing at pages 468 to

469 of the record of appeal and also adopted the 1st Appellant's arguments in so far as they were applicable to the 2nd Appellant's appeal. The 2nd Appellant submitted that the court below erred in law and in fact when it found that the 2nd Appellant failed to conduct transparent, free and fair elections in Munali Constituency and urged us to set aside the lower court's finding.

In oral submissions, Mr. Mutale, SC, submitted that the first three allegations in the petition upon which the election of the 1st Appellant was nullified were founded on the interpretation of section 97(2)(a) of the Act. It was State Counsel's position that the lower court's interpretation was seriously misconceived. Citing our decision in **Giles Chomba Yamba Yamba v Kapembwa Simbao,**[11] Mr. Mutale, SC, argued that the petitioner needed to prove the misconduct with crystal clear evidence, and that the majority of the electorate were prevented from electing their preferred candidate.

Mr. Mutale, SC, contended that the 1st Respondent failed to discharge her obligation to produce cogent evidence that the 1st Appellant did abuse Government resources during her campaign, citing our decision in **Abiud Kawangu v Elijah Muchima**[12] for

support. State Counsel further submitted that the 1st Respondent had failed to adduce evidence that the 1st Appellant or any of her agents were involved in attacking the 1st Respondent's campaign bus or that the incident was widespread in Munali Constituency. He submitted that the incident was isolated and that the video evidence involving the attack on the campaign bus was irrelevant as it only testified to one incidence of violence in Mtendere ward of the Munali Constituency and did not assist the 1st Respondent in confirming that the violence was widespread. Also, that RW10 confirmed at page 948 of the record of appeal that the incident was the only incident of violence that the 2nd Appellant heard of in Mtendere ward.

Turning to the allegation that the 1st Appellant and Kaizer Zulu closed the gate and denied the 1st Respondent entry to Vera Chiluba polling station, it was State Counsel's contention that the lower court's finding was perverse as it was not supported by evidence and that the 1st Respondent confirmed in her testimony that it was incorrect as the 1st Appellant was not responsible for closing the gate and that Kaizer Zulu was not at the polling

station. Mr. Mutale, SC, submitted that the finding of the court below should be set aside for being perverse.

On the allegation of failure to provide GEN12 forms, State Counsel submitted that the same were anchored on section 97(2)(b) of the Act. He contended that the 1st Respondent failed to adduce any evidence confirming that the failure to provide GEN12 forms by the 2nd Appellant affected the results of the entire Munali Constituency. Mr. Mutale SC, added that from a total of 80,727 votes, 37,935 were cast in favour of the 1st Appellant while 42,792 was the total cumulative votes cast in favour of the opposing candidates, showing that the majority voted against the 1st Appellant. That this went against the allegation that any conduct of the 1st Appellant affected the majority from voting for a candidate of their choice.

Mr. Lungu, learned co-counsel for the 1st Appellant, added that the court below misdirected itself on the burden and standard of proof in election petitions, as set out in various case authorities. Referring to page 52 of the record of appeal, Mr. Lungu submitted that the learned trial Judge misdirected himself when he appeared to reverse the burden of proof on the allegation

of use of Government resources, placing the burden of proof on the 1st Appellant to show the existence of guidelines concerning use of Government resources in campaigns. It was submitted that it ought to have been the 1st Respondent (as petitioner) to adduce evidence on the use of Government resources and that the finding of the court below was liable to reversal.

On the allegation of violence, learned counsel Mr. Lungu submitted that a case falls or stands on its pleadings and that the court below found as a fact that there was no evidence that it was the 1st Appellant who sponsored the violent cadres that attacked the UPND campaign bus. That the allegation having not been proved, the court below misdirected itself when it continued to delve into the matter as regards the widespread nature of the violence.

Learned counsel for the 2nd Appellant, Mr. Mwala, relied entirely on the 2nd Appellant's written heads of argument filed on 23rd January, 2017.

In opposing this appeal, the 1st Respondent relied on heads of argument filed on 20th January, 2017. In regard to ground

one, the 1st Respondent submitted that by her own admission, the 1st Appellant bad stated that she was a Government Minister in the Ministry of Gender, holding a constitutional office and, therefore, a public servant. Our attention was drawn to the 1st Respondent's submissions in the court below at pages 377 to 378 of the record of appeal and to our judgment in **Steven Katuka.**[4] It was contended that the candidature of the 1stAppellant in the 11th August, 2016 general election was unlawful as she had failed to comply with the Constitution by failing to vacate her ministerial position before she decided to stand as a candidate in Munali Constituency. That the 1st Appellant could not benefit from a contravention of the law, citing **Valsamos Koufou v Anthon Greenberg**[13] for authority.

And quoting extensively from the case of **Mabenga v Wina**[1] for support, it was the 1st Respondent's contention that the 1st Appellant had admitted to getting an unlawful salary from May to July 2016. Further, that there was abundant evidence on record that the 1st Appellant had used a Government vehicle in her campaigns and occupied a Government house, contrary to regulation 15(1)(k) and (l) of the Electoral Code of Conduct. It

was contended that the learned trial Judge was on firm ground when he found that the 1st Appellant used Government resources and that that affected the 1st Respondent who had no access to such resources.

In regard to ground two, the 1st Respondent began by recounting some of the testimonies on the incident of 8th August, 2016 in Mtendere and discounted the 1st Appellant's assertion that the UPND had engaged in acts of violence. Referring to the testimony of RW4 and the 1st Appellant regarding an alleged act of violence by UPND cadres on 10th August, 2016 at RW4's house and in which the 1st Appellant's vehicle and another vehicle were allegedly damaged, it was the 1st Respondent's contention that the alleged attack by the UPND was a manufactured story. It was submitted that the petition was filed on 26th August, 2016 and the report was made on 27th September, 2016. Further, that the police report at page 190 of the record of appeal made no reference to the 1st Appellant's Toyota Noah vehicle; that in essence no report was made to the police. It was the 1st Respondent's position that the foregoing confirmed the evidence of RW10 at page 948 of the record of appeal that no other

incidence of violence was reported in Munali Constituency apart from the reported incident of 8th August, 2016.

In response to the 1st Appellant's assertion that the findings of the court below at page J53 of the judgment, to the effect that the UPND rally at Mahatma Ghandi grounds failed because of fear of an attack by PF cadres, were not supported by any evidence, it was the 1st Respondent's contention that the 2nd Appellant's own witness, RW10, confirmed that the 2nd Appellant learnt of the 8th August, 2016 incident through the media. It was submitted that many voters in Munali Constituency saw or heard of the violence that occurred on that day and were prevented from electing a candidate of their choice.

On the 1st Appellant's claim that she had no knowledge of the persons who sponsored the violence of 8th August, 2016, the 1st Respondent referred to the case of **Mlewa v Wightman**[14] where it was held that the question of personal knowledge was irrelevant. It was the 1st Respondent's position that the principles of the electoral system and process are well stated in section 3(a), (b), (c) and (d) of the Act, citing the case of **Mulondwe Muzungu v Eliot Kamondo**[7] and the South African case of **August v**

Electoral Commission and others[15] which, according to the 1st Respondent, emphasized the importance of universal adult suffrage and free and fair elections.

On the question of an appellate court interfering with the findings of the trial court, the 1st Respondent drew our attention to the case of **Augustine Kapembwa and another v Attorney General**[16] which outlines when an appellate court can interfere with the findings of the trial court.

Learned counsel for the 1st Respondent, Mr. Phiri, opened his oral submissions by discounting the 1st Appellant's understanding of this Court's holding in **Giles Chomba Yamba Yamba**[11] as it applied to the allegation of abuse of Government resources. Referring to page J75 of that judgment, Mr. Phiri quoted the following excerpt:

> **"It should be borne in mind that that decision came two days before the elections of 11th August, 2016. Its effect, therefore, is post 9th August, 2016, and not before."**

Mr. Phiri argued that understanding the decision hinged on the word "effect"; that the Court was referring to the order directed to the ministers to pay back salaries and that the 1st Respondent failed to see how that could be interpreted to mean

that the stay of the Ministers in office post dissolution of Parliament was legal. That the order to pay back was a result of the illegality that was perpetrated.

Counsel was brief in his response to ground two of the appeal, arguing that though the 1st Appellant was, admittedly, not seen in the video directing the attack on the bus, ground two should fail as the aspect of her election agents had not been specifically addressed. When probed by the Court to show, from the record, evidence linking the 1st Appellant or her election agents to the attack, Mr. Phiri conceded that he had not seen any direct evidence of her sponsorship of violence on the record but maintained that the link could only be seen to the extent that the 1st Appellant benefited from what happened because the incident had an effect on the election.

In opposing ground three, counsel submitted that the court below was clear in stating that the 1st Respondent was denied entry into the polling station and that this was unfair treatment. That as the record showed, this was not rebutted. We were referred to page 61 of the record of appeal where the court below held that there was a demonstration of double standards to the

detriment of the 1st Respondent who by law had a right to access the polling station.

On ground four, Mr. Phiri submitted that the 1st Respondent had evidence of the non-availability of GEN12 forms at 14 polling stations. Counsel argued that the GEN12 form was a primary document for recording results from polling stations in the 2016 elections and that the absence of the form at 14 polling stations would have a material effect on any election. Mr. Phiri referred the Court to a portion of the judgment of the court below at page 65 of the record of appeal where the learned trial Judge lamented the alleged lapses on the part of the 2nd Appellant. That the non-availability of Form GEN12 was a finding of fact that was proved.

In regard to the 1st Appellant's assertion that the trial Judge had shifted the burden of proof on the allegation of abuse of Government resources, Mr. Phiri referred to the following excerpt of the judgment of the court below at page 52 of the record of appeal:

> **"In the contrast, there is evidence from the Petitioner that the 1st Respondent was seen driven in a government motor vehicle with a Zambian flag flying during campaigns."**

Mr. Phiri contended that there was no proposition advanced from the 1st Appellant as to why the finding should be interfered with and we were urged to dismiss the appeal.

In supplementing the arguments, Dr. Mbushi submitted in regard to ground one that evidence from the 1st Respondent's witnesses, such as PW5 who allegedly saw the 1st Appellant in a Government vehicle with a flag, supported the fact of the 1st Appellant's abuse of Government resources. Further, that the 1st Appellant, in her own words, informed the court below that she was living in a Government house and was receiving a salary from which she paid her workers, citing the case of **Mabenga v Wina**[1] for support. Dr. Mbushi contended that the 1st Appellant did use public resources as the evidence to that effect was not challenged. And in regard to the attack on the UPND campaign bus on 8th August, 2016, it was Dr. Mbushi's contention that, as confirmed by RW10, the incident was known throughout the constituency. That violence is illegal no matter the perpetrator and urged this Court to take the issue of violence very seriously.

Learned counsel Mr. Mweemba addressed grounds four, two and one in that order. He opened his submissions by stating

that it was not the position of the law that if it could not be proved that a candidate or their agents was involved in an illegality, the election could not be annulled. Mr. Mweemba argued that Zambia was a democracy and that the interpretation of the law must be looked at in the context of democracy and the fundamental principles that govern it. He contended that the Electoral Process Act could not be read in isolation but should be interpreted in the context of Zambia as a constitutional democracy, citing the Kenyan case of **Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and 2 others.**[17] Mr. Mweemba argued that one of the fundamental principles of democracy, which also applies to elections, is citizen participation and sovereignty of the people. That people have a right to participate without being intimidated. Counsel also cited government accountability and transparency and the principle of regular, free and fair elections.

Submitting on ground four of the appeal, Mr. Mweemba argued that the law does not provide for quantitative analysis as to whether the election was materially affected or not, hence the use of the word 'may' in section 97 of the Act. Counsel referred

us to Articles 8 and 9 of the Constitution on the national values and principles, that section 97 of the Act should be interpreted in light of the same.

Reiterating his point that there was nothing in the Act that suggested that if a candidate was not linked to a malpractice the election could not be annulled, Mr. Mweemba argued that the 8th August, 2016 attack on the UPND bus in Mtendere was widely known as it was in both the print and electronic media. That the 2nd Appellant was part of the proceedings and if it was found wanting, the election could still be nullified even if the 1st Respondent had not proved that the 1st Appellant or her agents were liable. Counsel contended that the court has the power to nullify an election if the principles of democracy are breached.

In opposing ground one, Mr. Mweemba contended that the Ministers' stay in office was illegal from the time Parliament was dissolved. That as the record showed, the 1st Appellant had conceded to remaining in office after the dissolution of Parliament. Counsel wound up his submissions by urging this Court not to interfere with the judgment of the court below, citing

Wilson Masauso Zulu v Avondale Housing Project Limited[18] for authority.

The 1st Appellant filed heads of argument in reply on 23rd February, 2017. In regard to the 1st Respondent's assertion that the 1st Appellant was not qualified to stand as Member of Parliament for Munali Constituency because she was a constitutional office holder, the 1st Appellant cited Article 266 of the Constitution to argue that Ministers and Members of Parliament were excluded from the definition of 'public officer' and 'constitutional office holder'. It was submitted that Article 266 aforesaid puts it beyond doubt that not all persons acting in or holding a public office are public officers for purposes of interpreting the provisions of the Constitution. The 1st Appellant argued that the 1st Respondent's assertion was misconceived and should be dismissed. Further, it was the 1st Appellant's contention that, contrary to the 1st Respondent's assertion, there is nowhere in the record, including the portions relied on by the 1st Respondent, where the 1st Appellant referred to herself as a constitutional officer holder or public servant, thus triggering the provisions of Article 70(2)(b) of the Constitution. That the 1st

Appellant's evidence was simply that she served as Minister of Gender following the dissolution of Parliament, up to the delivery of the judgment of this Court in **Steven Katuka.**[4] It was further contended that the 1st Respondent's proposition on the alleged failure by the 1st Appellant to vacate her ministerial position before deciding to contest the Munali seat was not supported by any authority.

On the 1st Respondent's comparison of the present case and **Mabenga v Wina**[1] on the question of abuse of Government resources in election campaigns, it was the 1st Appellant's contention that the issue was not one of access to public resources but the use of such resources for campaign purposes. That regulation 7(1)(l) and 7(2) relied on in **Mabenga v Wina**[1] was couched in terms similar to regulation 15(1)(k) of the current Electoral Code of Conduct. It was submitted that the 1st Respondent had not addressed the use of Government facilities for campaign purposes and, therefore, no parallel could be made between the present case and **Mabenga v Wina**[1].

In regard to issues arising in ground two, it was the 1st Appellant's contention that it was the court below in its judgment

that found the UPND liable for perpetration of violence. That if the 1st Respondent wished to challenge this finding, she ought to have filed a cross-appeal in accordance with the rules of this Court. As the 1st Respondent had not done so, it was submitted that arguments concerning that finding ought to be dismissed. In the alternative, the 1st Appellant submitted that RW10 did not testify that the UPND did not engage in acts of violence in Munali Constituency. That to the contrary, RW10's evidence was that the 2nd Appellant had reached the conclusion that supporters of the PF and the UNPD had been involved in a violent incident on 8th August, 2016 in Mtendere. Further, that RW10 did not testify that the PF supporters were the perpetrators and UNPD supporters the victims. That the 2nd Appellant admonished both the PF and the UPND.

In regard to the 1st Respondent's argument that RW10's evidence confirmed media reports on the 8th August, 2016 incident, it was the 1st Appellant's position that RW10 did not indicate who received the media report, which media or news outlets and access by the majority of the voters of the said media in Munali constituency. Also, that RW10 did not indicate what

was reported and how and whether any video or photographs of anything relating to the incident were published or televised. The 1st Appellant submitted that it is the duty of a petitioner to adduce evidence to a high degree of convincing clarity that the majority of voters in a constituency were or may have been affected by the misconduct alleged and that, in this case, the 1st Respondent had failed to adduce evidence to that effect.

To augment, State Counsel Mutale contended that the judgment of the court below ought to be set aside. He submitted that the 1st Respondent did not adduce any evidence of abuse of Government resources and urged the Court to discredit the evidence of PW5. And on the 8th August, 2016 attack on the UPND campaign bus, Mr. Mutale, SC., argued that no witness was called to identify the perpetrators of the violence. That even if the perpetrators were identifiable, it would have been pertinent for the court to ascertain whether they were the legitimate election agents of the 1st Appellant as defined by the Act.

State Counsel Mr. Silwamba, supplementing, referred this Court to section 97(2)(a)(ii) of the Act, arguing that the law was clear that to nullify an election the malpractice must be

committed by the candidate or her agents and that the majority must have been prevented from electing a candidate of their choice. Further, that section 97(3) of the Act is clear on the role of an election agent. Our attention was also drawn to the following excerpt of the judgment of the court below at page 63 of the record of appeal:

> **"The allegation concerning lack of or the inadequacy of Form Gen12 did not affect the Petitioner alone. Suffice to state that it affected all the participants in that Parliamentary race."**

Mr. Silwamba, SC, submitted that the 1st Respondent had not cross-appealed that finding of the court below. He submitted that this Court addressed the issue of Form GEN12 in **Giles Chomba Yamba Yamba.**[11]

Mr. Lungu added that the **Steven Katuka**[4] case distinguished between whether the Ministers' stay in office after dissolution of parliament was void or voidable and did not create an irrebuttable presumption on the abuse of Government resources. He contended that the 1st Respondent still had to adduce evidence that Government resources were abused. And on the 8th August, 2016 incident of violence, counsel submitted that nullification on the basis of generalized violence was not

pleaded in the court below and the 1st Respondent was not entitled to go outside the pleadings. And in regard to determining the effect on the majority, Mr. Lungu discounted the 1st Respondent's argument that it was not possible to quantify the claim that the majority of voters were precluded from electing their preferred candidate, citing the case of **Mubika Mubika v Poniso Njeulu**[6] for support.

Mr. Mwala, on behalf of the 2nd Appellant, submitted that the 2nd Appellant called in a witness, RW12, who testified that Form GEN12 was provided at every polling station in excess of 20 copies per election. Mr. Mwala argued that the court below glossed over RW12's evidence and chose to accept the evidence of PW5 who, in his view, was discredited. Drawing our attention to page 65 of the record of appeal, Mr. Mwala submitted that the court below misdirected itself in finding that the failure to countersign a GEN12 form amounted to a failure to provide the document at polling stations, citing section 49(2) of the Electoral Process (General) Regulations and the case of **Mazoka v Mwanawasa**[3] for support.

We are grateful to the parties for the detailed submissions advanced in this appeal. We have carefully considered the grounds of appeal and the written and oral submissions for and against this appeal. We have also given careful consideration to the judgment of the court below and the evidence on record. From the outset, it is clear to us that this appeal attacks the judgment of the court below on aspects of both law and fact. The key question in this appeal is whether the learned Judge in the court below was on firm ground when he found that all the allegations brought against the 1st Appellant and the 2nd Appellant were proved in accordance with the requirements of the current electoral laws based on which he proceeded to nullify the election of the 1st Appellant as Member of Parliament for Munali Constituency in the 11th August, 2016 general elections.

This Judgment comes at a time when this Court has had occasion to pronounce itself on key aspects of the new electoral legal regime as espoused by the Act. That notwithstanding, before we proceed to address the grounds of appeal in the instant case, we find it imperative, and in order to put things in context, to

restate our position on the current state of the law governing the nullification of elections in Zambia.

Section 97(2) of the Act is central to the judicial resolution of electoral disputes. Section 97(2)(a) is couched in the following terms:

> **"97. (2). An election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or tribunal as the case may be, that-**
>
> **(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election-**
>
> **(i) by a candidate; or**
>
> **(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and**
>
> **the majority of the voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;"**

As earlier stated, we have, in unequivocal terms, stated our position on the above provisions. In order for a petitioner to successfully have an election annulled pursuant to section 97(2)(a), there is a threshold to surmount. The first requirement is for the petitioner to prove to the satisfaction of the court, that the person whose election is challenged personally or through his

duly appointed election or polling agents, committed a corrupt practice or illegal practice or other misconduct in connection with the election; or that such malpractice was committed with the knowledge and consent or approval of the candidate or his or her election or polling agent. Sections 81 to 95 in Part VIII of the Act and also relevant provisions of the Electoral Code of Conduct outline the corrupt or illegal practices or misconduct in the electoral process.

In addition to proving the electoral malpractice or misconduct alleged, the petitioner has the further task of adducing cogent evidence that the electoral malpractice or misconduct was so widespread that it swayed or may have swayed the majority of the electorate from electing the candidate of their choice. Recently in **Austin Liato v Sitwala Sitwala**[19] we said:

> **"...it is not sufficient for a petitioner to prove only that a candidate committed an illegal or corrupt practice or engaged in other misconduct in relation to the election without proof that the illegal or corrupt practice or misconduct was widespread and prevented or may have prevented the majority of the voters in the constituency, district or ward from electing a candidate of their choice."**

We reaffirm the above position.

> "...we wish to assert that it cannot be seriously disputed that parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probability. It follows, therefore, that in this case where the petition has been brought under Constitutional provisions and would impact upon the governance of the nation..., no less a standard of proof is required. It follows also that the issues raised are required to be established to a fairly high degree of convincing clarity."

We have also expressed agreement with the sentiments expressed in **Brelsford James Gondwe v Catherine Namugala**[2] that:

> "The burden of establishing any one of the grounds lies on the person making the allegation and in election petitions, it is the petitioner in keeping with the well settled principle of law in civil matters that he who alleges must prove. The ground(s) must be established to the required standard in election petitions namely a fairly high degree of convincing clarity."

It is the foregoing principles and law that will guide this Court in determining the issues raised in this appeal.

Ground one is to the effect that the learned Judge in the court below erred in law and in fact when he held that the continued stay of the 1st Appellant in office as a Cabinet Minister created an irrebuttable presumption of the abuse of Government resources and that such abuse materially affected the outcome of the election in Munali Constituency. The 1st Respondent submitted that the court below was on firm ground when it found

that the 1st Appellant had used Government resources during the campaign and that that adversely affected the 1st Respondent. That by her own admission, the 1st Appellant stated that she was a Minister in the Ministry of Gender and, thus, she had failed to comply with the Constitution when she did not vacate her ministerial position before standing as a candidate in Munali Constituency. Further, that there was abundant evidence on record that the 1st Appellant had used a Government vehicle and that she was occupying a Government house, contrary to regulation 15(1)(k) of the Electoral Code of Conduct.

However, under cross-examination as shown at page 604 of the record of appeal, the 1st Respondent failed to adduce evidence that the 1st Appellant did in fact use her ministerial salary and allowances in the campaign. And as shown at page 633 of the record of appeal, the 1st Respondent could not recall the registration number of the Government vehicle she allegedly saw the 1st Appellant in and could not state the name of the Government driver allegedly used by the 1st Appellant during the campaign.

It was also the 1st Respondent's testimony that the 1st Appellant, as Minister, inspected on-going Government projects in the constituency, although, as shown at page 590 of the record of appeal, the 1st Respondent conceded that she was aware of some of the developmental projects the 1st Appellant initiated since her election as Member of Parliament in 2011. The 1st Respondent also testified that she was denied permission by the police to hold meetings while the 1st Appellant was allowed to freely have public meetings because she was a Minister.

PW5, Wendy Lwendo Michelo, a polling agent, testified that during the campaign she saw the 1st Appellant being driven in a white Government vehicle with a flag on it in Kaunda Square Stage 2 and that a Noah bus in PF colours was following behind. As shown at page 737 of the record of appeal, PW5 described the alleged Government vehicle as "white in colour similar to a Hardbody" but conceded to not having details of the driver. At page 730 of the record of appeal, PW5 stated that the 1st Appellant distributed chitenge materials at a house.

In rebuttal, the 1st Appellant denied using public resources in her campaign. She argued that the 1st Respondent failed to

adduce cogent evidence that the 1st Appellant abused Government resources in the course of her campaign for the Munali parliamentary seat. At page 874 of the record of appeal, the 1st Appellant testified that she knew the regulations and rules and did not remember using Government transport, fuel or driver on any day. It was her testimony that her salary was meagre and she raised K100,000 from well-wishers and also used her gratuity from Parliament in the sum of K88,000 to fund her campaign. The 1st Appellant testified that she had two personal vehicles, a Toyota Noah and a Toyota Regius, lined up for her campaign and did not use her official Government vehicle, a gray Land Rover Discovery.

RW1, Steven Chanda, the 1st Appellant's Campaign Strategist, RW2, Humphrey Tembo, a business man and RW3, Martin Mwanza, in charge of planning, also testified that the 1st Appellant did not use Government transport during the campaign as alleged but that she had designated her two personal vehicles to the campaign. RW4, Watson Mtonga, also testified that the 1st Appellant did not use a Government vehicle or driver during the campaign. RW1 added that there were other personal vehicles

from volunteers used in the 1st Appellant's campaign and that RW2 or himself drove the 1st Appellant during the campaign.

We have carefully considered the submissions on this ground and the evidence on record. From our perspective, the key question that falls for our consideration is whether, on the totality of the evidence on this aspect, the 1st Appellant, in her capacity as Minister, utilized public or Government resources towards her campaign contrary to the provisions of the electoral laws and regulations and that such malpractice affected the majority of the electorate in Munali Constituency as required by section 97(2)(a) of the Act.

Regulation 15(1)(k) of the Electoral Code of Conduct provides as follows:

> **"15(1) A person shall not –**
> ...
> **(k) use Governmental or parastatal transportation or facilities for campaign purposes, except that this paragraph shall not apply to the President and the Vice President in connection with their respective offices;"**

The provision is clear. Use of Government or public resources by any person in the course of a campaign is proscribed except for the President and the Vice President. The allegation against the 1st Appellant is essentially that she fell

afoul of regulation 15(1)(k) aforesaid in her pursuit of the Munali parliamentary seat.

According to the record, the learned Judge in the court below was of the view that the lacuna in the 1st Appellant's testimony was that he had not seen any guideline to preclude a minister from using Government resources during the campaigns. The specific words of the learned trial Judge at page 52 of the record of appeal were as follows:

> **"The lacuna in her evidence is that I have not seen any government guideline to preclude a Minister from using government resources such as a government motor vehicle during campaigns. Ministers had government resources at their disposal...."**

The 1st Appellant submitted that the court below misdirected itself when it shifted the burden of proof on the allegation that she used a Government vehicle in the campaign; also, that there were discrepancies in the evidence regarding the make of the Government vehicle allegedly used by the 1st Appellant. Further, that the trial Judge did not apply the correct standard of proof in election petitions and relied on presumptions in finding that the allegations were proved. The 1st Appellant further argued that the court below misapprehended the holding

of this Court in **Steven Katuka**[4], which tainted its reasoning and that it failed to distinguish between void and voidable acts.

We note that at page 48 of the record of appeal, the learned trial Judge reminded himself of the applicable principles on the burden and standard of proof in election petitions. His exact words were:

> **"I now remind myself that the burden of proof rests on the Petitioner. In an election petition like the one in casu, the standard of proof required though a civil matter is higher than 'on a balance of probabilities' in order that the allegations raised must be proved to a fairly high degree of convincing clarity."**

We agree with the learned trial Judge on the correct position of Zambian jurisprudence as far as election petitions are concerned. However, we also note that the 1st Appellant argued that in considering the issues in ground one, the learned trial Judge shifted the burden of proof from the 1st Respondent, the petitioner in the court below, to the 1st Appellant, who was the respondent. Mr. Mutale, SC, for the 1st Appellant, drew our attention to this Court's decision in **Abiud Kawangu v Elijah Muchima**[12] where we said at page J19 to J20:

> **"We agree with the Respondent's submission that the burden lay on the Appellant as Petitioner in the court below to prove the allegations made in his petition against the Respondent. This is because the one alleging... carries the burden of proving all the allegations. He must**

> prove the allegations to the required standard with cogent evidence otherwise no judgment will be entered in his favour."

We reaffirm that position here. In particular, we emphasise that the burden resting squarely on the shoulders of the person alleging is to adduce cogent evidence to prove the allegation, without which judgment will not go in his or her favour. In the instant case, the 1st Respondent is the one that brought the allegation against the 1st Appellant that she abused Government resources to propel her campaign for the Munali parliamentary seat. Thus, it was incumbent upon the 1st Respondent to demonstrate, with convincing clarity by way of cogent evidence, the affirmative of the allegation to the effect that the 1st Appellant committed electoral infractions contrary to regulation 15(1)(k) of the Electoral Code of Conduct. We, therefore, find it odd that the trial Judge placed the burden on the 1st Appellant to prove that indeed she did not use or abuse Government or public resources in her bid to secure the Munali parliamentary seat. The learned trial Judge clearly misdirected himself despite having reminded himself of the settled position of the law on who bore the burden of proof. At page 52 of the record of appeal, the trial Judge said:

> "Ministers had government resources at their disposal. It was left solely to the Ministers themselves whether or not to avail themselves of

those government resources, of which the 1st Respondent denies having used government resources."

Evidence on the record shows, as the trial Judge acknowledged, that the 1st Appellant denied availing herself of Government resources in her campaign. We have not seen any concrete evidence on the record from the 1st Respondent to show, with convincing clarity, that the 1st Appellant, despite her denials, actually abused Government resources as alleged and, as a consequence, committed a breach of the law prohibiting abuse of Government resources in election campaigns.

Our firm view is that the 1st Respondent failed to establish with convincing clarity that the 1st Appellant abused Government resources in her campaign, contrary to regulation 15(1)(k) of the Code of Conduct. Further, there was no evidence adduced by the 1st Respondent to show how the alleged misconduct affected the majority of the electorate. The 1st Respondent's evidence on this allegation clearly failed the test required in section 97(2)(a) of the Act and we, accordingly, reverse the finding of the court below on this aspect.

On the alleged use of a Government vehicle by the 1st Appellant during the campaign, evidence on record shows that

there were discrepancies on the type of Government vehicle the 1st Appellant allegedly used. At page 589 of the record of appeal, the 1st Respondent could not say for certain what kind of Government vehicle she saw the 1st Appellant in but said it was white in colour and "looked like a Prado VX." PW5, under cross-examination at page 737 of the record of appeal, described it as "white in colour similar to a Hardbody." The 1st Appellant herself testified at page 877 of the record that her official vehicle was a gray Land Rover Discovery and her personal-to-holder vehicle was a gold Toyota GX. The learned trial Judge's position, as stated at page 52 of the record of appeal, was as follows:

> **"Truly, the 1st Respondent had her personal motor vehicles, namely, a Toyota Noah and a Toyota Regius which she used during her campaigns <u>but I have not seen evidence to show that she truly did not use a government motor vehicle as well</u>."** (emphasis added)

Clearly, the learned trial Judge accepted the 1st Appellant's evidence and made a finding of fact that she had her personal vehicles which she used in her campaign. What is perplexing to us is that the trial Judge also expected the 1st Appellant to demonstrate that she truly did not use a Government vehicle as well. Again, this was a clear reversal of the burden of proof on this aspect and a misdirection on the part of the trial Judge. We

reiterate our position that the 1st Respondent bore the burden of proof and the onus was on her to prove her allegations with convincing clarity. Given the clear discrepancies in her testimony and that of her key witness PW5, as to the type of Government vehicle allegedly used by the 1st Appellant and that no evidence was adduced on the identity of the alleged Government driver, we find that the 1st Respondent did not discharge that burden. In the absence of clear and convincing evidence on this point, we cannot support the finding of the court below.

Another aspect on this ground is that the 1st Appellant used her salary as Cabinet Minister towards the campaign. The 1st Respondent, at page 604 under cross-examination could not specifically point to what the 1st Appellant used her salary and allowances on during the campaign, insisting only that she knew as a fact that the 1st Appellant continued to get her salary despite being adopted as a candidate for Munali constituency; this, she said, was unfair. In rebuttal, the 1st Appellant's position was that she used her gratuity from Parliament and funds from well-

wishers to finance her campaign; that she used her salary to pay domestic workers and for personal upkeep.

The position of the court below at pages 53 to 54 of the record of appeal was as follows:

> "Indeed that was an admission that the salary which she was paid was spent on her campaigns. She was paid that salary as a Minister, the office which she held illegally. To the extent that she held the office of Minister illegally it follows that even the salaries which accrued to her were paid illegally, she was not entitled to that money. Those salaries were government money which she used to fund her campaigns." (emphasis added)

It is not in dispute that the 1st Appellant held the position of Cabinet Minister during the 2016 election campaign period. However, the flaw in the learned trial Judge's finding is that it was made on a mere assumption that because the 1st Appellant was a Cabinet Minister then she must have used her earnings towards the campaign. As we have noted already, the 1st Respondent in her testimony could not say how the 1st Appellant used her salary, except to maintain that she knew as a fact that the 1st Appellant was receiving her salary. We have also not seen any evidence on record to demonstrate that the alleged malpractice prevented or may have prevented the majority of the electorate from electing their preferred candidate.

Taking into account the evidence before the court below, we find that the requirements of section 97(2)(a) of the Act were not satisfied in regard to the issues raised under this ground. We find that ground one of this appeal has merit. We accordingly reverse the finding of the court below and hold that the 1st Respondent did not prove, with convincing clarity, that the 1st Appellant abused government or public resources in her campaign as alleged.

In ground two, the 1st Appellant contends that the court below erred in law and in fact when it annulled the poll in Munali Constituency based on the attack of a UPND campaign bus in Mtendere on 8th August, 2016 without evidence linking the 1st Appellant or her election agent to the said act of violence. The 1st Respondent's testimony was to the effect that as her campaign entourage approached Mtendere on 8th August, 2016, they saw "a group of PF members" running towards their direction and the other vehicles in her procession scampered in all directions. The male cadres on the bus tried to block the PF supporters but were no match for them and the alleged PF members came onto the bus and attacked the 1st Respondent and threatened to rape her.

The 1st Respondent testified that she lost consciousness; that when she regained consciousness, she found herself in a taxi surrounded by female residents of the area; that the PF cadres regrouped and came towards the taxi and the taxi driver abandoned her at a house about 100 metres from the scene of the bus attack. The 1st Respondent testified that some police officers came on the scene and later she ended up at Levy Mwanawasa Hospital.

PW2, Christopher Hamoonga, testified that on 8th August, 2016, before the UPND campaign bus reached Mtendere main market, a group of people he described as clad in PF regalia run towards the bus armed with stones and machetes. That he jumped off the bus and went to observe the incident from a distance and heard the attackers talking about raping the 1st Respondent and that they removed UPND campaign materials from the bus. In re-examination, as shown at page 666 of the record, PW2 stated that the distance from the scene of the attack to Mtendere East where the 1st Appellant was holding meetings was about three to four kilometres. PW3, Joseph Chilekwa, filmed the attack.

PW6, Kelvin Pilati Hamwete's testimony was that he was at a bus station waiting for a friend when he witnessed PF youths organizing themselves and giving each other t-shirts. He telephoned the UPND Youth Chairperson who advised him to wait at the station. Shortly afterwards PW6 saw what he described as a "small Canter" from which was playing a UPND party song; that when it reached the market, the PF youths chased the vehicle. Then he was informed that the UPND bus had been attacked and that one person had been killed.

In her testimony, the 1st Appellant denied any connection to, or knowledge of the attack on the UPND campaign bus. She asserted that she was in Mtendere East, about five kilometres away, when RW6, Rachel Phiri Nyangu, called her to warn her not to proceed to Mtendere because of the violent incident.

RW1 testified that the 1st Appellant did not sponsor the attack on the UPND campaign bus; that the 1st Appellant was five kilometres away in Mtendere East at the material time. RW2's evidence was that he was with the 1st Appellant in Mtendere East when she received a telephone call on the incident and abandoned her plans to meet marketeers in Mtendere. RW3's

testimony was to the effect that on 8th August, 2016, the 1st Appellant planned meetings in Mtendere and Mtendere East. That the 1st Appellant was in Mtendere East conducting door-to-door meetings when her team received information about the violent incident in Mtendere and the planned meetings were abandoned.

RW4 also testified that on the material day, he was at Mtendere market waiting for the 1st Appellant, who was in Mtendere East conducting door-to-door meetings; that the 1st Appellant was scheduled to meet some women at the market to lobby for their support. RW4 stated that he received a telephone call from RW6 informing him about the incident and that she had communicated to the 1st Appellant and RW1. That the planned meeting at Mtendere market was then abandoned. RW6 testified that on 8th August, 2016 she saw a red double decker bus coming from the direction of Kabulonga. That the bus stopped and three people clad in UPND regalia alighted and started hurling stones at people who were on the road side. She confirmed calling RW1, RW4 and the 1st Appellant, who informed

her that she (the 1st Appellant) was in Mtendere East addressing a small meeting.

As the record of appeal shows at page 922, RW10, Crispin Nasilele Akufuna, Public Relations Manager for the 2nd Appellant, testified that in July 2016, the 2nd Appellant suspended campaigns in Lusaka due to rising levels of intolerance which escalated into violence, including loss of life and damage to property. That the suspension of campaigns was meant to remind political parties of their obligations under the Electoral Code of Conduct. RW10 also testified that the 2nd Appellant strongly condemned the violence in Mtendere in a national address, urging both the PF and the UPND to remind their supporters not to engage in violence.

We have viewed the video evidence and given careful consideration to the submissions and the evidence on record on this ground of appeal. As the learned Judge in the court below rightly observed, it is not in dispute that on the afternoon of 8th August, 2016, violence erupted in Mtendere in which a UPND campaign bus and its occupants came under attack. What is in dispute is whether or not the 1st Appellant perpetrated the violent

act against the 1st Respondent and, as a consequence, violated the electoral laws and regulations.

In order for us to appreciate the real issue in controversy, we find it necessary to restate the allegation as it appeared in paragraph 5(ii) of the petition as shown at page 73 of the record of appeal and which reads as follows:

> **"That on the 8th August 2016 on or about 15:00 hours, she sponsored violent cadres in Mtendere and attacked us and destroyed the party campaign bus."**

The allegation in paragraph 5(ii) of the petition is very specific and unequivocal. In our understanding, the 1st Respondent clearly claimed that the 1st Appellant sponsored the attack on the UPND campaign bus on 8th August, 2016 resulting in its destruction. According to the **Concise Oxford English Dictionary** a sponsor is, *inter alia*, a person taking official responsibility for the actions of another. The **Pocket Oxford Dictionary & Thesaurus** includes the words "backer", "promoter", "supporter" and "contributor" as synonyms of the word "sponsor". In effect, therefore, the allegation of the 1st Respondent was that the 1st Appellant backed, promoted or contributed to the violent attack on the UPND campaign bus.

Regulation 15(1)(a) of the Electoral Code of Conduct states:

> **"A person shall not -**
>
> **(a) cause violence or use any language or engage in any conduct which leads or is likely to lead to violence or intimidation during an election campaign or election;"**

Also, section 83(1)(g) of the Act says:

> **"A person shall not directly or indirectly, by oneself or through any other person –**
> ...
> **(g) unlawfully prevent the holding of any political meeting, march, demonstration or other political event."**

The foregoing provisions show that the law proscribes violence, intimidation and similar conduct in the electoral process. The Act in section 83(1)(g) also prohibits the unlawful prevention, by any person, of the stated political activities. As we have already noted, it is not in dispute that the UPND campaign bus was attacked in Mtendere on 8th August, 2016. The key question, as we see it, is whether or not the violent attack on the UPND campaign bus was directly or indirectly perpetrated by the 1st Appellant as alleged by the 1st Respondent in her petition in the court below. At page 54 of the record of appeal, the learned trial Judge stated as follows:

> **"There is no dispute that the UPND campaign bus was attacked in Mtendere on 8th August, 2016 at about 15.00 hrs. There are only two disputes. The first dispute is that the attackers of that UPND bus were sponsored by the 1st Respondent. The 1st Respondent vehemently**

> denied sponsoring cadres to attack that UPND campaign bus. I have seen no evidence to show or even to suggest that the 1st Respondent sponsored cadres to attack that UPND campaign bus." (emphasis ours)

It is unequivocal from the holding of the learned trial Judge that, though the attack on the UPND campaign bus happened, there was no evidence to link the 1st Appellant, or even to suggest her connection or contribution, to the violent incident. We have also carefully searched the record on this aspect and we have not seen evidence connecting the 1st Appellant to the incident.

As we noted *supra*, the first requirement in section 97(2)(a) of the Act is for the petitioner in an election petition to prove, with convincing clarity, and on the basis of cogent evidence, that the candidate whose election is disputed engaged in a corrupt or illegal practice or other misconduct in connection with the election. In the instant case, the court below found no evidence connecting the 1st Appellant to the attack on the UPND campaign bus. The learned Judge went as far as stating that there was nothing to even suggest that the 1st Appellant conducted herself as alleged by the 1st Respondent. None of the witnesses, including the 1st Respondent herself, proffered evidence directly addressing the allegation as it was framed in the petition. All the

testimony was to the effect that violence had erupted in Mtendere on the afternoon of 8th August. 2016 in which the UPND campaign bus and its occupants were attacked by alleged PF supporters. At page 49 of the record of appeal, the learned trial Judge reminded himself that the petitioner's evidence must support the pleadings which are in the petition. Citing **Saul Zulu v Victoria Kalima,**[20] the trial Judge said:

> **"The Petitioner is not allowed to bring in any evidence other than the evidence which is connected to the pleadings and goes to support those pleadings. Put simply, pleadings in an election petition are allegations by the Petitioner against the Respondent(s). What this means is that the Petitioner cannot go at sea, the Petitioner is restricted only to the evidence which is supportive of the allegations outlined in the petition. If the Petitioner or indeed any witness for the Petitioner adduces evidence which does not support the pleadings then that evidence is irrelevant and inadmissible to the extent of its irrelevancy."**

And referring to the cases of **Michael Mabenga v Sikota Wina,**[1] **Brelsford James Gondwe v Catherine Namugala**[2] and **Anderson Mazoka v Levy Mwanawasa,**[3] the trial Judge categorically said:

> **"What this means is that I must look out only for evidence which supports the pleadings in the petition."**

We have carefully perused the record and, having viewed the video which was availed to us on the violence in Mtendere on 8th August, 2016, we find that there is no evidence supporting the allegation as couched in paragraph 5(ii) of the petition as shown

at page 73 of the record of appeal, that the 1st Appellant sponsored violent cadres to attack the 1st Respondent's campaign bus.

The next question that arises is, if the 1st Appellant was not personally involved, could she still be culpable indirectly? Under section 97(2)(a)(ii) of the Act, an election can be annulled on account of a corrupt or illegal practice or other misconduct committed in connection with the election "with the knowledge and consent or approval of a candidate or of that of a candidate's agent or polling agent." The 1st Appellant testified at pages 879 to 880 of the record of appeal that at the time of the attack on the UPND bus, she was conducting her own activities and did not know of the 1st Respondent's programme on the material day; that she just got a warning call from RW6 about what was happening in Mtendere and was advised not to proceed there for her planned campaign activities.

We have perused the record on this aspect and note that the 1st Respondent did not adduce any evidence to show that the 1st Appellant knew of the attack or that any of her duly appointed election agents were involved or knew or approved of the incident.

That there were violent clashes involving political party cadres and supporters during the 2016 campaign period is indisputable. The testimony of RW10 confirmed that there were rising levels of violence in Lusaka leading to the 2nd Appellant suspending campaigns in July, 2016. Also, that the 2nd Appellant strongly condemned the violence in Mtendere in a national address. At page 922 to 923 of the record of appeal, RW10 said:

> **"The Commission also condemned in very strong terms the violence that occurred specifically in Mtendere through a national address and cited both the ruling PF and the UPND to ensure that they as a party or parties followed provisions of the code of conduct and remind their supporters not to engage in violence."**

We wish to say from the outset that we frown upon and condemn all forms of electoral violence. We are of the firm view that elections must be conducted in a peaceful environment and in strict adherence to the Electoral Code of Conduct.

However, for purposes of the instant case, the key issue that falls for our consideration is whether or not the 1st Appellant, as a candidate, or through her election agents knew or approved of the violent incident of 8th August, 2016 in Mtendere. According to the court below, the 1st Appellant had "not sufficiently shown to the court what measures she took in order to cage her

supporters and/or agents whose violent conduct had then become a notorious fact..."

As already mentioned, the 1st Appellant, whose election was annulled by the court below, was a candidate for the PF party. At page 55 of the record of appeal, the court below said the following:

> **"The second dispute is that the attackers of that UPND campaign bus were PF cadres. The 1st Respondent denied that they were PF cadres. I do not agree with the 1st Respondent. I say so because there is evidence that the 1st Respondent was not at the scene of the attack....The 1st Respondent can, therefore, not know whether those attackers of the UPND campaign bus were PF or not because she was not at the scene of the attack and did not see the attackers for her to positively say they were not PF cadres."**

And at page 67 of the record of appeal, the trial Judge concluded thus:

> **"There is evidence that the campaigns in Munali Constituency Parliamentary elections were marred with violence. This violence reached a crescendo when on 8th August, 2016 the UPND campaign bus was attacked by PF cadres. Apart from saying that she was not at the scene of the attack and that she did not know of the attack, F/Nkandu Luo has not sufficiently shown to the court what measures she took in order to cage her supporters and/or agents whose violent conduct had then become a notorious fact even to the 1st Respondent."** (emphasis ours)

The 1st Appellant contended that the finding by the learned trial Judge was perverse and a misdirection as she could not be expected to demonstrate measures taken to "cage" her supporters

as she had no burden of proof to discharge and that the finding of the court below fell outside the ambit of the pleading and the law.

We agree with the 1st Appellant. From our perspective, it appears that the trial Judge not only reversed the burden of proof on this allegation but apportioned blame onto the 1st Appellant for violent acts that PF supporters or cadres generally could have been engaged in during the campaign. As a consequence, the trial Judge held that the allegation was proved.

The law as provided in section 97(2)(a)(ii) of the Act is very clear. In his evaluation of the evidence before him, and having initially determined that the 1st Appellant was not personally involved, the learned trial Judge should have carefully considered whether, in the totality of the evidence available to him on this aspect, the 1st Appellant, or her duly appointed election agent, was responsible for the attack on the UPND campaign bus within the terms of section 97(2)(a)(ii) of the Act. The trial Judge did not do that. Instead, we note that he held the allegation as proved simply on his finding that there were PF cadres involved and that the 1st Appellant did not show what measures she took to control

her supporters. This was a gross misdirection on the part of the learned trial Judge. Recently in **Crispin Siingwa v Stanley Kakubo,**[21] we cited with approval, as we have done in our earlier decisions, the holding of the Supreme Court in the case of **Lewanika v Chiluba**[5] wherein it said:

> **"...a candidate is only answerable for those things which he has done or which are done by his election agent or with his consent. In this regard, we note that not everyone in one's political party is one's election agent since...an election agent has to be specifically so appointed."** (emphasis added)

Section 2 of the Act defines "election agent" as:

> **"a person appointed as an agent of a candidate for the purpose of an election and who is specified in the candidate's nomination paper."**

Also, regulation 55(1) of the Electoral Process (General) Regulations 2016 reads as follows:

> **"A candidate shall name an election agent in the nomination paper and, subject to the other provisions of this regulation, the person named shall be the election agent of the candidate for the purpose of that election."**

As we have stated above, in the holding of the court below as reflected at page 67 of the record of appeal, the trial Judge said the 1st Appellant needed to show "measures she took" to "cage her supporters and/or agents." State Counsel Mutale had submitted that no witness was called to identify the perpetrators of the violence and that even if they were identifiable, it was

pertinent for the court below to ascertain whether they were the legitimate election agents of the 1st Appellant as defined by the Act.

We agree. A careful perusal of the record reveals that the 1st Respondent did not adduce a shred of evidence to support the involvement of the 1st Appellant's duly appointed election agents in the violent act. Neither was it shown in evidence that the 1st Appellant or her election agents knew of the attack on the UPND campaign bus. According to the record, the 1st Appellant only became aware of what had transpired when she was informed by telephone.

That cadres or supporters of the PF were implicated in the attack is not enough to attach responsibility to the 1st Appellant or her duly appointed election agents and to annul the election on the basis of section 97(2)(a)(ii) of the Act. In **Richwell Siamunene v Sialubalo Gift**[22] we said the following:

> **"Mere proof that the UPND supporters were indeed involved in the said acts does not warrant an inference being drawn that the Respondent had directly or indirectly incited the UPND supporters to act as they did. To so hold would amount to speculation and it is not the duty of this Court to make assumptions based on nothing more than party membership and candidacy in an election."**

Our firm view is that, in the circumstances of the instant case, the threshold in section 97(2)(a)(ii) aforesaid was not reached. Considering the gravity of the allegation and taking into account the fact that the occurrence of the attack was not in dispute, the court below should have seriously assessed the evidence before it on this aspect in light of the clear requirements of section 97(2)(a)(ii). The 1st Respondent had brought to our attention the holding in **Mlewa v Wightman**[14] as reflected at page 424 of the record of appeal, to the effect that it does not matter who the wrongdoer is. Our firm position is that that argument is not tenable under the current electoral law as espoused in section 97(2) of the Act and we accordingly discount it.

Learned counsel Mr. Phiri, for the 1st Respondent, had submitted that though there was nothing on the record to show that the 1st Appellant sponsored the attack on the UNPD bus, ground two should still fail as the 1st Appellant benefitted from what happened because the incident had an effect on the election. We disagree. The onus was on the 1st Respondent, to demonstrate with convincing clarity, in terms of the current electoral law, that the 1st Appellant or her election agents were

directly or indirectly connected to the alleged violent act. In this regard, our views in **Richwell Siamunene v Sialubalo Gift**[22] were that:

> **"When section 83 is read with section 97, it is clear that the violence or threat of violence must be perpetrated by the candidate or with the candidate's knowledge and approval or consent or that of his election or polling agent. In order for the candidate to be liable for the illegal practice or misconduct, it must be shown to be that of his official agent; there must be proof to the required standard that he had both knowledge of it and approved or consented to it; or that his election or polling agent had knowledge and consented to or approved of it."**

We reaffirm that position.

We further find as untenable the argument by learned counsel Mr. Mweemba that the election could still be nullified as long as the 2nd Appellant was part of the proceedings even if the 1st Respondent had not proved that the 1st Appellant or her agents were liable for the attack on the campaign bus as alleged in the petition.

We agree with State Counsel Mutale that the 1st Respondent failed to adduce evidence that the 1st Appellant or any of her election agents were involved in attacking the 1st Respondent's campaign bus. Further, there was no evidence that the violence was with the 1st Appellant's knowledge, consent or approval or that of her agents. We also find that the learned trial Judge

veered from the specific allegation as contained in paragraph 5(ii) of the petition to hold that it had been proved, on the basis of which he nullified the election of the 1st Appellant. We accordingly reverse the finding of the court below and hold that, on the totality of the evidence on record, the 1st Respondent failed to prove the allegation and that the court below did not properly address itself to the correct position of the law on the issues surrounding the allegation. Ground two has merit and it succeeds.

Ground three for the 1st Appellant and ground two for the 2nd Appellant challenge the holding of the court below that the 1st Respondent was denied entry into Vera Chiluba School polling station and that the denial materially affected the outcome of the election in Munali Constituency. The 1st Respondent testified that at around 20:20 hours on poll day, she went to Vera Chiluba Polling Station in Mtendere. She stated that the 1st Appellant and one Kaizer Zulu were permitted to enter the polling station while the 1st Respondent and her delegation were denied entry by a police officer despite introducing herself as a candidate, a situation she characterized as unfair.

Under cross-examination, when referred to her allegation under paragraph 5(v) of the petition claiming that the 1st Appellant and Kaizer Zulu closed the gate to the polling station and prevented her and her agent from seeing her polling agents, the 1st Respondent conceded that the allegation was not correct. It was her testimony that the 1st Appellant was not responsible for the gate at Vera Chiluba Polling Station.

The 1st Appellant, in rebuttal, contended that the allegation by the 1st Respondent was not true and that Kaizer Zulu was not part of her campaign team. She stated that she had to beg the police and the 2nd Appellant's officers to allow her to enter the polling station.

RW3 testified that it was not possible to close the gate as alleged by the 1st Respondent as it was guarded by the police. RW12, Emmanuel Makulila, the returning officer for Munali Constituency, also testified that it was not possible for the 1st Appellant and Kaizer Zulu to close the gate. He stated that the law provided that polling opened and closed at 06:00 hours and 18:00 hours respectively. It was his further testimony that at Vera Chiluba polling station, there was a group of people who

wanted to vote after the close of the station; that the presiding officer closed the gate and kept the key himself.

In her submissions, the 1st Appellant particularly took issue with the following excerpt in the lower court's judgment at page 61 of the record of appeal:

> **"The material fact is that there was a demonstration of double standards when one parliamentary candidate, namely, F/Nkandu Luo of the PF was allowed entry into the polling station, yet at almost the same time entry into the same polling station was denied to F/Doreen Sefuke Mwamba of the UPND who was also a parliamentary candidate in the same constituency. This was unfair treatment to the petitioner."**

The 1st Appellant contended that the court below did not address itself to the pleadings but merely discredited the testimony of RW12 on ground that he was untruthful. That the finding of unfair treatment was irrelevant as it was not pleaded.

The 2nd Appellant submitted that as the 1st Respondent had admitted in cross-examination that the 1st Appellant and one Kaizer Zulu did not lock her out of the polling station, the matter should have ended there. That it was trite law that the evidence must support the pleadings and that the court below wrongfully accepted and applied the 1st Respondent's testimony to the effect that she was locked out of the polling station by a police officer

while the 1st Appellant was allowed to go in. It was the 2nd Appellant's contention that the 1st Respondent's allegation that the 1st Appellant and Kaizer Zulu closed the gate was not truthful and that the trial Judge erred when he found that there was a demonstration of double standards, resulting in unfairness on the part of the 2nd Appellant's conduct of the elections.

We have carefully looked at the evidence on the record, the parties' submissions and the holding of the court below on this aspect of the appeal. The key issue, as we see it, is whether the court below was on firm ground to find that the allegation, as framed in paragraph 5(v) of the petition, had been proved.

The 1st Appellant and the 2nd Appellant, in their respective submissions, have argued that the learned trial Judge went outside the pleading in reaching his decision. At page 60 to 61 of the record of appeal, the court below said:

> **"There was no dispute that F/Nkandu Luo who was a Parliamentary Candidate for Munali Constituency went to Vera Chiluba School Polling Station. There are only two (2) disputes. The first dispute is that F/Nkandu Luo was in the company of the said M/Kaizer Zulu. The second dispute is that the Petitioner was denied entry into the polling station. The evidence on this aspect is clear. I have gone through this evidence. I have taken note of the frantic efforts which the Petitioner did in order to be allowed into the polling station. These efforts included self-introduction by the Petitioner that she was an interested party being a Parliamentary Candidate in Munali Constituency. This effort fell on deaf ears. Whether F/Nkandu Luo was in the company of the said M/Kaizer Zulu or not is immaterial. The material fact is that**

> there was a demonstration of double standards when one Parliamentary Candidate, namely, F/Nkandu Luo of the PF was allowed entry into the polling station, yet at almost the same time entry into the same polling station was denied to F/Doreen Sefuke Mwamba of the UPND who was also a Parliamentary Candidate in the same constituency. This was unfair treatment to the Petitioner." (emphasis added)

The learned trial Judge then proceeded to discount the testimony of RW12 on this aspect, saying that RW12 was not there when the alleged incident happened. At page 62 of the record, the trial Judge concluded as follows:

> **"I am satisfied that this allegation in the pleading has been proved."** (emphasis added)

It is significant to note that the allegation in paragraph 5(v) of the petition, as shown at page 73 of the record of appeal, was very specific and succinct. It reads:

> **"(v) That on the 11th August 2016, at Vera Chiluba School polling station Nkandu Luo and Kaizer Zulu closed the gates and refused me and my agent from seeing our polling agents."**

The issue in controversy, as we see it, was that the 1st Appellant and Kaizer Zulu blocked the 1st Respondent and her agent from entering the named polling station and, as a consequence, prevented her from seeing her polling agents. That there was unfair treatment or a demonstration of double standards was not the nature of the allegation. In **Mazoka v Mwanawasa,**[3] the Supreme Court guided as follows:

> "The function of pleadings is very well known, it is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matter in dispute between the parties. Once the pleadings have been closed, the parties thereto are bound by the pleadings and the court has to take them as such."

And in the old English case of **Thorp v Holdsworth,**[23] Jessel MR outlined the function of pleadings as follows:

> "The whole object of pleadings is to bring the parties to an issue...to prevent the issue being enlarged, which would prevent either party from knowing...what the real point to be discussed and decided was."

In **British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd,**[24] Saville L.J. observed that pleadings:

> "...are not a game to be played at the expense of the litigants, nor an end in themselves, but a means to the end, and that end is to give each party a fair hearing." (emphasis added)

The 2nd Appellant submitted that in arriving at his conclusion, the learned trial Judge wrongfully accepted and applied the 1st Respondent's testimony to the effect that she was locked out of the polling station by a police officer while the 1st Appellant was allowed to go in. In her evidence in chief, the 1st Respondent said at page 567 of the record:

> "My Lord on polling day about 20:20 hours I went to Vera Chiluba Polling Station in Mtendere. The candidate for the PF Professor Nkandu Luo and the special adviser to the President, Kaizer Zulu were permitted to enter the polling station whilst I who was a candidate was not allowed in."

From our perspective, the record shows that the evidence adduced at trial did not address the allegation. The 1st Respondent's evidence was at variance with what she pleaded in the petition on this aspect. She did not call any other witness to testify on this issue.

The question then is, what is the effect of this on the appeal? Though only of persuasive value to this Court, we find the case of **Christopher Lubasi Mundia v Sentor Motors Limited**[25] instructive where it was held that where the pleadings are at variance with the evidence adduced in court, the case fails since the case is completely recast without actual amendment of the claim. In that case, Chirwa J, as he then was, cited the case of **London Passenger Transport Board v Moscrop**[26] where Lord Russell of Killowen said:

> "I have already stated my difficulty in justifying this implication, but, with it as the basis of their order, the Court of Appeal made a declaration that the representation clause was void. This appears to me to have been a complete re-casting of the respondents' alleged cause of action and the matter was unfortunately carried through without amendment of the statement of claim. This should not be so. Any departure from the cause of action alleged, or the relief claimed in the pleadings should be preceded, or at all events, accompanied, by the relevant amendments, so that the exact cause of action alleged and relief claimed shall form part of the Court's record, and be capable of being referred to thereafter should necessity arise. Pleadings should not be 'deemed to be amended' or 'treated as amended.' They should be amended in fact." (emphasis added)

We are persuaded. More so because Zambian jurisprudence on election petitions has long required that the petitioner must prove all the allegations with a high degree of convincing clarity, above the balance of probabilities required in ordinary civil matters. There is no evidence on the record that the pleading in paragraph 5(v) of the petition was amended with leave of the court to reflect the issues the 1st Respondent brought up in her testimony. We further note that the 1st Respondent pointed out what she termed a typographical error only under cross-examination. In cross-examination, the exchange between State Counsel Mutale and the 1st Respondent, as shown at pages 605 to 606, was as follows:

> **"Q: ...Yes Mrs. Mwamba, in paragraph 5(v) of the petition this is what you said, 'On 11th of August, 2016 at Vera Chiluba School polling station Nkandu Luo and Kaizer Zulu closed the gate and refused me and my agents from seeing our polling agents." Would you like to correct that?**
>
> **A: Yes, my Lord. Just one word of correction which must have been a typing error which says that she closed the gate, explaining that she is the one who closed the gate. The policeman closed the gate.**
>
> **Q: So it is not correct to say Professor and Kaizer Zulu closed the gate?**
>
> **A: No, it is not right.**
>
> **Q: And that she was not in charge or responsible for that gate?**
>
> **A: My Lord, the issue in this statement is not the gate the issue has become the gate because of the closing because it is mentioned that Professor Nkandu Luo and Kaizer closed the gates. My Lord the issue**

here is the unfairness that even Kaizer Zulu who was not a candidate in Munali....

Q: Mrs. Mwamba, just answer the question I read the paragraph and you have said it is not correct. Professor Luo was not responsible for that gate, do you agree?

A: Yes I agree, my Lord.

Q: Yes that is the position. My Lord, that is all from the 1st Respondent. Much obliged."

We have taken the liberty to reproduce what transpired in the court below for emphasis. We note from the above exchange that in the face of cross-examination, the 1st Respondent revised the nature of her allegation from what was specifically pleaded in the petition to matters that were not pleaded under the guise of a typographical error. She clearly conceded that her allegation was not true; in other words, it was a falsehood. This, in our view, called into question the credibility of the 1st Respondent, an issue the court below should have interrogated.

The 1st Respondent claimed in her testimony that a police officer prevented her access to the polling station. If that were the case, our considered view is that the 1st Respondent should have been specific in her petition. We agree with the 1st Appellant and the 2nd Appellant that the learned trial Judge erred in accepting evidence on matters that were not pleaded. The

learned author of **Zambian Civil Procedure: Commentary and Cases**, volume 1, puts it as follows at page 565:

> **"Pleadings constitute the spine and sprinkle of a suit on which the fate of the case of a plaintiff or defendant depends. Thus the case of a party is articulated in a pleading and no relief based on any ground not set out in the pleadings can be granted by the court. Parties to a suit are bound by the pleadings. It is the case that has been pleaded that has to be proved and consequently, the decision of the court cannot be based on grounds not set out in the pleadings of the parties."**

What the 1st Respondent required to prove in the court below is that the 1st Appellant, acting with one Kaizer Zulu, took charge of the gates at Vera Chiluba Polling Station and prevented the 1st Respondent from entering the polling station to see her polling agents. That is the burden which the 1st Respondent needed to discharge. The 1st Respondent failed the test on this aspect as no evidence was adduced to support the allegation as framed in the petition. The net effect is that the threshold required to be established pursuant to section 97(2)(a) of the Act was not reached. We find that no electoral offence was established against the 1st Appellant or her election agent in relation to the allegation in paragraph 5(v) of the petition.

We do not agree with the court below that "the allegation in the pleading" had been proved. We, accordingly, find merit in

ground three of the 1st Appellant's appeal and ground two of the 2nd Appellant's appeal and they succeed.

Ground four of the 1st Appellant's appeal and grounds one three, four and five of the 2nd Appellant's appeal impugn the finding of the court below that the non-provision of GEN12 forms to all the candidates' polling agents materially affected the outcome of the election in Munali Constituency and that the 2nd Appellant failed to conduct transparent, free and fair elections in Munali Constituency. The 1st Respondent's testimony was to the effect that the 2nd Appellant did not provide adequate amounts of Form GEN12. That she made photocopies of the same which were then distributed to Chainda, Chakunkula, Mtendere and Kalingalinga wards. Also, that polling agents were using note books that they were given to record results. It was also the 1st Respondent's testimony that on 12th August, 2016, she went to Kalikiliki polling station where she discovered that there had been a dispute on figures to be written on the GEN12, though it was later resolved after a recount.

PW5 testified that on 12th August, 2016, at the Community Hall Munali Ward 33 Masasa, PF cadres stormed the polling

station, causing confusion, simply because a demand for Form GEN12 had been made. That a police officer managed to calm the situation and asked the PF cadres to leave the polling station. PW5 further testified that the 2nd Appellant's officials said they did not give GEN12 forms to polling agents, advising that they (polling agents) write in their note books. That on further insistence, the agents were given the Presidential form which they then photocopied at the market and returned the original.

Under cross-examination, PW5 contradicted the testimony of the 1st Respondent in regard to the point at which photocopies of the GEN12 form were given to the UPND polling agents. At page 757 of the record of appeal, PW5 conceded that the 1st Respondent testified that all polling agents were given GEN12 forms. When asked to clarify her earlier position that the polling agents were writing in note books and yet she had admitted that the 1st Respondent had supplied copies of Form GEN12, PW5 failed to reconcile the two contradictory positions.

The 1st Appellant contended that the 1st Respondent failed to adduce any evidence confirming that the failure to provide GEN12 forms by the 2nd Appellant affected the results in the

entire constituency. Also, that the failure to sign or countersign GEN12 forms could not form the basis for nullification if each candidate was affected, citing section 49 of the Electoral Process (General) Regulations.

The gist of the 2nd Appellant's detailed submissions on this aspect of the appeal was that the issue for determination was the alleged refusal by the 2nd Appellant to provide GEN12 forms to the 1st Respondent's polling agents and whether, as a result, the 1st Respondent was not able to have the correct total of results. It was the 2nd Appellant's position that PW5 was not a credible witness as her testimony contained various untruths on collateral matters and the court below ought not to have believed and accepted the evidence of PW5. Citing regulation 49(2) of the Electoral Process (General) Regulations, it was submitted that the court below misdirected itself in finding that the failure to countersign a Form GEN12 amounted to a failure to provide the document to polling stations. That non-availability of polling agents at completion of the election process could not be regarded as refusal by the 2nd Appellant to provide copies of Form GEN12.

RW12 testified that it was not true that the 2nd Appellant refused to provide Form GEN12 to polling agents. That one of his duties as returning officer was to ensure that all documentation was provided to polling stations and that not less than 20 copies each per election of Form GEN12 was given to presiding officers in all the 47 polling stations.

We have carefully considered the submissions and the evidence on record on these grounds of appeal. In our considered view the key issue that falls for our determination is whether the 2nd Appellant fell afoul of section 97(2)(b) of the Act by allegedly abrogating or neglecting its duty to supply adequate numbers of Form GEN12, which dereliction of duty materially affected the election in Munali Constituency. Related to that is the claim that polling agents did not countersign some of the GEN12 forms, affecting the 1st Respondent's ability to know the correct results.

It is trite that in terms of Article 229(2)(b) of the Constitution the 2nd Appellant has the mandate to conduct elections. And as we observed in **Giles Chomba Yamba Yamba v Kapembwa Simbao,**[11] the 2nd Appellant fulfils its functions by

ensuring that the requirements of the Act are respected and observed in the electoral process. A key requirement in the conduct of elections by the 2nd Appellant is the provision of election materials. Pursuant to regulation 4(1)(a) of the Electoral Process (General) Regulations, the 2nd Appellant appoints a returning officer for each constituency, district or ward. According to regulation 29(1)(b) of the Regulations aforesaid, the returning officer shall, as part of the preparations for the taking of a poll in a polling station within the returning officer's constituency, district or ward:

> **"provide each presiding officer with such number of ballot boxes, ballot papers, official seals, official marks, the voters' roll relating to the polling station and such other things as may be necessary for the taking of the poll;"** (emphasis ours)

RW12 was the returning officer for Munali Constituency in the 11th August, 2016 general elections. As we have already noted, in his testimony he confirmed that one of his duties was to ensure that all documentation was provided to the polling stations and that not less than 20 copies each per election of Form GEN12 was given to presiding officers in all the 47 polling stations in Munali Constituency. On the other hand, the 1st

Respondent's contention is that the 2nd Appellant failed to deliver on its duty to supply adequate GEN12 forms.

As we noted in **Giles Chomba Yamba Yamba,**[11] section 97(2)(b) of the Act calls for the annulment of elections in the event that there has been non-compliance with the principles laid down in the Act in as far as the conduct of elections is concerned. Section 97(2)(b) reads:

> **"97. (2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that- ....;**
>
> **(b) subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election;"** (emphasis added)

Thus, a person challenging the election of a candidate on the basis of section 97(2)(b) must demonstrate, with cogent evidence, that there was non-compliance with the provisions of the Act relating to the conduct of an election and that the non-compliance affected the result of the election. We must, however, be quick to point out that not every electoral infraction on the part of the 2nd Appellant's officials attracts the ultimate sanction

of annulment of an election. Section 97(2)(b) is made subject to section 97(4) of the Act, which is in these terms:

> "(4) An election shall not be declared void by reason of any act or omission by an election officer in breach of that officer's official duty in connection with an election if it appears to the High Court or a tribunal that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such an act or omission did not affect the result of that election." (emphasis added)

It is clear from the above provision that where there has been substantial compliance with the provisions of the Act, an election cannot be annulled on the basis of section 97(2)(b) of the Act. The learned authors of **Halsbury's Laws of England**, 5th Edition, Volume 38A, also state at paragraph 667 that:

> **"No election is to be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the appropriate elections rules if it appears to the tribunal having cognizance of the question that the election was so conducted substantially in accordance with the law as to elections, and that the act or omission did not affect its result. The function of the Court in exercising this jurisdiction is not assisted by consideration of the standard of proof but, having regard to the oonsequences of declaring an election void, there must be a preponderance of evidence supporting any conclusion that the result was affected."**

In the instant case, the learned trial Judge held as follows at page 65 of the record of appeal:

> "There are some Form Gen12 which are partially signed. This confirms the allegation by the Petitioner that there were no Form Gen12 at polling stations. The failure by the Electoral Commission of Zambia to avail Form Gen12 did not help to build confidence in the electoral process in Munali constituency Parliamentary elections. There was a total absence of transparency and it is the Electoral Commission of Zambia who are responsible for the failure to build confidence in the

> electoral process ...as well as the total absence of transparency. This was a lapse on the part of the Electoral Commission of Zambia and the result is that no one can positively ascertain whether or not the votes cast in favour of the Petitioner were fully accounted for. In this regard, the Electoral Commission of Zambia has let down the people of Munali constituency and the Petitioner was personally affected." (emphasis ours)

Earlier at page 63 of the record, the trial Judge had found as follows:

> "The allegation concerning the lack of or the inadequacy of Form Gen12 did not affect the Petitioner alone. Suffice to state that it affected all the participants in that Parliamentary race."

We find it contradictory on the part of the learned trial Judge that he initially determined that the problem of Form GEN12 affected all participants in the poll only to isolate the 1st Respondent as having been personally affected and ultimately finding that the allegation had been proved. It is worth noting that in his holding *supra*, the trial Judge noted that some GEN12 forms were partially signed and that that confirmed the allegation by the 1st Respondent that there were no Form Gen12 at polling stations. We are perplexed because at page 63 of the record of appeal, the learned trial Judge made this clear statement:

> "I have seen Form Gen12 for each polling station in Munali Constituency."

From our perspective, the foregoing unequivocal statement was a clear finding of fact by the court below and confirmation that Form GEN12 was available at all the polling stations in Munali Constituency contrary to the 1st Respondent's assertion. We do not agree that a finding that some GEN12 forms were partially countersigned equates to non-availability of the document at polling stations. Further, the record of appeal shows at pages 215 to 262 that the 2nd Appellant produced in evidence all the GEN12 forms for the 47 polling stations in Munali Constituency, a fact confirmed by the court below as indicated above.

The record of appeal shows that the learned trial Judge addressed the allegation relating to Form GEN12 at pages 62 to 65. We have carefully looked at this portion of the judgment of the court below. Our considered view is that the learned trial Judge did not properly evaluate the evidence on this aspect as against the 1st Respondent's allegation that the 2nd Appellant failed to supply adequate amounts of the Form GEN12. For instance, we note that the trial Judge never made any reference to the testimony of RW12 who had testified that he issued not

less than 20 copies of Form GEN12 per election to the presiding officers at all the 47 polling stations and that the evidence was before court. A careful perusal of the record shows that this aspect of RW12's testimony was not challenged in cross-examination.

We hold that the issues surrounding the 1st Respondent's allegation that there were inadequate supplies of Form GEN12 in Munali Constituency should have been carefully considered and measured against the threshold in section 97(2)(b) of the Act as read with section 97(4). We have not seen any evidence on record proving with convincing clarity the allegation made by the 1st Respondent that the 2nd Appellant abrogated its duty pursuant to section 97(2)(b) aforesaid. We, accordingly, reverse the finding of the court below on the ground that it is one which, on a careful assessment and evaluation of the evidence before it, the court below would not have reached.

We now turn to the connected aspect of signing and countersigning Form GEN12. We note that after confirming that he had seen all GEN12 forms for all the 47 polling stations, the learned trial Judge observed that GEN12 forms for 14 polling

stations were "not signed at the back". Further, after naming the 14 polling stations, the trial Judge said at page 64 to 65 of the record of appeal:

> "In the wake of the demands by the Petitioner and her agents to comply with the provisions of Form Gen12, I have seen no reason why Form Gen12 for all the above fourteen (14) polling stations were not signed by polling agents....Interesting to note is that it is not only the losers who did not sign Form Gen12 in those polling stations but the winners as well."

We have had occasion to address the issue of signing and countersigning of Form GEN12 in recent decisions. The provisions of the law on the signing and countersigning of the election results are well stated. Paragraph 5(2) of the Electoral Code of Conduct reads:

> "An election agent or polling agent shall counter sign the election results duly announced or declared by a presiding officer or returning officer, as the case may be, except that failure to countersign the election results by such election agent or polling agent shall not render the results invalid." (emphasis added)

Also, regulation 49(2) of the Electoral Process (General) Regulations, to which we were referred by the 2nd Appellant, provides:

> "The presiding officer shall announce how the votes have been cast for each candidate in Form GEN20 set out in the Schedule, and how many have been rejected in the polling station and may require if present, election agents or monitors to countersign the results, except that failure to countersign the election results does not render the results invalid." (emphasis added)

In addressing the importance of Form GEN12 in the electoral process, the learned trial Judge had this to say at page 63 of the record of appeal:

> "This issue...is an important matter in the conduct of elections and in the spirit of promoting transparency and building confidence in the electoral system. It is important because Form Gen12 is a document for the Electoral Commission of Zambia which is used in an election at polling stations to record election results both in figures and in words. The design of Form Gen12 shows that polling agents should append their names in full and signature at the back of that Form Gen12. Even if the use of Form Gen12 is not couched in mandatory terms, when a dispute of this magnitude arises, compliance as to the way it is supposed to be filled in becomes a necessity." (emphasis added)

We agree with the learned trial Judge that Form GEN12 plays an important role in our electoral process and that its proper use enhances transparency and confidence in the electoral system. In **Giles Chomba Yamba Yamba**,[11] we said the following when addressing the question of Form GEN12 at page J70:

> "We venture to say the ideal situation of course is that all the people required to sign for the election results should sign to enhance transparency in the electoral process."

And in **Lewanika v Chiluba**[5] the Supreme Court put it thus:

> "The flaws of all types which we have said were established, of course, did not reflect well on those managing the electoral process. Many of them can and should be addressed in order to enhance our democratic profile and in order to engender greater confidence in the electoral process."

We endorse those views. Considering that elections provide a means for the governed to express their will as to who is to govern them, those managing the electoral process must, as far as possible, work on and eliminate any flaws in the process.

The record shows that out of the 47 polling stations in Munali Constituency, GEN12 forms for 14 of those were not signed by any polling agent. According to the court below, this amounted to a total absence of transparency and a lapse on the part of the 2nd Appellant as, in the lower court's view, no one could positively ascertain whether or not the votes cast in favour of the 1st Respondent were fully accounted for.

The problem we see with the position taken by the court below is that, despite finding that both the losing and winning sides in Munali Constituency did not countersign the Form GEN12 in the named polling stations, the court below isolated the 1st Respondent as the candidate whose votes cast in her favour could not be positively accounted for. Our considered view is that this was an unbalanced approach to the issue by the court below. In our view, the non-signing of Form GEN12 for the 14 polling stations affected all the participating candidates. In

our recent decisions, we have cited with approval the case of **Mazoka v Mwanawasa,**[3] where the Supreme Court said:

> **"We accept that there were flaws, incompetency and dereliction of duty on the part of the Electoral Commission of Zambia. This is exemplified by the late delivery of the election materials and insufficient supply of Presidential ballot papers in the complaining constituencies which led to the delays and extension of the gazetted voting period. However, in our view, any negative impact arising out of these flaws affected all candidates equally and did not amount to a fraudulent exercise favouring the 1st Respondent."**

We remain persuaded by that position.

Most importantly, however, the law, as we have cited it above, clearly stipulates that failure to countersign the election results by election or polling agents does not render the results invalid. The court below found as a fact that all GEN12 forms for all the polling stations in Munali were exhibited in evidence before it. In that regard, we are of the view that, as far as this aspect is concerned, the 2nd Appellant conducted the election in Munali Constituency in substantial conformity with the requirements of the law and it should not have been a basis for nullifying the election. Further, we have not seen, from the record, cogent evidence to show how the non-signing of GEN12 forms for the named polling stations affected the overall result in the 2016 Munali parliamentary election. It is our firm view that the election in Munali Constituency was conducted substantially

in accordance with the provisions of the Act. We find ground four of the 1st Appellant's appeal and grounds one, three, four and five of the 2nd Appellant's appeal meritorious and they succeed.

All the 1st Appellant's grounds of appeal and the 2nd Appellant's grounds of appeal have succeeded and, therefore, the entire appeal succeeds. Accordingly, we set aside the decision of the court below to nullify the election and declare that the 1st Appellant, Nkandu Luo, was duly elected as Member of Parliament for Munali Constituency.

We order that each party bear their own costs of this appeal and in the court below.

.....
A. M. Sitali
Constitutional Court Judge

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M. S. Mulenga
Constitutional Court Judge

.....
E. Mulembe
Constitutional Court Judge

.....
M. M. Munalula
Constitutional Court Judge

.....
M. Musaluke
Constitutional Court Judge

AKASHAMBATWA MBIKUSITA LEWANIKA, HICUUNGA EVARISTO KAMBAILA, DEAN NAMULYA MUNGOMBA, SEBASTIAN SAIZI ZULU, JENNIFER MWABA v FREDERICK JACOB TITUS CHILUBA (Constitutional Jurisdiction)

IN THE MATTER of an Application under Article 41(2) of the Constitution of Zambia and IN THE MATTER of the eligibility of a candidate in respect of Article 34(3) of the Constitution of Zambia and IN THE MATTER of regulation 1 5 made pursuant to the Electoral Act, 1991 and IN THE MATTER of the Presidential Election held in Zambia 'on the 18th day of November, 1996, S.C.Z. 8/EP/3/96, S.C.Z./SIEP/3196, S.C.Z./8/EP/4/96, S.C.Z./8/EP/4196 (1998) Z.R.49 (S.C.)

SUPREME COURT
NGULUBE,C.J., BWEUPE, D.C.J., SAKALA, CHIRWA AND LEWANIKA, JJ.S.10TH FEBRUARY, 1997 AND 7TH JANUARY,1998 AND ONTO 10TH NOVEMBER,1998. (S.C.Z. JUDGMENT NO. 14 OF 1998)

Flynote

(1) Constitutional law – Presidential election – Candidate – Qualifications – Citizenship – Constitutional requirements that presidential candidate and parents be Zambian citizens – Successful candidate taking office as president – Petition challenging election alleging disqualification – Citizenship of president challenged – Whether president satisfying citizenship requirements – Proof of parentage – standard of proof – Northern Rhodesia (Constitution) Order in council 1963, AI 1963/2088 – Zambia Independence Act 1964, s 2(1), Sch 2, ss 3, 16(3) – British Protectorates, Protected States and Protected Persons Order in Council 1949, s 9 – Constitution of Zambia Act 1991 (as amended), Sch, art 34(1), (3), (4).

(2) Constitutional Law – Presidential election – Election petition – Jurisdiction – Constitution vesting jurisdiction in 'full bench of the Supreme Court' – Meaning of full bench – Constitution of Zambia Act 1991, Sch, art 41 (2).

(3) Legal profession – Counsel – Right to appear – Requirements of professional independence – Conflict of interest – Cabinet minister holding practising certificate – Whether entitled to appear as counsel on behalf of individual litigant.

(4) Constitutional law – Presidential election – Election petition – Petition impacting on governance of nation and deployment of constitutional power and authority – Standard of proof required.

(5) Constitutional law – Presidential election – Allegations of electoral impropriety involving bribery and corruption, irregularities and flaws in the electoral system – whether public philanthropic activity at election time amounting to bribery – Whether election null and void – Electoral Act, s (18).

Headnote

The five petitioners challenged the election on 18 November 1996 of the respondent as President of Zambia on the ground that he was not qualified to be a candidate for election as president and be elected because neither he nor his parents were citizens of Zambia by birth or by decent as required by art 34(3) of Sch 2 to the Constitution of Zambia Act 1991 as amended in 1996. They pleaded that his identity and that of his parents had never been

ascertained, contended that he was the illegitimate son of one of the witnesses born from an illicit liaison with the mother while she was married to a Mozambican and that he was born in the then Belgium Congo (Zaire) in 1944 when his father, the witness was an alien. They also gave evidence touching upon the respondent's citizenship qualifications and of the possible nationalities of his father. There was no dispute that the respondent's mother 'belonged' to the British protectorate of Northern Rhodesia, within the meaning of s 16(3) of the 1963 Constitution, before it became the Independent state of Zambia on 24 October 1964, and would therefore, but for her prior death, have become a citizen of Zambia at independence by virtue of the 1964 Order and the 1963 Constitution. The petitioners also alleged electoral flaws in the electoral system, and asked for the avoidance of the election on the ground that it was rigged and not free and fair. Certain preliminary points arose, namely (i) what would be 'full bench of the Supreme Court' to hear the case as required by art 41 of the Constitution; (ii) the propriety of Cabinet ministers who were lawyers holding practising certificates appearing as counsel for the respondent, and (iii) the standard of proof required.

Held: Petition dismissed

(1) The respondent was already a Zambian citizen and was not disqualified from election as president. Whichever of the several biographies proposed to the court was adopted, before independence the respondent had been a British protected person 'belonging' to Northern Rhodesia, in terms of the Constitution of Northern Rhodesia 1963, having been born in Northern Rhodesia or whose parents were ordinarily resident there. In requiring a presidential candidate to be, inter alia, a Zambian Citizen aged 35 years or more, both of whose parents were citizens by birth or decent, art 34(3) of the Constitution of Zambia (as amended) had to be construed as referring to those who became Zambian citizens at independence or would, but for their prior deaths, have then become Zambian citizens. When Zambian citizenship was created at independence on 24 October 1964, the Zambian Independence Order 1964 s 3, had conferred such citizenships on every British protected person who had been born in the former Protectorate of Northern Rhodesia or, if born outside the protectorate, whose father became, or would but for his prior death, have become, a citizen by birth in the protectorate. It was unnecessary to determine where the respondents had been born, although the preponderance of evidence from official records indicated that he had been in Northern Rhodesia. There was no dispute that his mother had belonged to the to Northern Rhodesia and would have become a citizen at independence but her prior death. Since the various accounts presented to the court of his paternal parentage were irreconcilable, the petitioners had failed to establish to the necessary degree of convincing clarity that the respondent's father was an alien; there was no basis for foisting a father upon the respondent nor for finding against the one he had officially declared. In any event, even the finding most favourable to the petitioners, the father proposed for the respondent was a former British protected person belonging to Northern Rhodesia who had become a citizen of Zambia at independence (see pp 163–165, 170-171, post). *Motala v. A-G* [1993] 1 LRC 183 considered.

Per curiam. The parentage qualification for election as president introduced into the Constitution of Zambia 1991 by the amendment in 1996 pose a number of difficulties apparently without solution, eg whether the reference is to legitimate or biological parentage and whether adoptive parentage is included (see p 169, post).

(2) The requirement of a 'full bench of the Supreme Court', which by art 41(2) of the Constitution of Zambia 1991 was given jurisdiction to determine whether any provisions of the Constitution or any law relating to the election of the President had been complied with, was satisfied when the maximum available odd number of judges of the court were empanelled to hear the case (see p 144, post).

(3) Although it was undesirable for Cabinet Ministers to be in active practice at the bar it was not contrary to law for them to exercise the right of audience and to represent a litigant. Any advocate should decline to accept instructions when there were circumstances which would render it difficult for him or her to maintain the requisite professional independence or which would in some way impair or undermine his ability to promote the best interests of the

administration of justice. Ideally an advocate should not appear as such in his own cause as in any other situation of possible want of independence or conflict of interest or embarrassment generally. There was no conflict of interest in the present case. If anything, there might have been a case of common vested interests on both sides, having regard to the number of advocates, even on the petitioners' side, who were themselves senior members or leaders of some of the political parties on whose behalf the petition was brought (see p 144, post). *Re Lord Kinross* [1905] AC 468 comsidered.

(4) Parliamentary election petitions were required to be proved to a standard higher than on a mere balance of probability and therefore in this, where the petition had been brought under constitutional provisions and would impact upon the governance of the nation and deployment of constitutional power, no less a standard of proof was required. Furthermore the issues raised were required to be established to a fairly high degree of convincing clarity (see p 145, post).

(5) (i) As to the allegations of bribery and corruption: the government's established programme of selling council houses, which was taken advantage of by giving discounts in election year, did not amount to the corrupt practice of bribery under reg 51 of the Electoral (General) Regulations so as to be caught by the spirit of s 18 of the Electoral Act and, in any event, it was doubtful whether the house sales could have significantly affected the election result in a nationwide constituency; although treating was established, it had not been shown that it prevented the majority of voters from electing the candidate of their choice; the donation by the respondent and various ministers of public funds to public causes before, during and since the elections was not prohibited by the regulations (see p 173, post).

(ii) As to the allegations of irregularities, although there was some evidence of irregularities and malpractices there was no evidence that the respondent personally or his lawful election agent was privy to them. In any event, since the constituency was nationwide it was not established that the proven irregularities were such that nationally the majority of the voters ere or might have been prevented from electing the candidate of their choice or that such irregularities affected the election result to any significant extent (see p 182, post)

(iii) Although the flaws in relation to the electoral system, including the duplication of national registration cards, the fact that some people had two or more voters' cards, complaints about the registers, the polling districts, the sitting of the polling stations and the results, did not reflect well on those managing the electoral process; they did not by their very nature go to the general integrity of the system and did not necessarily suggest that the electoral system had been comprehensively massaged or predisposed in advance to grant an unfair or any advantage or disadvantage to any candidate. It followed that although the elections were not perfect and some aspect of them were quite flawed they had been conducted substantially in conformity with the law and practice governing elections (see p 191, post).

Per curiam. (i) During election period there should be a closed season for any activity suggestive of vote-buying, including any public and official charitable activity involving public funds and not related to emergencies or any life-saving or life-threatening situations (see p. 175, post).

(ii) Elections are the sole lawful constitutional and legitimate method for the peaceful and legal acquisition of political power and the culmination of the exercise of some of the most basic fundamental rights. The various flaws in the electoral process which had been established should be addressed by the authorities (see p 191, post).

[Editors' notes: Articles 34(3) and 41 of the Constitution of Zambia Act 1991 (as amended) are set out at pp 145-146, respectively, post.
Section 16(3) of the 1963 Constitution, so far as material, is set out at pp 157-158, post.

Section 2(1) of the Zambia Independence Act 1964 is set out at p 158, post.
Section 18 of the Electoral Act 1991 is set out at pp 171-172, post.

Cases referred to in judgment

A-G v Clarkson [1990] 1 QB 156, UK CA
Akar v A-G of Sierra Leone [1969] 3 ALL ER 384, [1970] AC 853, [1969] 3 WLR 970, SL PC

Cape Brandy Syndicate v IRC [1921] 2 KB 403, UK CA
Capper v Baldwin [1965] 1 ALL ER 787, [1965] 2 QB 53, [1965] 2 WLR 610, UK DC
Kinross, Re Lord [1905] AC 468, UK HL (C of P)
Miyanda v Handahu [1994] SCZ Judgment No. 6, unreported
Motala v A-G [1993] 1 LRC 183, [1991] 4 ALL ER 683, [1992] 1 AC 281, UK HL; rvsg [1991] 2 ALL ER 312, UK CA
Ormond Investment Co. Ltd v Betts [1928] AC 143, [1928] ALL ER Rep 709, UK HL
Shamwana v People [1985]] LRC (Crim) 120, (1985) SR 41, Zam SC

Legislation referred to:

(1) Halsbury's Laws of England, 4th Ed. Vol.3, Paragraph 1143
(2) Constitution of Zambia, Article 34 (3) (a), (b) and (e)
(3) Electoral Act (1991) as amended by Act No.23 of 1996
(4) Northern Rhodesia Order-In-Council, 1911
(5) The Barotziland-North-Western Rhodesia Orders-In-Council of 1899, 1902 and 1909
(6) The North Eastern Rhodesia Orders-In-Council, 1900, 1907 & 1909 and Northern Rhodesia Gazettes of the period (e.g. 1923 and 1924)
(7) British South Africa Company's Northern Rhodesia Government Gazette number 209 of Friday 21st March, 1924
(8) Government Notices No. 153 of 1924; No. 89 of 1926, No. 107 of 1927 and No. 149 of 1928)
(9) Halsbury's Laws of England, 3rd Edition, Volume 5 from paragraph 1273
(10) Government Gazette 213 of 1962
(11) Government Notice No. 25 of 1964
(12) Zambia Independence Order, 1964, Section 6(1) and (2)
(13) The Constitution of Zambia (1964) Sections 3, 4, 5 and 6
(14) British Nationality Act,(1948), Section 32
(15) Halsbury's Laws of England 3rd Edition, Volume 1, in Note (i) at page 528
(16) Government Notice number 91 of 1934, Government Notices of Northern Rhodesia at page 109
(17) Affiliation and Maintenance of Children Act Cap 64 of the Laws of Zambia (1995) Edition
(18) Citizenship of Zambia Ordinance number 61 of 1964, Section 3 (Now section 11 of Cap 124 of the Laws of Zambia (1995) Edition
(19) Electoral Act, Cap 13 of the 1995 Laws of Zambia, Section 18
Electoral (General) Regulations

For the Petitioners: Mr. M Chona SC. of Mahachi Chambers,
Mr. E.J.Shamwana SC. of Shamwana and Co,
Mr. D. M. Lisulo SC. of Lisulo and Co,
Prof. Mvunga of Mvunga and Associates,
Mrs. N. Mutti of Lukona Chambers,
Mr. S. Sikota of Central Chambers
Mr. Lungu of Andrea Masiye and Co,
Mrs. M. Zaloumis of Dove Chambers, and
Mr. S. Sitwala of Light House Chambers.
For the respondent: Mr V. Malambo and Mr E. Silwamba of Malambo and Co.

Judgment

NGULUBE,C.J.: delivered the judgment of the court.

Delay in rendering this judgment is regretted but was occasioned in part by the length and complexity of the case and by the heavy work load and schedule of other cases which the members of the court had to contend with. There were over a hundred witnesses; the transcript of the record runs into well over three thousand pages; there was a vast quantity of documentary exhibits and it was necessary to analyze all this evidence. The court was mindful also of the constitutional importance of a case of this kind and magnitude and the need which is self-evident for thorough reflection and consideration of the law and the facts. The hearing of the case occupied the greater part of the period between 10th Feburary and 7th January , 1998. During the course of such hearing, we were called upon to render and did deliver several rulings on a variety of issues. We also received detailed submissions for which we are indebted to counsel on both sides. It should also be noted, as a novel point, that this was the first time ever when this court which is essentially an appellate court had to sit as a trial court of first and last instance under the very special jurisdiction given by the constitution for the trial of presidential election petitions. Quite early in the proceedings, we had to construe what would be the "full bench of the Supreme Court" to hear the case as required by Article 41 of the Constitution when it became apparent that there were practical difficulties and the distinct possibility of the trial never taking off. The requirement was found to be fulfilled by construing it to mean the maximum available odd number of the judges of the court that could be mustered to hear the case. Both sides agreed and the trial commenced.

One of the preliminary points raised on which we said we would give our reasons in the judgment concerned the propriety of the Cabinet Ministers who are lawyers holding practising certificates appearing as counsel for the respondent. Objection was taken that it was morally, ethically, professionally and otherwise improper for the Cabinet Ministers to appear as counsel for the respondent, among other reasons, the because in the process they had to neglect their full time ministerial responsibilities. The gravamen of the submission was that members of the bar who are members of the executive and also of the legislative branches should not appear on behalf of an individual though they can appear for the State. One reason for this was the possibility of a conflict of interest and another was the need to enhance the separation of powers. Commenting on certain precedents and instances in this country where Ministers who were practising advocates actually appeared at the bar in their character quo advocates - (such as was the case in Shamwana and Others v The People (1985 Z.R. 41 where the Minister of Legal Affairs was a member of the prosecution team in his character as Attorney-General) - counsel for the petitioners .submitted that it was now time to initiate a correct and more acceptable legal culture which would disallow this sort of thing. The case of In re: LORD KINROSS (1905)A.C. 468 was cited in support. This was a case in which the House of Lords (Committee for Privileges) held that a barrister who is also a peer may argue as counsel on an appeal at the bar of the House of Lords, but may not appear as counsel to argue before committees of the house, or before the house when sitting under the presidency of the Lord High Steward on a criminal case. In our considered opinion, this case is infact authority to support the general proposition alluded to in our brief ruling at the time that any advocate whatsoever must decline to accept instructions when there are circumstances which would render it difficult for him/her to maintain the requisite professional independence or which would in some way impair or undermine the advocate's ability to promote the best interests of the administration of justice. Ideally, an advocate should not appear as such in his own cause as in any other situation of possible want of independence or conflict of interests or embarrassment generally: See Halsbury's Laws of England, 4th Ed., Vol. 3 paragraph 1143 et seq. We did not see any conflict of interest in this matter. If anything, there may have been a case of vested common interests on both sides, judging from the number-of advocates even on the petitioners' side who are themselves senior members or leaders of some of the political parties on whose behalf the petition was brought. It is not contrary to law for practitioners with current practising certificates who also happen to be Ministers to have audience and to represent a litigant. It is certainly undesirable for Ministers to be in active private practice at the bar but the matter can not be put higher than that.

By their petitions which were consolidated, the petitioners advanced a number of prayers arising from the several allegations and averments in the petition. The prayers were in the following terms:

"1. That it may be determined and declared that the provisions of Article 34 (3) (a), (b) and (e) in respect of the Respondent have not been satisfied and accordingly that the Respondent did not qualify to contest the election and to be elected President of the Republic of Zambia and that his election way void.

2. That it may be determined and declared that the Respondent has falsely sworn as to the citizenship of his parents and is in contravention of Section 9 of the Electoral Act 1991 as amended by Act No. 23 of 1996.

3. That it may be determined and declared that the Electoral Commission neglected its statutory duty to superintend the election process thereby allowing a fraudalent

exercise favouring the Respondent.

4. That it may be determined and declared that the election process was not free and fair and that the election was rigged and therefore nulland void.

5. That the Petitioners may have such further or other (relief) as may be just."

The petitioners challenge the election of the respondent as President of Zambia. By their prayers, the petitioners have raised issues concerning the respondent's qualifications under the Constitution in respect of his own citizenship and that of his parents. They have questioned the electoral process and the way it was handled by the Electoral Commission and they have asked for the avoidance of the election for the reason that it was rigged and not free and fair. The prayers arose out of a number of allegations pleaded in the petition and with which we will be dealing.

As part of the preliminary remarks which we make in this matter, we wish to assert that it can not be seriously disputed that parlimentary elections petition have generally long required to be proved to a standard higher than on a mere balance of probability. It follows, therefore,. that in this case where the petition has been brought under constitutional provisions and would impact upon the governance of the nation and the deployment of the constitutional power and authority, no less a standard of proof is required. It follows also the issues raise are required to be established to a fairly high degree of convincing clarity. In a moment we will be examining the evidence and making our finds with this yard stick in mind. The preliminary observations would not be complete if we did not set out, at the very outset, the relevant provisions of the constitution with which we are here concerned. The constitutional provisions in the question include the controversial parentage amendments of 1996 so that article 34(1), (3) and (4) read:

"34. (1) The election of the President shall be direct by universal adult suffrage and by secret ballot and shall be conducted in accordance With this Article and as may be prescribed by or under an Act of parliament.

(3) A person shall be qualified to be a candidate for election as President if:

(a) he is a Zambian citizen;
(b) both his parents are Zambians by birth or descent;
(c) he has attained the age of thirty-five years;
(d) he is a member of, or is sponsored by, a political party;
(e) he is qualified to he elected as a member of the National Assembly; and
(f) has been domiciled in Zambia for a period of at least twenty years.

(4) A candidate for election as President (hereinafter referred to as a Presidential candidate) shall deliver his nomination papers to the Returning Officer in such manner, on such day, at such time and at such place as may be prescribed by or under an Act of Parliament."

Article 41(2) reads:

"41.(2) Any question which may arise as to whether:

(a) any provision of this Constitution or any law relating to election of a President has been complied with;

(b) any person has been validly elected as President under Article 34; shall be referred to and determined by the full bench of the.Supreme Court "

The other law referred to in these Articles is the Electoral Act and we will be alluding to it from time to time.

THE RESPONDENT'S QUALIFICATIONS

We now turn to that part of the case which concerned the respondent's qualifications.

The issues which arose included who the respondent was; where he was born; who are or were his parents; what is his citizenship and what is or was the citizenship of his parents? We heard evidence from basically three categories of witness, namely the petitioners themselves, the category of relatives or alleged relatives and acquaintances, and the others who included officials and writers. It was the petitioners position by their pleading that the identity of the respondent and the identity of his parents has been and still is a subject of contradictory public records, public controversy and public concern and has never been ascertained. Since the petitioners had to establish an affirmative case and not simply to confirm the controversy, their final submission was that we should find that the respondent was the illegitimate son of the witness PW3 Luka Chabala Kafupi who it was claimed had an illicit liaison with the mother while she was married allegedly to a Mozambican Jim Zharare Nkhonde; that we should find that the respondent was born at Chibambo Mission Hospital in the then Belgian Congo; and that the biological father alleged was at the time an alien as he himself claimed. The petitioners proceeded on the premise that PW3 is a Zairean (now Congolese) but who also claims to be a Zambian. They also proceeded on the footing that the parents of a presidential candidate referred to in the constitution are the biological and not necessarily the legal parents. It will thus be necessary to deal with all these aspects.

The petitioners gave evidence touching upon the citizenship qualifications of the respondent and the possible nationalities of his parents as PWs I(Zulu), 2(Lewanika),8 (Kambaila), 6(Mrs Phiri) and 16(Mungomba). To this list can be added the petitioner PW35(Dr. Chongwe) though not a petitioner of record. The petitioners simply made the allegation of want of qualification and obviously had no personal knowledge or direct evidence to give. They depended on the other witnesses of fact. Without a doubt, the petitioners were genuinely and truly aggrieved by the amendments of 1996 which introduced a requirement that even the parents of a candidate must be Zambian citizens by birth or by descent, pointing out that the amendments had managed to knock out in advance of impending elections the former president of the country and proposed candidate for a major opposition party which could not even field its deputy leader because another amendment barred traditional chiefs from active politics.

The next group of witnesses was that of relatives or alleged relatives and acquaintances.

These were PWs 3(Kafupi), 4(Ngosa), 5(Musangu), 7 (Chilekwa), 13 (Kasuba),14(William Banda), 28(Kakonde), 29(Musonda) 32(Anna Chilekwa), 33 (Lengwe), 34(Musendeka), 5I(Chikonde), 59(Kenani), 80(Chaziya), 83(Sikazwe) and 102(Mumba). For reasons of economy and practicality since their evidence is on record, we give only a digest containing the essentials of their evidence as follows:- PW3, Mr Kafupi, said that the respondent under the name of Titus Mpundu is his illegitimate son conceived of an adulterous affair between him and the mother in 1943. He said the respondent was born in 1944 at Chibambo in Zaire by caesarean section and all this he was told by the mother. He saw the baby at five months old and next saw him at thirty-six years in 1980 in the house of one mother-of -Kapaya (a maternal relative of the respondent) at Musangu village in the presence of one the late Bismark Chonaula who queried why the young ones should "promote" him - i.e. acknowledge and recognise him - when the elders had not. The respondent is alleged to have said in Swahili a remark to the effect that a lion when stranded could even eat grass, a reference to PW3's attempt to be accepted so late in the day.

PW3 was seventy-eight years old when he testified, which meant he was born in about 1919. He said his own parents had settled in Zambia although he did not specify whether .this was during the last or at the turn of this century. He said he was both a Zambian and a Zairean because, although his parents had settled in Zambia and he had been conceived in Zambia at Musangu villlage, he was born at a place in Zaire where his then pregnant mother was visiting a sick relation. He has a green national registration card which is reserved for Zambian nationals.

As will be seen later in this judgment, PW3 was born at a time when the former British protectorate of Northern Rhodesia (as Zambia was called before independence) was divided into North Western Rhodesia and North Eastern Rhodesia. Together with Barotseland, the territory was then being governed by an Administrator of Northern Rhodesia from the British South Africa Company on behalf of a High Commissioner based at Cape Town. This was before that company handed over the administration of Northern Rhodesia to the British Crown on 1st April,1924, under the Northern Rhodesia Order in Council, 1924.

The next witness in this line was PW4, Mr Thomas Ngosa who gave his evidence with much undisguised bitterness against the respondent whom he claimed to be some sort of second cousin. He deposed that he knew the respondent as Titus Mpundu Chabala; that the

respondent's mother lived in Luanshya with mama Kapoma Bangwa; that the respondent's mother was married in Luanshya to a Tukuyu man and that she was put in a family way by PW3 when she visited the village. He said as a result her husband then chased her. The witness said he was eight years old at the time of the events to which he was deposing. He said at age nine years, he visited the respondent's mother in Chibambo Hospital in Zaire where the respondent (the survivor of twins, a girl and a boy) was born by operation at the hands of one Dr. Dixon.

This witness fared rather badly under cross-examination, even claiming he could not know fellow children and relatives living in the same village allegedly because he was from a poor family. We found his explanations to be as incredible as his other claim that at eight years old he attended a meeting at which PW3 was warned not to claim the pregnancy as his. This was a witness who was untruthful when he said he was visiting a relation of the respondent's known as the mother-of Blaston up to 1984 when she had died in the fifties. This was the witness who failed to identify two gentlemen by the names of Bunkum and Blaston whom he had earlier claimed were his relations and were also relations of the respondent when they were paraded in court. It was highly improbable that PW4 could have been personally privy as a young lad to the kind of facts he sought to speak to. In any event, he withered under cross-examination.

Next, there was PW5, Mr. Gilbert Musangu Chipulu. His evidence was that he knew the respondent as Titus Mpundu while they were schoolmates in the villages and they played together after the respondent had been expelled from Kawambwa Secondary School. He also knew PW34, Champo Thom Musendeka. Later, he learnt that the respondent who was then in the Zambia Congress of Trade Unions was now going by the name of Frederick Chiluba.

The next witness in this category was PW7, Mr. Mark Chilekwa who was called to establish another possible father different from PW3. He said he knew the respondent to be Titus Mpundu Jim Zharare Nkhonde whose father was Mr. Jim Zharare Nkhonde, a miner and part-time herbalist of House number D.4/190 Wusakile Mine Township, Kitwe. He said he ate and played together with jim and Titus, the sons of Mr Nkhonde, during school holidays when they would come from schools in Luapula. According to PW7 Mr. Nkhonde who was a widower was a close friend of their family and used to say he came from Lourenco Marques, Tete Province, Zumbo District, in Mozambique. He disputed the details of the father given by the respondent at nomination. He said he had associated with the respondent from 1955 to 1959, and next saw him in 1977 (according to the evidence in chief) or in 1976 (under cross examination). He was surpirsed to hear that the names had changed to Frederick Chiluba. He said he had resigned from employment with Zambia National Tourist Board voluntarily but accepted when pressed that he was in fact imprisoned for an offence involving dishonesty.

We can interpose two small observations here. One is that there can be no doubt whatsoever that the respondent started life under the names Titus Mpundu and later changed them to his current names. During the course of the hearing, a question arose whether persons could change their names informally, more or less. The short answer seems to be that name – changes before the coming into force of the National Registration Act could apparently take place quite informally so that any formalities and official practices since introduced can not be resorted to in a discussion of name – changes that occurred prior to registration under that Act. The second observation is a passing comment arising from the evidence of PW7 viewed against the evidence of PW4 who said that the father chased the mother when he discovered that she was pregnant by another man: One wonders then how come the father kept the child who was the result of the illegal pregnancy.

The next witness in this line was PW13, Mr. David Kasuba, President of a very minor political party. He did his early primary schooling in Mambilima in Zambia and did the rest in Zaire where he even held political posts, as well as the post of Chief Executive Secretary in that country's Ministry of Health. He oversaw the Africanisation programme at Chibambo Mission. He produced the certificate of registration - the "Chitupa" - of his grandfather one Moses Kabambale a Northern Rhodesian working at Chibambo Mission Hospital under Dr. Dixon whom he knew personally. Subsequently he was told that the respondent was his relative and that one of his parents was not a Zambian, while the respondent himself may have been born outside Zambia. Being aggrieved by the citizenship and domicile provisions in the 1996 amendments to the constitution, he resolved to investigate by conducting an opinion poll in the villages as to who the villagers considered to be the respondent's father. All this multiple hearsay was ruled inadmissible. Mr. Kasuba's evidence was of doubtful value even on the question of whether PW3 was the father or not.

Next was PW14, Mr. William K. A. Banda who was sixty-one years old when he testified. He said he came to know the respondent as Titus Mpundu in 1960 in Mufulira: where the

respondent was then staying with an elder sister in Kankoyo township. The witness testified that the respondent was then a street vendor of vegetables. Towards the end of 1962 to mid 1963, he kept the respondent at his house together with one John Kapapi Mwansa, who was another relative of the respondent. He found a job for the respondent with Central African Road Services (CARS). In mid 1963, the respondent was transferred to Kitwe. Mr. Banda said the respondent used to say his father was "Kafupi" who was somewhere in Zaire. He said the respondent spoke Lingala - a Zairean language - and not Swahili to the Zairean lady vendors. Subsequently, he heard that CARS had sent the respondent to open a branch in Tanzania. Later, he met the respondent in Ndola in 1976 when he was now called Chiluba.

There were some witnesses called by the petitioners whose evidence was to be classified with that of the witnesses testifying to the respondent's personal history and background but whose evidence was so utterly useless that we will not waste time reviewing it. An example of this was the testimony of PWI Mr Chalo Wisdom Muwowo whose evidence flew in the teeth of many other perfectly acceptable accounts when he tried to show that the respondent never went to Kawambwa Secondary School. The witness infact went to that school long after the respondent had been expelled. Of the same flavour was evidence called to show that the respondent never lived in Kitwe.

The next witness of some substance in this line was PW28, Mr. Elijah, Mwape Kakonde who was bom in 1943. He was called upon to recall events when he was seven or so years old. He hails from Musangu Village and knew the respondent there as Titus Mpundu. He said in the early 1950s he lived with the respondent in a mutual relative's home, namely in the house of one Mr. Chonaula. As far as he had heard, PW3 Mr. Kafupi was the "real" father of the respondent. In reference to PW4 (Mr Ngosa), the witness said in one breath that he lived in town and in the next that he lived in the village. The witness got confused with the names of the people he intended to refer to. He was able to tell the court that Mr. Ngosa's relatives included Bunkum Mwenya who was Headman Kaombe, the mother-of-Kapaya, and Zharare the elder brother of Titus Mpundu.

The witness lost his temper and fumbled very badly under cross-examination. He got thoroughly confused in his references to Ngosa and also in reference to when he started schooling allegedly in 1950. According to him, the respondent had started school earlier than him. Other evidence which was more acceptable showed that the respondent started school in 1952. PW28 fared rather badly in the witness box, particularly under cross-examination. We found him not be a witness of credit.

The next witness in this group was PW29 Mr. Jonathan Musonda who was 39 years old and could only depose to what he had been told and what he heard, which was all hearsay. He had heard that the respondent was Titus Mpundu and that PW3 was his father. He was able to say that the respondent's relatives included Bunkum, Blaston, the witness Ngosa (PW4) and the respondent's brother Jim Nkonde.

PW32 was Anna Mwansa Chilekwa, the sister of PW7 Mark Chilekwa. She testified that as an eleven-year-old in 1955, she came to know Jim Zharare Nkhonde and his younger brother Titus Mpundu Jim Zharare Nkhonde who is now known as Frederick Chiluba. She said that they lived with their father a Mozambican called Jim Zharare Nkhonde who was a widower and underground miner but who was also a herbalist and helped their mother conceive and have the youngest sister Zuze now living in Zimbabwe. The youngest sister was named Zuze by Mr. Nkhonde. The witness said that the parents became close friends; PW7 slept at Mr. Nkhonde's house and when, his two sons came for holidays (between 1955 and 1959) they played and ate together. She testified that she has since visited the respondent at State House and has been given some money. She said that after the public debate had started over the respondent's identity, government functionaries drove her to Luanshya with a view to seeing her mother whom they did not find. They threatened her if she talked about knowing the respondent as a result of which she sought an appointment with the respondent. When she saw him, he disclaimed the threateners and gave her a gift of money.

The next was PW33, Mr. Jonathan Mulundu Lengwe. He testified that a Mr. Maxwell Kalesha Chisoko, his mother's true brother, lied on a television programme to say the respondent was his (Kalesha's) nephcw from his sister when the respondent is not a relative of theirs at all.

PW34 was Ruben Champo Thom Musendeka. He told the court that he knew the respondent as Titus Mpundu in 1956 when they were in the same class in standard three at Lubunda Primary School. They continued to be classmates until they completed standard six in 1960 at Johnston Falls. In August 1960, they went together for Form 1 at Kawambwa Secondary school. From what he heard, the respondent's father was PW3. The witness said that in 1961 in the last term of Form 1, the respondent, the witness and twenty others were expelled from school for

a protest demonstration and refusing to cart firewood on the head when the Headrnaster had a vanette which he refused to be used for the purpose. He said he and the respondent were the ringleaders and had been emboldened because they had smoked dagga. He told the court that the Headmaster delivered all the expellees to their villages in the vanette. He continued to visit the respondent until one evening the respondent and two companions of his arrived at his home on foot, carrying their suitcases, en route to Mufulira. He next saw the respondent in Mufulira in 1965 when, still as Titus Mpundu, he was working for CARS as a bus conductor. The witness next saw the respondent at an MMD rally in 1991 and marvelled that Titus Mpundu was now called Frederick Jacob Chiluba.

He tried to see him without success and finally decided in 1995 to go to the Post Newspaper to reveal what he knew of the respondent's identity.

PW51 was Mrs. Evelyn Chikonde. When she was nine or ten years old, she knew the respondent as Titus Mpundu at Kawambwa where he was a friend of her brother. She said he got expelled for smoking dagga. The witness - who was the UNIP Women District Chairperson for Ndola - told the court that the respondent said his father was Kafupi Chabala and that her own father assisted Titus with transport money after the expulsion from school. This was in contrast with PW34 who said the school principal delivered the expellees to their parents' homes. PW51 said that during the run up to the 1991 general elections, the respondent had vowed to deal with her for not supporting his campaign and she believes that most probably it was the respondent who engineered her dismissal from her job at the Ndola Central Hospital. PW51 came through as a most unimpressive witness.

PW59 was Mr. J.P. Chibwe Kenani, the UNIP District Chairman for Chingola. He said he went to the Post Newspaper to refute media claims by his long-standing friend, one Maxwell Kalesha Chisoko that he was the respondent's uncle. He said that in 1990 during a discussion about certain problems in the Mine Workers Union of Zambia where Chisoko was a branch chairman, the respondent was allegedly heard to remark that he did not know this Maxwell Kalesha Chisoko.

Next in this line of witnesses was PW80 Mr. John Jamale Chaziya who was 69 years old and who migrated from Mozambique, as the former Portugues East Africa is known. He told this court that he was related to one Zhuwao Sixpence Tembo and his cousin one Jim Zherari who left Mozambique and went to Salisbury (now Harare) to seek work in the 1920's. In 1943, the witness trekked to Salisbury in the then Southern Rhodesia where he learnt carpentry. From there, he moved to Ndola in the then Nothern Rhodesia in April 1950. In 1954, he met a fellow Mozambican called Kamuchacha who told him about Sixpence being in Mufulira. He cycled to Mufulira and found Sixpence who called Jim Zherari from his own house in the Mufulira mine township. Sixpence introduced the witness to Zherari who came with his son aged about twelve years old who was introduced as Titus Zherari and who was said to be the survivor of twins who were both males. From the various accounts before the court the respondent would have been about ten or eleven years old in 1954. However, to continue with the summary, the witness said he next saw the respondent then known as Frederick Chiluba at Atlas Copco in Ndola in 1976 and the respondent started visiting the witness, sometimes in company of his father-in-law a Mr. Ndhlovu, said to be the father of the first lady.

The witness said that in 1979, when the respondent felt harassed by other trade unionists, he (the respondent) reported that he had met and talked to Honourable Joachim Chissano (President of Mozambique but at the time its foreign Minister) who said the respondent could go home to Mozambique any time. PW80 hotly disputed any claims to the respondent by Zaireans or alleged Zaireans.

Next was PW83 Mr. Rodwell Kasonteka Sikazwe who, apart from alleging that the respondent had manipulated the constitution of a certain trade union, testified that his brother-in-law Maxwell Chisoko Kalesha can not possibly be the respondent's uncle, as he had falsely claimed on television.

Finally in this group of witnesses, there was PW102, Mr. Harry John Mumba who said that he came from the same area as the respondent who was known as Titus Mpundu. He said they went to the same primary schools and that he had heard that PW3 was the respondent's father.

Then there was the category of witnesses whom we have referred to as the others whose evidence in some way touched upon the issue of the respondent's qualifications. These included PWs 9,10,11,12,23,25,38, 48,52,61, 62,87,88,94,95,96,103,104,105,106, and 107. PW9 was Mr. Basil Kabwe whose evidence on the issue was of no value. He grew up and

attended school in Wusakile, Kitwe, and said that during that time he did not know the respondent. The evidence of PWIO, Mr. Sketchley Sachika along the same lines was equally of little assistance. He also said that he knew the respondent in Kitwe in the 60's as Titus Mpundu but that later in Ndola in 1967 or 68 he learnt that he was now Frederick Titus Chiluba. PW11 was Mr. Charles Simpute from the Registrar General's office. He produced the official records of the respondent as Fredrick Jacob Chiluba, NRC No. 168118/67/1. He also talked about the procedures for change names under the National Registration Act, CAP. 126, and the Regulations. The Act came into force in July 1964 and regulations in 1965. A perusal of this law shows that only a registered person was required to follow the procedure for a change of name, especially the surname. It follows therefore - as we have previously observed - that the statutory procedures are irrelevant to changes made prior to the date of the Act and prior to registration. It follows also that the Act was irrelevant to persons who died before any registrations started. PWI2 was Mr. Thilasi, the Chief Passport and Citizenship Officer. He produced the official file on Frederick Jacob Chiluba, which showed that the father was given as Jacob Titus Chiluba of Musangu Village, Chief Lubunda, Mwense District. There was no record on file to show that the father was also known as Jacob Titus Chiluba Nkonde of Lengwe Village, Kawambwa District, as set out in the respondent's oath at nominations.

The next witness under this category was PW23 Jumbe Ngoma who said that his company - Multimedia - printed the book by the respondent called "Democracy – The Challenge of Change" which was produced as an exhibit. It has a brief auto-biographical note about the respondent. PW25 was the learned Mr. John Mwanakatwe, S.C. who wrote the book "End of Kaunda Era" which the petitioners produced in evidence to show the conflicting biographical details of the respondent. The witness wrote in that book that the respondent was born in Musangu Village as Frederick Jacob Titus Mpundu; that the father was a miner while the mother died when the respondent was very young; and that the respondent started primary school in Wusakile, Kitwe. While PW25, alleged in his book that the respondent was born in Musangu started in Wusakile, all other books and articles, including books, affidavits and official forms attributable to the respondent talked about birth in Wusakile, Kitwe. The only other publication produced in evidence which suggested birth in Luapula Province was the book (which was Exhibit P.7) by the National Democratic Institute of the United States of America who were involved in monitoring the landmark elections of October 1991. As far as schooling goes, all other evidence was that the respondent went to schools in Luapula province only. In fairness to PW25, he was not adamant and graciously acknowledged that a mistake may have been made.

PW38 was Mr. Hamusankwa of the Chronicle Newspaper who said he had read the contradictory biographical materials in Mr. Mwanakatwe's book and in the respondent's book. He sent a questionnaire to Mr. Mwanakatwe and published his reply and an article calling upon those concerned to come forward and clear the air. They did not come forward.

PW48 was Mr. Justine Mwiinga of the Zambia Daily Mail newspaper. He informed their Lordships that he wrote about the President's origins, nationality and place of birth. He was in a delegation co-sponsored by the government which travelled to Zaire and found no documentary evidence that the respondent was born at Chibambo Mission Hospital. He wrote an article about it which was produced in evidence and which was pro-the respondent and highly critical of other earlier reports by other newspapers as to the respondent's alleged place of birth. He also wrote that contrary to other reports there was no Zambia Electricity Supply Corporation powerline from Musangu Village to Chibambo Mssion Hospital. The witness wrote that Chibambo Hospital did not exist at the time of the respondent's birth. This assertion is to be contrasted with other evidence that it did exist as far back as 1930 or oven earlier.

PW52 was Mrs. Pauline Banda of the Zambia Daily Mail who did not make any useful contribution to the case. She was called to produce an article which she had written about a protest staged against the then MMD Publicity Secretary Mwangilwa who was reported in the Post Newspaper to have confirmed that the respondent was born in Zaire. PW61 was Dr. Mwacalimba, the UNZA Librarian whose evidence added nothing useful. He was called ostensibly to produce the respondent's Master of Philosophy Dissertation where there is an autobiography that he was born in Kitwe at Wusakile to Titus Jacob Chiluba Nkonde and Daina Kaimba. Another unhelpful contribution was made by PW62 Mr. Jabani of Zambia Information Services (ZIS who was called to produce a pamphlet since unauthenticated on the respondent, giving his background and academic qualifications. The pamphlet was rendered even more useless when PW87, Mr. Muyunda Sibeso from the Government Printer, was called to say that the government Printer did not in fact print the exhibited pamphlet for ZIS on the respondent so that the legend on it to that effect was false.

PW88 was Mr. Phiri an artist whose contribution was not usable. He sought to show that a picture of the respondent can be "aged" to look like PW3 and the latter's picture can be "rejuvenated" to look like the respondent. He did the same for Dr. Kaunda and his son Panji.

If anything reliance even to a very tiny degree can be placed on mere resemblance of persons, the court's own ocular observation would be more trustworthy than the liberties taken by a fertile artistic imagination. If entertained, Mr Phiri would have us believe that sons and fathers can be transmuted at different ages into virtually identical likeness almost of the identical twins kind. We have discounted Mr. Phiri's evidence.

PW94 was Mr Kaira from the Times of Zambia Newspaper whose evidence was not useful to the issue being discussed. He reported on the death of one Edward Chiluba described as the respondent's brother without verification.

PW95 was Mrs. Mutiti of the National Archives. She produced the file on Chibambo Mission Hospital in Congo-Belgium which had been heavily tampered with by a person or persons unknown. She said the file went missing for some days only to re-appear mysterously on her desk. Someone went to a great deal of trouble to "doctor" the file so that there should be no documents showing the hospital existed even before the respondent's birth. The documents showed it was a Christian Missions in Many Lands (CMML) Church Mission Hospital which was grant-aided by the Northern Rhodesian government because of its service to the local inhabitants of the border area.

PW96 was Masautso Phiri of the Post Newspaper who was an active collaborator with the petitioners. His evidence dealt with issues of the respondent's qualifications as electoral issues. We digest here the evidence as he touched upon the question of qualifications. The witness told this court that he had seen documents generated by various persons or authorities which gave conflicting bio-data on the respondent, for instance, the official MMD bio-data of 1991 said he was born somewhere in Luapula. He said an anonymous circular suggested PW3 as the respondent's father. In March 1995 out of curiosity while on a trip to Luapula, he decided to call on PW3 at Musangu Village and interviewed him. He re interviewed him on a subsequent occasion and wrote PW3's story in the Post Newspaper. He also photocopied the entire Chibambo Mission Hospital file at the National Archives when it was still intact and which was later nobled. The photocopy file was admitted in evidence. He also produced books on the Hospital. He said the Post investigated and published stories about Chibambo which were duly countered in the government media for instance, by the "In search of truth" project and press conferences by Minister Ben Mwila. Cross examination revealed that the witness has sent two persons called Bondo Lusato and Simusokwe to cook up documents from Chibambo recording the alleged birth of the respondent and that both his parents (in this context Daina and Kafupi) were Zaireans. To his credit, it should be stated that the witness did not attempt to produce the alleged birth certificate.

PW103 was Mr. Vicent Tembo, Deputy Chief Inspector of Schools. His evidence was not useful and was to the effect that he failed to find any record at any school in the names Titus Mpundu or Titus Mpundu Chabala or Frederick Jacob Chiluba or Frederick Chiluba as records were not kept by the various schools. PW104 was Mr. Joseph Phiri, the Archivist for Zambia Consolidated Copper Mines (ZCCM) whose evidence was equally not useful. He said he had checked the personnel records from 1929 and found none in the names Jacob Titus Chiluba Nkonde, or Jacob Chiluba, or Jacob Nkonde, or Titus Chiluba, or any combinations of these names. He did not check for house occupancy records. When counsel for the respondent showed him a record for a Jacob Chiluba he said another team of researchers must have pulled it out. It seemed possible that the records had all been nobled. PW105 was Mr. Msimuko of ZCCM whose evidence was equally unhelpful. He produced records cards for employees with the names Jacob Chiluba or Titus but none under Nkonde or Nkhonde. Equally unhelpful was the evidence of PWs 106 and 107, Dr. Siatwinda of ZCCM Luanshya and Dr. Simukonde of ZCCM Kitwe respectively. They did not find any records of birth that might have been for the respondent.

In a nutshell, the foregoing was the evidence concerning the issues of qualification which was placed before us. The issues to be addressed included where the respondent was born; who are or were his parents; what is his own citizenship and what is or was the citizenship of the parents. In paragraph 9 of the petition, the petitioners averred that the identity of the respondent and the identity of his parents has been and was a subject of contradictory public records, public controversy and public concern and has never been ascertained. It is a fact that there was public debate and controversy in the media regarding the respondent's place of birth and parentage especially in respect of his father. However, controversy alone does not take the matter very far. It is also a fact and we so find that Chibambo Mission Hospital contended for by some existed and operated long before the respondent's birth; but so did Wusakile, Kitwe and Musangu Village the other places mentioned. Indeed, so did Luanshya mentioned by PW4 Mr. Thomas Ngosa. It follows that purely as a matter of possibility and technically, he could have been born in any one of these places. From the petitioner's point of view, the most desirable finding would be that the respondent was born at Chibambo. If, for the sake of argument that were the case, would birth at a nearby hospital in another country

render a person a non-Zambian citizen? The current and latest position under the Constitution (In fact since 1973 – see Act 27/73) is that a person born in or outside Zambia becomes a citizen at birth if at least one of his parents is a citizen, thus ensuring citizenship by birth and descent. However, the position is that we have to consider the citizenship of persons who become Zambians on 24th October, 1964, a matter which is governed by the Zambia Independence Order and the Constitution which was scheduled to it.

We had to research into the Constitutional and other legal instruments applicable from the beginnings of any kind of nationhood or statehood for this country. We took note of African migrations and the partition of Africa as recorded by historians. Zambia was formerly the protectorate of Northern Rhodesia in which the British Crown acquired jurisdiction under concessions and undertakings of protection at various times between 1891 and 1900. The King of the Lozi's gave what was North-Western Rhodesia to the British, while four or so other chiefs signed away what was North-Eastern Rhodesia. The protectorate was first administered under Charters and Orders in Council by the British South Africa Company. An administrator of Northern Rhodesia governed the territory on behalf of a High Commissioner who was based at Cape Town. An all-white Advisory Council acted as some kind or non-binding legislature: see generally The Northern Rhodesia Order in Council, 1911 and the previous orders which it revoked, namely The Barotseland-North-Western Rhodesia Orders in Council, 1899, 1902 and 1909 and the North-Eastern Rhodesia Orders in Council, 1900, 1907 and 1909. As a nascent but coherent political entity, this country started off as a white man's country and it was viewed as suitable for European settlement. A perusal of the Northern Rhodesia Gazettes of the period (e.g. for 1923 and 1924) shows that some whites were even applying for letters of naturalization under the Northern Rhodesia Naturalization Order in Council, 1914. The minutes of the Advisory Council meetings with the Administrator gazetted in 1923 and 1924 show that even as the British South Africa Company prepared to hand over the administration and governance of Northern Rhodesia to His Majesty's direct jurisdiction, European settlement was uppermost in their minds. This was to be reflected in the formal "Constitutional" instrument promulgated, which was the Northern Rhodesia Order in Council, 1924 published in the British South Africa Company's Northern Rhodesia Government Gazette No. 209 of Friday, 21st March, 1924. This order in Council (a) constituted the office of Governor and defined his powers; (b) constituted an advisory Executive Council; (c) provided for a Legislative Council; (d) provided for the courts; and (e) provided for native affairs. There were also detailed royal instructions given to the Governor (see page 27 of the Gazette) clause 23 of which enjoined the Governor to ensure the welfare and interests of the native inhabitants, especially their religion and education. The natives were not directly or indirectly involved in the legislature which was outlined in a separate order in Council.

On Tuesday, 1st April,1924, Herbert James Stanely, former Imperial Secretary under the High Commissioner for South Africa became the first Governor of Northern Rhodesia. Between 1924 and 1928 (see for example Government Notice No. 153 of 1924; Government Notice No. 89 of 1926; and Government Notice No. 107 of 1927) Commissions of Inquiry were set up to recommend the establishment of Native Reserves for the benefit of natives along the line of rail and in other districts who would be affected in their occupancy of land by actual or probable European Settlement along or near the railway line or by actual or probable mineral development or near the same. Elsewhere in the territory, it was found necessary to set aside land for the exclusive use of the natives and which would not be available for expansion of white settlement. The exercise was crowned by the Crown Lands and Native Reserves Order in council, 1928 and the Regulations (see page 69 for the Order in Council and Government Notice No. 149 of 1928 for the Regulations).

As far back as 1927, the European settlers discussed plans to merge Northern Rhodesia with other East African dependencies or with Southern Rhodesia or even to split it up and add the parts to other adjacent territories – see the Governor's speech to the Legislative Council at page 247 et seq of the Gazette. The reason advanced for this was the alleged sparse population which made it necessary – according to the Governor – for the native labour to circulate freely to and from Nyasaland, Portuguese East Africa, Katanga, Southern Rhodesia and Tanganyika. the natives were viewed as a source of cheap labour and were to be encouraged free movement in all the surrounding countries and within the territory –see the governor's speech to the Legislative council on 16th April 1928 (page 56 et seq). And so it was that for the purposes of native tax, the colonial administration taxed two categories of native, that is to say, natives with a village and domiciled in the territory and natives domiciled in some other country but resident in the territory. And so it was too that under the Native Registration Ordinance, CAP 59 of the Laws of Northern Rhodesia 1930, indigenous natives of working age had had to register while alien natives of working age had to register under the Alien Natives Registration Ordinance, CAP 60 of the Laws of Northern Rhodesia, 1930. Under the latter statute, alien natives who had shown an intention to settle in the territory could be treated as natives of the territory.

Meanwhile, the European settlers brought in the ill-fated Federation of Rhodesia and Nyasaland. Northern Rhodesia continued to be a protectorate. As from 1948 when two Africans got into the Legislative Council, the so-called natives steadily began to make in-roads into the political organs of Government. A useful summary of this can be read in Halsbury's Laws of England, 3rd Edition, vol. 5 from paragraph 1273. We are taking some time to outline the constitutional progression to statehood for a good reason which will soon become apparent.

The next "Constitutional" milestone was the passing of The Northern Rhodesia (Constitution) Order in Council, 1962 –see Gazette 213 of 1962. This Order (a) revoked the previous "Constitutional" Orders in Council; (b) made provision for the governor, the Executive Council, the Legislative Council, the High Court and the House of Chiefs; (c) provided for a power-sharing arrangement between the Europeans and the Africans; and also the Coloureds and Asians; (d) it divided the voters into higher franchise and lower franchise voters; (e) such voters had to be, inter alia, a citizen of the United Kingdom and Colonies or of the Federation of or a British protected person by virtue of his connexion with Northern Rhodesia. Under this arrangemesnt the right to vote was given to any British protected person by virtue of his connexion with the Territory; or any British subject or a British protected person who had been resident for an aggregate of at least four years out of the preceding seven years; or a resident registered under a chief's area; or any person who had been continuously resident for seven years during the preceding ten years; or the wives of any of the foregoing.

The Order of 1962 was revoked by that of 1963 – see Government Notice No. 25 of 1964 vol. 1 of Government Notices from page 228. The 1963 Constitution introduced a bill of rights which included a non-discrimination clause excepting, inter alia, "with respect to persons who do not belong to Northern Rhodesia". It also introduced a Constitutional Council. Up to this point in time the British nationality law both statutory and common laws applied and there was in none of what may be termed the "Constitutional instruments" thus far any talk of "Citizenship" of Northern Rhodesia. Instead, chapter 1 of the 1963 Constitution talked of persons belonging or not belonging to Northern Rhodesia. Section 16(3) of the 1963 Constitution provided as follows:-

> *"16 (3). For the purposes of this chapter a person shall be deemed to belong to Northern Rhodesia if he is a British subject or a British protected person and:*
>
> *(a) was born in Northern Rhodesia or of parents who at the time of his birth were ordinarily resident in Northern Rhodesia;*
> *(b) has been ordinarily resident in Northern Rhodesia continuously for a period of seven years or more and since the completion of such period of residence has not been ordinarily resident continuously for a period of seven years or more in any other part of the common wealth;*
>
> *(c) is a citizen of the United Kingdom and colonies by virtue of registration in Northern Rhodesia, or the grant of naturalisation in Northern Rhodesia, under the British Nationality Act, 1948;*
>
> *(d) is the wife of a person to whom any of the foregoing paragraphs applies not living apart from such person under a deed of separation; or*
>
> *(e) is the child, stepchild, or child adopted in a manner recognised by law under the age of eighteen years of a person to whom any other foregoing paragraphs applies."*

A little later, we will be citing the House of Lords' decision in Motala And Others v Attorney -General (1991)4 ALL E.R. 682 among other things in connection with the automatic though there unwelcome acquisition of Zambian Citizenship by operation of law by the children of parents who had migrated to Northern Rhodesia from India. For the moment, we rely on it too as very persuasive authority for considering the question of citizenship against the backdrop of the pre-existing or previously existing state of the law and official practice. We would figuratively speaking underline the constitutional provision which in 1963 said a person "belonged" to Northern Rhodesia if born there or even if only born"....of parents who at the time of his birth were ordinarily resident..." There were thus no persons known as citizens of Zambia prior to 24th October ,1964.

Zambia Citizenship came with the grant of independence and it is the legal instruments of that time which made provision for the very first time for citizenship of Zambia. In this connection we wish to refer to some salient provisions in the Zambia Independence Act 1964; The Zambia Independence Order, 1964, and the Independence Constitution which it ushered in.

We wish to quote Sections 2(1) and 3(2) and (3) of the Zambia Independence Act 1964 which read:

"2. *Operation of existing law----(1) Subject to the following provisions of this Act, on and after the appointed day all law which,whether being a rule of law or a provision of an Act of Parliament or of any other enactment or instrument whatsoever, is in force on that day or has been passed or made before that day and comes into force thereafter, shall, unless and until provision to the contrary is made by Parliament or some other authority having power in that behalf, have the same operation in relation to Zambia, and persons and things belonging to or connected with Zambia, as it would have apart from this subsection if on the appointed day Northern Rhodesia had been renamed Zambia but there had been no change in its status."*

3. *(2) A person who, immediately before the appointed day, is for the purposes of those Acts and of the said Order in Council of 1949 a British protected person by virtue of his connection with Northern Rhodesia shall not cease to be such a British protected person for any of those purposes by reason of anything contained in the proceeding provisions of this Act, but shall so cease upon his becoming a citizen of Zambia.*

(3) Except as provided by section 4 of this Act, any person who immediately before the appointed day is a citizen of the United Kingdom and colonies shall on that day cease to be such a citizen if he becomes on that day a citizen of Zambia."

Thus, it is seen that those who granted this country its nationhood made provision that, until replaced, the existing law, that is to say the law existing before independence day, should continue to operate in relation to the country as well as to "persons and things belonging to or connected with Zambia" as if Northern Rhodesia had simply changed its name without change in status. We should also draw attention to the fact that the terms of the citizenship provisions at independence which we are about to set out made no suggestion that being native or indegenous or of any particular race would be part of the definition of criteria. Section 6(1) and (2) of the Zambia Independence Order, 1964 read as follows:

"6. *(1) Any person who, at the commencement of this Order, is entitled to be registered as a citizen of Zambia under section 4 or 8 of the constitution shall, until he becomes a citizen of Zambia or until 24th October, 1966, (whichever is the earlier) and subject to the provisions of subsection (3) of this section, have the status of a citizen of Zambia.*

(2) Any person who has the status of a citizen of Zambia by virtue of the provisions of this section shall be regarded as such a citizen for the purposes of the provisions of the Constitution (other than Chapter II or section 66 (1) and the provisions of any other law for the time being in force in Zambia (other than a law made or having effect as if made in pursuance of section 11 of the Constitution)."

The Constitution which was a schedule to the Zambia Independence Order dealt with citizenship in chapter II. Sections 3, 4, 5 and 6 of that Constitution were in the following terms:--

"3. *(1) Every person who, having been born in the former Protectorate of Northern Rhodesia, is on 23rd October,1964, a British protected person shall become a citizen of Zambia on 24th October,1964.*

(2) Every person who, having been born outside the former Protectorate of Northern Rhodesia, is on 23rd October,1964, a British protected person shall, if his father becomes, or would but for his death have become, a citizen of Zambia in accordance with the provisions of subsection (1) of this section, become a citizen of Zambia on 24th October, 1964."

"4. (1) Subject to the provisions of this section, any woman who, on 23rd October, 1964, is or has been married to a person--

(a) who become a citizen of Zambia by virtue of section 3 of this Constitution; or

(b) who, having died before 24th October, 1964, would but for his death, have become a citizen of Zambia by virtue of that section,

shall be entitled, upon making application in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen of Zambia.

(2) Subject to the provisions of this section, any person who, on 23rd October,1964, is a citizen of the Untied Kingdom and Colonies, having become such a citizen by virtue of his having been naturalisedor registered in the former Protectorate of Northern Rhodesia under the British Nationality Act 1948, shall be entitled, upon making application before such date and in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen as a citizen of Zambia:

Provided that any person who is under the age of twenty-one years (other than a woman who is or has been married) shall not be competent to make an application for registration under this subsection, but an application may be made on behalf of that person by his parent or guardian.

(3) Subject to the provisions of this section, any woman who-

(a) is on 23rd October, 1964, married to a man who after that date becomes a citizen of Zambia; or

(b) is on 23rd October, 1964, married to a man who becomes entitled to be registered as a citizen of Zambia under subsection (2) of this section but whose marriage is terminated after that date by death or dissolution and before that person exercises his right to be so registered,

shall be entitled, upon making application before such date and in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen of Zambia.

(4) Subject to the provisions of this section, any woman who on 23rd October 1964 has been married to a person who becomes or would, but for his death, have become entitled to be registered as a citizen of Zambia under subsection (2) of this section, but whose marriage has been terminated by death or dissolution before 24th October 1964, shall be entitled, upon making application before such date and in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen of Zambia.

(5) An application for registration as a citizen under this section shall not be made by or on behalf of any person who, under any law in force in Zambia, is adjudged or otherwise declared to be of unsound mind."

"5. Every person born in Zambia after 23rd October 1964 shall become a citizen of Zambia at the date of his birth;

Provided that a person shall not become a citizen of Zambia by virtue of this section if at the time of his birth--

(a) neither of his parents is a citizen of Zambia and his father possesses such immunity from suit and legal process as is accorded to the envoy of a foreign soverign power accredited to Zambia; or

(b) his father is a citizen of a country with which Zambia is at war and the birth occurs in a place then under occupation by that country."

"6. A person born outside Zambia after 23rd October 1964 shall become a citizen of Zambia at the date of his birth if at the date of his birth his father is a citizen of Zambia otherwise than by virtue of this section or Section 3(2) of this Consitition."

The scheme of the Constitution at independence was such that some became citizens

automatically; some became entitled to that status and could register as of right; while others who were potential citizens could apply to naturalize. Even the law enacted to facilitate registration and naturalisation introduced another element of automatic acquisition of citizenship by adoption: See, the Citizenship of Zambia Ordinance, 1964 (61 of 1964) and subsequent legislation. The Constitutional provisions at independence defined a "British protected person" by reference to the British Nationality Act, 1948, Section 32 of which provided that a British protected person meant a person who was a member of a class of persons declared by order in Council to be protected persons by virtue of their connection with the relevant protectorate, state or territory. The British Protectorates, Protected States and Protected Persons Order in Council, 1949, gave various instances of such protected persons including, under Section 9, those born in a protectorate or a trust territory and those born elsewhere but whose fathers were born in a protectorate or a trust territory. As will be seen shortly when we refer to the MOTALA Case, the state of affairs brought about by the British Nationality Act, 1948 as read with the citizenship provisions in the instruments which ushered in our independence must be viewed in light of the pre-existing state of the law on the subject. Viewed in this way, it is seen that the Legislation of the Untied Kingdom dealing with nationality and elaborated subsequently begins with the British Nationality and Status of Aliens Act, 1914. Under that law, there was a common British nationality for all subjects of the Crown throughout the Commonwealth and Empire which had grown out of the common law doctrine of allegiance to the King. As the learned authors of Halsbury's Laws of England, 3rd ED: vol. 1 point out in Note (i) at page 528---

> *"Before 1st January 1949, the terms "British national" and "British nationality" were generally used to indicate a British subject and the status of a British subject. In fact, there existed at that time another group of British nationals, i.e. British protected persons, but in strict law they were treated as aliens, although they were deemed not to be aliens for the purposes of any provision having effected by virtue of the Aliens Order, 1920....."*

The Act of 1948 radically changed the whole of the citizenship law of the United Kingdom. We have already mentioned the Order in Council dealing with protected persons which was made under this Act. However, as early as 1934, there was promulgated the British Protected Persons Order, 1934: See Government Notice No. 91 of 1934 in the 1934 Government Notices of Northern Rhodesia, at page 109. The object of that Order in Council was to define which persons were to "regarded as belonging" to the affected territories and therefore British protected persons. The persons to be regarded as belonging included those born in the territory and those whose fathers belonged by their own birth in the territory. We have previously quoted Section 16(3) of the 1963 Constitution in which an extended and more expansive definition of the persons who belonged to Northern Rhodesia was given. This was long after 1934 and 1948. This was an expanded list of the persons – to use the language of the recitals in the 1934 Order in Council – regarded as belonging to the territory and who were afforded Her Majesty's protection and were known as British protected persons.

The Zambian citizenship provisions at independence were considered in the Court of Appeal as well as in the House of Lords in the MOTALA case reported respectively in (1991) 2 ALL E.R. 312 (CA) and 1991) 4 ALL E.R. 682 (HL). The claimants Safiya and Farug Motala were born in British Protectorate of Northern Rhodesia. Their parents were Indian citizens born in Gujerat who married at Fort Jameson (now Chipata) in Northern Rhodesia in July, 1950 and brought up a family of eleven children there. Their father had gone to live in Chipata in 1946 and had carried on a successful business as a trader until he went to live in Manchester, England, shortly before he died in 1984. The father applied to become a citizen of the Untied Kingdom and Colonies by registration. It was granted to him on 13th February, 1953, at Lusaka by a certificate signed by the Chief Secretary of the Government of Northern Rhodesia. Subsequently, Mrs. Motala also registered as a citizen of the United Kingdom and Colonies. The two claimants were citizens of the United Kingdom and Colonies by descent at birth under Section 5(1) of the British Nationality Act 1948 because their father, who had been born in India, had already become a citizen of the United Kingdom and Colonies by registration in Northern Rhodesia. In 1979, the claimants were refused United Kingdom passports on the ground that they were not citizens of the United Kingdom and Colonies and were in any case illegitimate because their parents' marriage was not valid. In 1983, they applied successfully for a declaration that they were legitimate and that they were citizens of the United Kingdom and colonies. The Attorney General appealled, contending that although the claimants had been entitled to citizenship of the United Kingdom and Colonies by descent they had also been British protected persons as defined by the 1948 Act and therefore by virtue of Section 3(3) of the Zambia Independence Act 1964 and Section 3(1) of the Constitution of Zambia which was scheduled to the Zambian Independence Order, 1964 they had lost their status as citizens of the United Kingdom and Colonies by descent on 23rd October 1964, the day before Zambia became independent, and had become citizens of Zambia on Independence Day, 24 October 1964. The Court of Appeal reject the Attorney General's contention, holding that under the

1948 Act the status of a British Protected person and that of a citizen of the United Kingdom and Colonies were inconsistent and mutually exclusive so that a person could not be both at the same time. Accordingly, the claimants were not British protected persons immediately before Zambia's independence and, in the absence of express provision in the 1964 Act, they did not become Zambian Citizens on Independence Day but retained their status as citizens of the United Kingdom and Colonies. The Court of Appeal simply considered the language of section 3(3) of the Zambia Independence Act 1964 and section 3(1) of our Independence Constitution and proceeded to construe it in light of the 1948 Act and the British Protectorates, Protected States and Protected Persons Order in Council 1949. They looked at the law against the background of the common law which traditionally considered protected persons to be aliens and held that it was not necessary for the draftsman to state in the 1948 Act that a citizen of the United Kingdom and Colonies was not and could not at the same time be a British protected person. This was considered to be implicit in the law. The Court of appeal upheld the trial judge's finding that the claimants had become British Overseas Citizens. The Attorney General took the matter to the House of Lords and was rewarded with success. Their Lordships held that although the status of a British protected person was different from that of a citizen of the United Kingdom and Colonies, the one status was not inconsistent with the other and therefore a British protected person did not cease to be such on becoming a British subject. The claimants were from their birth in Northern Rhodesia until Zambia became independent both citizens of the United Kingdom and colonies by descent under Section 5(1) of the 1948 Act and British protected persons by virtue of Section 32(1) of that Act, read with Section 9(1) of the British Protectorates, Protected States and Protected Persons Order in council 1949, and therefore by virtue of section 3(3) of the 1964 Act they ceased to be citizens of the United Kingdom and Colonies and became citizens of Zambia on 24th October 1964 under Section 3(1) of the Constitution of Zambia.

The question in the MOTALA case was whether the claimants were British protected persons who became Zambian citizens under section 3(1) of the Constitution or if, inspite of the wording of section 3(3) of the Zambia Independence Act 1964 they continued to be citizens of the United Kingdom and Colonies by descent. The question was also whether the status of a protected person and an overseas citizen were mutually exclusive. The House of Lords considered the common law and the pre-existing law in order to construe the 1948 and 1949 legislation in the proper context and to demonstrate that the Court of Appeal had misapprehended the common law position which preceded the 1948 Act precisely because it did not attempt to look at the pre-existing law. We can do no better than to quote from the leading opinion of Lord Bridge from page 685 where he said:

> *"Hence the critical question is whether from birth until 23rd October,1964, they each had the dual status of citizen of the United Kingdom and Colonies and British protected persons or whether, under the 1948 Act, that was an impossibility.*
>
> *Before addressing that question I must say at once that the courts below were denied the advantage which your Lordships have enjoyed of being referred to J Mervyn Jones British Nationality Law and Practice (1st edn. 1947), which is a valuable source of information with respect to the status of British protected persons at common law, or to the British Protected Persons Order 1934, SR & 01934/499, which shows how the status was treated in previous legislation.*
>
> *As an inevitable consequence the Court of Appeal approached the issue which arose on the construction of the 1948 Act and the British Protectorates, Protected States and Protected Persons Order in council 1949, SI 1949/140, made under the 1948 Act, without reference to their proper context.*
>
> *As will appear, when construed in the context of the pre-existing law, the 1948 and 1949 legislation wears a very different aspect.*
>
> *Mr. Mervyn Jones' book is a most useful starting point. It appears to have been the first comprehensive textbook on the subject matter of its title. It carries a foreword by Mr W E Becket, who was then the legal adviser to the Foreign Office Apart from giving the work his laudatory imprimatur, Mr Beckett points out that;*
>
> *'in the field of British Nationality law very few cases have ever gone to the courts at all, whereas a very large number of problems have confronted the two Departments of State, the Home Office and the Foreign Office, and have been dealt with administratively.Mr Mervyn Jones has been able to see the papers of these two departments where cases of interpretation have arisen. Not being an official, he has been entirely free to form his own judgement upon them, and in fully exercising this*

freedom, he has shown his own qualities as a scholar and as a lawyer.

This inspires confidence that the ensuing text accurately reflects both contemporary practice and accepted contemporary opinion in matters of nationality and status."

The most significant passage from the text, for present purposes, appears where the author states (p279):

> *"It may often happen that a person may be, at one and the same time, both a British subject and a British protected person. for instance, a number of British subjects also possess Palestinian citizenship. There are a large number of people from India who are, at one and the same time, British subjects by virtue of their connection with British India, and British protected persons by virtue of connection with some Indian state. It is a sort of domestic double nationality.*
>
> *In many territories under British protection, eg the Indian native states, the several states in what is now Malaysia and the protected states on the shores of the Persian Gulf, the question who was entitled to be regarded as a British protected person was determined by the local law in the sense that whoever was recognised as a subject of a protected state was also recognised as a British protected person."*

But, as Mr Mervyn Jones points out (at p 294) in the British protectorates, being:

> *"territories mainly in Africa where there is no native ruler..... the rules defining who can claim the status of a British protected person, by virtue of their connection with protectorates, have to be laid down by the British Crown."*

It was for this reason that the British Protected Persons Order 1934 was enacted. The territories to which the order applies are the British protectorates, including Northern Rhodesia, and mandated areas set out in the schedule. The order recites:

> *".....And whereas certain persons who are regarded as belonging to those territories are afforded His Majesty's protection, and are known as British protected persons: and whereas it is expedient to define in relation to those territories the persons who are so regarded as belonging thereto....."*

Again, after dealing with various aspects of the decision in the Court of Appeal, Lord Bridge continued, at pages 688 to 689:

> *"The 1948 Act came into force on 1 January 1949. The British Protectorates, Protected States and Protected Persons Order in Council 1949 and the order in council revoking the British Protected persons Order 1934 were made on the same day, 28 January 1949. The draftsmen of the new legislation must have been perfectly familiar with the pre-existing law and, if it had been intended that henceforth British protected persons could not at the same time be citizens of the United kingdom and Colonies and vice versa, it is inconceivable that this would not have been made clear in express terms, in the same way as it was made clear in express terms that henceforth British protected persons would no longer be aliens."*

Even if there was an ambiguity in the 1948 Act, there is available one further aid to its construction which was not brought to the attention of the Court of Appeal. Your Lordships are indebted to Mr Collins, whose industrious research unearthed a relevant provision in the Solomon Islands Act 1978; which he very properly brought to the attention of Mr Holman, Q.C., who naturally relies on it. It is s4(1),
which provides:

> *"A person who immediately before Independence Day is a British protected person by virtue of his connection with the Solomon Islands protectorate;*
>
> *(a) shall cease to be a British protected person on that day if he then becomes a citizen of Solomon Islands or is then a citizen of the United Kingdom and Colonies...."*

This provision clearly assumes that prior to Independence Day there may be some Solomon

Islanders who are both British protected persons and citizens of the United Kingdom and Colonies. In the words of Lord Sterndale, MR, in Cape Brandy Syndicate v IRC (1921) 2 K.B. 403 at 414, approved by your Lordships' House in Ormond Investment Co Ltd v Betts (1928) A.C. 143 at 156 (1928) ALL E.R. Rep 709 at 715-716:

> *"I think it is clearly established in Attorney-General v.Clarkson (1900) 1 Q.B. 156) that subsequent legislation on the same subject may be looked to in order to see what is the proper construction to be put upon an earlier Act where that earlier act is ambiguous. I quite agree that subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier. Hence, if the 1948 act were ambiguous on the point in question, s.4(1) of the Solomon Islands Act 1978 would resolve the ambiguity."*

We consider the House of Lords' decision as ample persuasive authority for having taken the expedition into the history of the instruments of the constitutional developments in this country. In context, therefore, the people said by the 1963 Constitution to "belong" to Northern Rhodesia were all British protected persons by virtue of their different kinds of connection with Northern Rhodesia. The legislation of 1963 being subsequent to 1948 and 1949 threw considerable light on the question of British protected persons by virtue of their connection with Northern Rhodesia and hence who became citizens. Using the House of Lords' approach, we are quite satisfied that belonging to Northern Rhodesia on any ground listed in the 1963 Constitution constituted the necessary connection for one to be a British protected person to that the non-repetition or specific mention of each and every category of the 1963 British protected persons in the 1964 legislation did not result in any lacunae so as to deprive the affected of their right to claim citizenship of Zambia or of the United Kingdom and Colonies as the case may be.

In light of the law discussed, the respondent "belonged" to Northern Rhodesia and was clearly a British protected person whichever biography out of the several proposed is or were to be adopted. In light of the law, therefore, the respondent's own citizenship cannot be in any doubt. He is a Zambian citizen. It must be stressed and sight should not be lost of the real issue here which is the citizenship of the respondent himself which cannot be affected by being born at Chibambo, if that is where he was born. As already shown, it was not solely one's own birth within Northern Rhodesia which resulted in "belonging" and being a British protected person. The contention in the petition was that if he was born at Chibambo he would be a foreigner: The law says otherwise, as already discussed. In the event, we are of the considered view that it would be idle, otiose and pointless to make a positive finding as to where the respondent was born although we note that the preponderance of the evidence of the available official records favours Kitwe.

The next question is who are or were his parents? a number of other questions arise such as whether the Constitution is concerned with legal or biological parents and whether in the event of a person being legally fatherless or illegitimate such a person is not entitled to become the President. Other questions arising include whether parents born before independence can be regarded as citizens of Zambia by birth or descent or if the provision should be construed as including only the parents who are or were literally Zambians by birth or descent (none of whom would be older than our independence so as to have any child of not less than 35 years old as required for presidential candidates).

We begin with the evidence. From the evidence given, there was no dispute who the mother of the respondent was, namely the late Daina Kaimba Mulaye of Musangu Village. The evidence has shown that the she belonged to that village and to Northern Rhodesia and she would, but for her prior death, have become a citizen of Zambia at independence. Three fathers have been proposed for the respondent in the evidence before the court and the question is: was it (a) PW3; (b) Jim Zharare Nkhonde or (c) Jacob Titus Chiluba Nkonde? In favour of PW3 Luka Chabala also known as Kafupi – "the short one" – was firstly PW3 himself. He laid his claim with much conviction and gusto. Then there was PW4 Mr. Ngosa a relative of the respondent who harboured undisguised bitterness and who fared very badly in the witness box. He was discredited and we found his evidence to be unreliable. It can not be resorted to in order to afford support to PW3. Then there was PW13 Mr Kasuba whose evidence on the point was all multiple hearsay and inadmissible. Next was PW14 Mr. Banda who claimed that the respondent himself told him in 1962 in Mufulira that his father was a Zairean called Kafupi who had other children in Zaire and that his home was in Zaire. He said the respondent spoke Lingala, a typical Zairean language, thereby suggesting that the respondent associated with or was brought up by or among Lingala-speaking folk. Mr Banda's evidence was in sharp contrast with that surrounding the respondent's educaion and that of PW3 himself who was either working on the Copperbelt or

living in the villages in Luapula province and had all his children in Zambia. While it is quite possible that PW14 knew the respondent and even kept him and procured the employment he had as a bus conductor with C.A.R.S., we gained the distinct impression that he was overly keen to embellish and colour his evidence, especially on the issue of the respondent's paternity.

The other witness to support PW3 was PW28 Mr. Kakonde. However, his evidence on the point was patently hearsay and, as already observed, he was in any case thoroughly discredited and not credible. Again as already noted when we recited a digest of the evidence, there was the inadmissible hearsay evidence of PW29, Mr Musonda. PW34 Champ Thom Musendeka the schoolmate, said he had heard that PW3 was the real father. This was obviously hearsay. There followed the evidence of PW51 Mrs. Chikonde who was not a credible witness and was contradicted by PW34. It was she who alleged that the respondent (then known as Titus Mpundu) had himself said his father was Kafupi Chabala when the respondent and her brother were expelled from school. Her allegation that her father gave the respondent transport money after the expulsion conflicted sharply with the account given by PW34 who said that the Headmaster delivered them to their homes in his vanette. Again, we have already commented upon the evidence of PW102, Mr Mumba, which was all hearsay. The position therefore is that PW3 largely stands alone with any kind of direct evidence, with no or very little support mainly of the hearsay type from the relatives and acquaintances. We now turn to the evidence in favour of Zharare Nkhonde, of Mozambican origin. The evidence given by PW7, Mr Mark Chilekwa and his sister PW32 Mama Anna Chilekwa was agreed that they lived in Wusakile and came to know the respondent and his father. The auto biography of the respondent agrees that he lived in Wusakile. These witnesses put the period at 1955 to 1959. We have also noted the similarity between the name Nkhonde (with an "h given by PWs7 and 32 and the name Nkonde (without an "h") given by the respondent himself at his nomination as a presidential candidate. In a general way, PW80 Mr. Chaziya was in support of the father being of Mozambican origin and known as Jim Zharare, without any other surname. It was PW80 who described how Sixpence and Zharare had worked at Bwanamkubwa and then transferred to Mufulira; thence to Chambeshi for two years until the mine collapsed thence back to Mufulira Mine where he found them in 1954. It was a notorious fact that Mufulira Mine – and Luanshya Mine suggested by PW4 – used to belong to Roan copper Mines Limited while Nkana – Kitwe used to belong to what was then Nchanga Consolidated Copper Mines Limited, before the companies merged in the seventies to form the Zambia Consolidated Copper Mines Limited. We were troubled by some aspects of the accounts relating to Mufulira and Kitwe which we found difficult to reconcile. Quite apart from the unlikelihood of transfers of miners between different companies those days, there was the timing of the events in Mufulira and Kitwe; the surnames used; and the claim by PW80 that Titus Zherera was the survivor of twins who were both male. The evidence relating to Kitwe was in agreement and tallied with other evidence that the respondent lived in Luapula where he was attending school, coming to Kitwe only during the school holidays. In contrast, PW80 suggested that the respondent and his father were living in Mufulira.

The evidence in favour of the respondent's father being Jacob Titus Chiluba Nkonde came from the published biographies and also from the documents which were produced by the witnesses, such as PW11 Mr. Simpute and PW12 Mr. Tilasi. There was also support from the documents in the bundles of documents at the trial. The rest of the evidence of the others, as already discussed when we summarised their evidence is peripheral.

From the evidence discussed, all the accounts as to which one might have been the father are quite plausible; but they are irreconcilable. PW3's evidence was otherwise quite believable; but so was the version supported by the Chilekwas and Mr. Chaziya regarding Mr Zharare which was otherwise also quite believable. Although there was no viva voce evidence to support the third father named in the official documents, that story too was plausible and was not positively discredited. In the absence of an affirmative case in support of a specific father, the petitioners finally urged that PW3 be found to be the father and proposed – without any evidence to support the linkage – that it be taken that the respondent was the illegitimate son of PW3, the product of an illicit affair while the respondent's mother was married to a Mozambican who brought him up. Assuming PW3 to have been the biological father but without making any finding to that effect, what would be the position? Would the respondent have been unqualified to stand on account of the citizenship of the presumed father? In other words, is PW3 a Zairean (or now Congolose)? PW3 testified that his parents settled in Northern Rhodesia and he was born in the Congo as it were by accident of circumstance when his mother visited a sick relative. The birth in that country would have the same flavour as the mothers in the border areas of this country who had to resort to Chibambo Mission Hospital which was grant-aided by the Northern Rhodesian Government. Their children did not cease to belong to Northern Rhodesia where they themselves belonged. The case proceeded on the assumption that PW3 who is otherwise a Zambian with a Zambian National Registration Card had a village where his own parents become a foreigner by birth in the then Belgian Congo. We have already dealt at great length with what will be the consequence had the respondent

infact being born in Chitambo in the Congo. The reasoning and the law which we set out in relation to the respondent's position applies with equal force PW. By law, he belonged to Northern Rhodesia and was British protected person born of parents – to lift an expression directly out of the 1963 Constitution – "who at the time of his birth were ordinarily resident in Northern Rhodesia." One of the counsel for the petitioners submitted that PW3 became a Zambian by registration – if we understood correctly – under the National Registration Act. This Act is concerned with the registration of all persons in Zambia who are over 16 years of age and whether they are Zambians, commonwealth citizens or aliens. It is not the Act for obtaining citizenship by registration for which a separate Act exists. The fallacy of assigning citizenship by registration for which a separate Act exists. The fallacy of assigning citizenship by registration to PW3 is self-evident. But in fact, by operation of law as already demostrated he became a citizen at independence so that if the law in the constituion were concerned with natural or biological parents, and if he were the father as he claims, the respondent would not have been disqualified.

We did pose the question whether the Constitution had in contemplation biological parents or legal parents. The citizenship law at independence traced its roots to the British legislation on the subject and if such legislation is resorted to, one finds that the law is concerned with legitimate. Thus, for example, Section 32(2) of the British Nationality Act 1948, provides as follows:

"32(2). Subject to the provisions of section twenty-three of this Act, (which considered the position of children legitimated by the subsequent marriage of their parents) any reference in this Act to a child shall be construed as a reference to a legitimate child; and the expressions "father ", "ancestor" and "descended" shall be construed accordingly."

The words in brackets are ours. Again, if the respondent were a non-marital child or filus nulius - to use an obsolete latin expression - the legal position appears to have always been that such a child has derived domicile and personal status through the mother. On the facts of the case at hand, that is, if the case were that the respondent was the illegitimate son of PW3 but brought up by the legal parents, he would undoubtedly have been considered to be a marital child - see for instance, the Affilliation and Maintenance of Children Act, CAP 64 of the 1995 edition of the Laws of Zambia. The parentage qualifications indeed raise a number of questions. For instance, it was suggested in the submissions that the reference to parents who are or were Zambians by birth or descent was intended by the legislature to disqualify those who are not indigenous. As we have pointed out in a number of cases in the past - for example in Samuel Miyanda v Raymond Handahu S.C.Z. Judgment No. 6 of 1994 - the fundamental rule of interpretation of all enactments to which all other rules are subordinate is that they should be construed according to the intent of the parliament which passed the law. Such intent is that which has been expressed and when the language used is plain and there is nothing to suggest that any words are used in a technical sense or that the context requires a departure from the fundamental rule, there would be no occasion to depart from the ordinary and literal meaning and it would be inadmissible to read into the terms anything else on grounds such as of policy, expediency, political exigency, motive of the framers and the like; see also Capper v Baldwin (1965)2 Q.B.53 by Lord Parker, C.J., at page 61. Accordingly, it is not possible to read the provisions as requiring or permitting only the indegenous sons and daughters who belong to one of the tribes native to Zambia and who have a village and chief in Zambia. Applying the fundamental rule, the provision would not disqualify for example a person born in Northern Rhodesia or in present day Zambia 35 years ago of Chinese parents (say who died) who has since been adopted by Zambian parents who are Zambian by birth or by decent; See for instance the automatic acquisation of citizenship by adoption introduced by section 3 of Ordinance 61 of 1964, that is the citizenship of Zambia Ordinance which read:

> "3. A child adopted, on or after the commencement under the provisions of any law relating to the adoption of children shall, if he was not a citizen at the date of such adoption, become a citizen by adoption on the date of that adoption if the adopter, or, in the case of a joint adoption, the male adopter, was at the date of the adoption a citizen."

(Now see s. 11 CAP 124 of the 1995 Edition of the Laws)

In the not too distant future, there will be second and third generation Zambians descended from ancestors who originated from a variety of continents and countries all over the world which ancestors are now "disqualified" Zambians. We have also pointed out a number of other questions which arise, including whether or not "biological" parents were intended and whether or not persons who were or are non-marital children are thereby excluded. We consider that the point has to be made that the parentage qualifications introduced into the constitution in

1996 pose a number of apparently solutionless problems and difficulties. In giving the example of the adopted Zambian of Chinese origins, we mean no disrespect to that great race but illusrate some of the difficulties. We doubt if the framers of the amendments had these problems in mind. If the aim was to provide for indigenous presidents only as suggested by counsel, then quite clearly the language of the amendments actually employed did not and could not achieve this. Had explicit language to that effect been employed, such language might conceivably have run the risk of infringing the non- discrimination provisions in the part of the constitution which is entrenched. This was not an issue here and we make no finding. However, we should mention the case of Akar v Attorney -General Of Sierra Leone (1969) 3 ALL E.R. 384 which we considered during our research. In that case, the appellant was born in 1927 in the former British protectorate of Sierra Leone of an indigenous mother and a Lebanese father who was born and bred in Senegal but who had lived in Sierra Leone for the last 56 years, and never been to Lebanon. On the attainment of independence by Sierra Leone on 27th April 1961 the appellant by virtue of Section 1(1) of the Constitution became a citizen of Sierra Leone. Act No. 12 of 1962, by Section 2, purported to amend the Constitution retrospectively to limit citizenship to persons of negro African descent. This, by the definition of the term (defined as meaning "a person whose father and his father's father are or were negroes of African Origin")- excluded the appellant. By Section 23 of the Constitution, laws discriminating, inter alia, on the ground of race, were prohibited except, inter alia, in cases where a disability imposed having regard to its nature and to special circumstances pertaining to persons on whom it was imposed, was reasonably justifiable in a democratic society. By a majority of four to one, the House of Lords affirmed the Chief Justice of Sierra Leone and reversed their Court of Appeal by holding that Act No. 12 of 1962 was unconstitutional; it was discriminatory within the meaning of Section 23 of the Constitution since different treatment was accorded to different people and the differentiation was attributable to wholly or mainly to respective descriptions by race. while their Lordships expressly stated with the wisdom or desirability or fairness of passing such a measure, nonetheless they commented as follows, at page 393:....

> "In view of the conclusions which their Lordships have expressed they need not refer further to the problems which have been raised. The circumstances that they are posed... is commentary enough of the difficulties which have been created by the scheme of legislation which it was thought appropriate to attempt to adopt."

The comment was rather apt. Another point already dealt with but worth noting again was the assertion by the petitioner Mrs. Phiri and other witnesses that there were no Zambian citizens as such prior to independence and that Zambian citizenship and nationality only commenced on 24th October 1964. This assertion which we accept as technically and legally correct means that the constitutional provision regarding parents or anyone born prior to independence who are or were Zambian by birth or by descent can meaningfully only be construed as a reference to those who became Zambians on 24th October 1964 or who would, but for their prior death, have become Zambians on that day.

To conclude on the question of the respondent's qualifications, we find that the various accounts as to the paternal parentage were irreconcilable in consequence of which an affirmative case has not been proved to the necessary degree of convicing clarity. In the circumstances, there is no basis for foisting a father upon the respondent nor for finding against the one he has officially declared. Above all we have already explained how even the most favourable finding from the petitioners' point of view would not have resulted in the respondent becoming unqualified.

ELECTORAL FLAWS

We now turn to the aspect of the petition which related to the election, including the whole of the electoral process. The issues raised under this part according to prayers of the petition were that the election process had been neglected by the Electoral Commission, thereby facilitating fraud and that the election was rigged and not free and fair, therefore null and void. The detailed particulars in the petition and the evidence raised issues of (i) bribery and corruption; (ii) irregularities and (iii) flaws in the electoral system. Since a presidential election is conducted under the practices and procedures set out by or under the Electoral Act, cap.13 of the Laws of Zambia (1995 Edition), this court had determined quite early in the proceedings that guidance would be sought from that Act on many of the issues that arose, for example, the grant of indemnities to witnesses. In the same vein, we had to look to the Act and the Regulations when considering the issues of bribery and corruption; irregularities; and the flaws. We also had to borrow from the principles set out in Section 18 of cap.13 which reads:

"18. (1) No election of a candidate as a member of the National Assembly shall be question except by an election petition presented under this Part.

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

(a) that by reason of any corrupt practice or illegal practice committed in connection with the election or by reason of other misconduct, the majority of voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred; or

(b) subject to the provisions of subsection (4), that there has been a non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election;

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

(d) that the candidate was at the time of his election a person not qualified or a person disqualified for election.

(3) Notwithstanding the provisions of subsection (2), where, upon the trial of an election petition, the High Court finds that any corrupt practice or illegal practice has been committed by or with the knowledge and consent or approval of any agent of the candidate whose election is the subject of such election petition, and the High Court further finds that such candidate has proved that:

(a) no corrupt practice or illegal practice was committed by the candidate himself or by his election agent, or with the knowledge and consent or approval of such candidate or his election agent; and

(b) such candidate and his election agent took all reasonable means to prevent the commission of corrupt practice or illegal practice at such election; and

(c) in all other respects the election was free from any corrupt practice or illegal practice on the part of such candidate or his election agent; then the High Court shall not, by reason only of such corrupt practice or illegal practice, declare that election of such candidate was void.

(4) No election shall be declared void by reason of any act or omission by an election officer in breach of his official duty in connection with an election if it appears to the High Court that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such act or omission did not affect the result of that election."

The evidence on these issues came from a fairly large number of witnesses.

(i) **Bribery and Corruption**

Thus, under bribery and corruption can be listed firstly the witnesses whose evidence touched upon the Sale of Council houses. These were PWs 53, 55, 56, 57 and 27. Then there was evidence touching upon what the Regulations terms as "treating" in the form of for example the distribution of meat and grinding mills in the Western Province and salt and cement in Mbala. The witnesses included PWs 24, 30, 49, 67 and 68. Then there was evidence of cash gifts given mostly by the witnesses from Chongwe and by some of the peitioners who complained of Ministers donating money to various causes. the witnesses under this head included PWs 26, 84, 85, 90 and 91. For the sake of economy, we summarise the gist only of the evidence of these witnesses as follows:

PW53 was Mr. Muyakwa of Mongu district Council. He told their Lordships that, acting

on a circular from the Ministry of Local Government, Council houses were sold at valuation less discounts ranging from 100% for pre-1959 houses to 20%. In September 1996, the respondent visited and fixed a maximum of K750,000. Under cross-examination, the court learnt that the respondent and the MMD candidates came off worst in all the Mongu constituencies during the elections. PW55 was Mr Chibbonta, Town Clerk of Livingstone. His evidence was that the Council had already decided to sell the houses and got permission to sell some and that the circular from the government was welcome and had better prices. He said the residents made representations to Lusaka and the houses had to be sold at the prices determined by the Council which were lower, less discounts. He informed us that the respondent had visited Livingstone before the government circular came out. PW56 was Mr. Mumbi, the Solwezi Town Clerk. He informed us that his council already had a programme to sell houses in 1995 and sought permission to sell. He said the government circular of May 1996 resulted in 229 houses being offered for sale, 44 of them "free" at 100% rebate. Under cross-examination, he informed the court that the respondent and the MMD infact fared very badly in Solwezi. PW57 was Mr Ali Simwinga, the Kitwe Town Clerk. He said that the Council decided to sell its houses as far back as 1993 as the minutes would show. The Council applied for permission to sell 5% of its 13,500 units and the Minister gave approval in February 1994. He said that the Council hoped to expand and develop the City more by selling so that the government circular was welcomed. by then, 530 units had already been sold. He said the respondent did not fix the prices; the circular set out the procedure and rebates. He informed their Lordships that Kitwe City council persuaded the government to reduce the prices even further below the circular's prices. PW27 was Mr. Munga of Zambia National Broadcasting Corporation who produced and showed us some video tapes. The first tape showed the respondent opening the MMD Southern Province Conference and it was not relevant to the issues. The second dated 18 April 1996 showed the respondent touring Council houses in Livingstone when the respondent was clearly compaigning against UNIP and for himself and his Party as he indicated there would be discounts. The third date 20 April 1996 showed the respondent on tour of Council houses in Ndola where he even handed over some Certificates of Title. The fourth tape recorded his tour of Western, North-Western and Luapula provinces and where he directed reductions on Council houses and generally held campaign rallies. The firth was an irrelevant film of 7 March 1991 titled "personalities in politics". The sixth and last film was his interview in Kabwe on 6 January 1996 when he made donations to public causes like the waterworks and also urged people to register as voters.

On the evidence we are satisfied and it is our finding that programmes for the sale of Council houses were long already in place and were otherwise unexceptionable but for the timing of the discounts in an election year. The exercise was clearly used to assist the campaign. The question we had to consider was whether the government exercise which was taken advantage of could amount to the corrupt practice of bribery under Regulation 51 of the electoral (General) Regulations so as to be caught by the spirit of Section 18 of the Electoral Act, CAP 13. The Regulation has eight paragraphs and we have read them most carefully but cannot find that the activity complained of falls within any of those paragraphs. We note also that had that been the case, it would have been extremely doubtful that the house sales could have significantly affected the result of the election in a nation-wide constituency. the results in Mongu and Solwezi where the respondent fared very badly are quite telling.

With regard to <u>treating</u>. PW24 Mr. Sikazwe, a polling agent for ZADECO, said that the MMD parliamentary candidate in Mbala was dishing out cement, salt and cash to the headmen and the villagers and gave some salt to the witness, urging them all to vote for the MMD candidates. PW30 Mr. Chituse was the ZADECO parliamentary candidate for the Luampa Constituency in Kaoma. He testified that the MMD parliamentary candidate Mr. Manjata was campaigning using a Government vehicle; that he tried to disrupt a public meeting called by ZADECO. He also said the MMD candidate used the installation of a public grinding mill to campaign for his party and to threaten those who would not vote for MMD. He said about six days before the elections day he found that at one place the people were feasting on the meat of three head of cattle slaughtered for the occasion by Mr. Manjata. PW49 was Mrs. Ruth Emelio, the ZADECO candidate for Sinjembela who testified on this point that the MMD parliamentary candidate donated a boat to the people on nomination day. He also bought beers and food and killed an animal to feed the people as they shouted "Vote for the hand that feeds you!" PW67 was Mr. Muteba, the ZADECO candidate in Lukulu who testified on the point that the MMD Parliamentary candidate dished out free meat to the people who began to query what ZADECO could do for them. PW68 was Mr. Wayoya, an election agent for ZADECO. He told us on this point that during the campaigns in Lukulu, only MMD supporters were allowed to use a grinding mill at Kakulanda Women's Club. He also told us that a few days before the voting, MMD killed cattle and dished out free meat, urging the people to vote for MMD candidates.

From the foregoing evidence, we accept and find that there was treating. The instances given were proved. We are also mindful of the provisos in the Electoral Act so that a candidate is only answerable for those things which he has done or which are done by his election agent or with his consent. In this regard, we note that not everyone in one's political party is one's election agent since, under Regulation 67 of the electoral (General) Regulations, an election agent has to be specifically so appointed. We have borne in mind that the constituency for the presidential candidates is national and were not satisfied that the treating established may have prevented the majority of voters in the country from electing the candidate whom they preferred.

There was evidence of cash gifts being given to some voters, which would amount to bribery, a corrupt practice. PW26 Mr. Rex Sinkonde was a ZADECO polling agent at one of the polling stations in Mbala. He informed us that he caught the MMD Chairlady in the area giving money – amounting to one pin (one thousand kwacha) – to a voter just outside the polling station and telling her to vote for the MMD. Then there were allegations of money being given to some voters by the MMD Councillor a Mr. Kasongo in the Chongwe area to persuade them to use his pre-marked ballot papers and surrender their own which they would be given in the polling station. The witnesses were PW84 Mr. Kabanje, PW90 Mr. Nkalamu and PW91 Mr. Nyeleti. It transpired that PW90 was a discreditable character and an outright liar who had posed as Mr. Martin Nkalamu but it turned out that the fellow's actual names were Boniface Mwansomeka. The evidence of these witnesses from the Chongwe area was characterised by improbability, placing Kasongo in several far distant places at the same time. The most notable was the pair of PWs 98 and 99 (Mr. Kanyembe and Mr. Lubansa) who said that Councillor Kasongo drove them and twelve others that morning from Chongwe to Ngwerere to ghost-vote in fictitious names at a non-existent polling station. It was highly improbable, in fact clearly impossible, that Kasongo could have been that ubiquitous. The evidence from this group of witnesses both as to allegedly voting with Kasongo's pre-marked ballot papers and with regard to obtaining national registration cards and ghost-voting in fictitious names was not credible. PW99 whose performance collapsed under cross examination had clearly never entered a polling station in his life. Above all the evidence of PWs98 and 99 rendered it impossible that Kasongo could have been in Chongwe at distantly located polling stations waylaying the voters and paying them to use his pre-marked ballot papers while he was also far away in Ngwerere. The allegations from these witnesses have not been established satisfactorily or at all. The single instance testified to by PW26 was insufficient to affect the national election.

There was evidence from some of the petitioners who complained that various Ministers and the respondent donated public funds to public causes, which donations were widely reported in the media. The donations have taken place before the elections, during and since. They continue to date. We have anxiously examined the Regulations in which various kinds of conduct or misconduct is prohibited or made an offence. We have tried to see where the allegation in the petition and in the evidence of various political leaders donating to community projects might fit in, without success. The timing of such public philanthropic activity must have had some influence on the affected voters yet the Regulations are silent on such matters and on any possibly improper donations when not directed at individual benefit. As at the present moment, public philanthropic activity is not prohibited by the Regulations and we can do no more than to urge the authorities concerned to address this lacuna so that there can be a closed – season at election time for an activity suggestive of vote buying; including any public and official charitable activity involving public funds and related to emergencies or any life-saving or life threatening situations.

(ii) **IRREGULARITIES**

The irregularities which were canvassed consisted of nine distinct subcategories which we have identified and which consisted of the following:

(a) The suggestion that unregistered persons could vote;
(b) Election materials were thrown away or destroyed obviously to cover up malpractices;
(c) That some voted twice; others even had two identities;
(d) That some election officials at polling stations were partisan and even allowed wrongful campaigning at polling stations;
(e) That voting procedures were not properly followed;
(f) That results were altered without proper justification or explanation;
(g) That some people were wrongfully prevented from voting;
(h) That voting certificates were wrongly used and wrongly issued; and

(i) That pre-marked ballot papers were in use.

As to (a), there was firstly the evidence of PW17 Mr. Meleba who is also Headman Joshua. He produced a note from the local school headmaster Muloya who had written urging that those who did not register as voters could still go and vote if they had national registration cards and were 18 years or more. The witness did not see any unregistered person actually vote, which would have been illegal. Then there was the evidence of PW44 Mr. Collins Chimgukuma. He testified that he was one of those who campaigned for the MMD parliamentary candidate in the Bwacha Constituency of Kabwe. He said the Kabwe Mayor produced twenty (20) blank voters' cards which he used to fill in the names of the witness and nine other MMD cadres who were each given two voters cards. The witness said because he was promised some money for doing so he voted twice at two polling stations despite not being registered. He said he voted only in the parliamentary election; not in the presidential election. To put it mildly, Mr. Chimbukuma withered under cross-examination when it was shown that his name allegedly unregistered friends who allegedly voted twice with him using fake voters' cards were in fact duly registered and voted in their proper polling stations. PW44 was thoroughly discredited. He was effectively and completely contradicted by the evidence of two of his friends who testified as RWs 1 and 2. RWI was Mr. Edward Phiri who was actually a registered voter and who said PW44 was simply a member of an MMD choir during the election campaigns. RW2 was Mr. Masumba who testified that, contrary to what Mr. Chimbukuma said, he was duly registered and voted regularly. The evidence in rebuttal of PW44 was fully corroborated by the evidence of CWI Mr. Kalale of the Elections Office who produced documents to show that the persons said by PW44 to have been unregistered were actually duly registered as voters. In the event Mr. Chimbukuma's story was not believable and we have rejected it. Finally under this part, there was the evidence of PWs 98 and 99. PW98 was Mr. Kanyembe of Chongwe who said that in expectation to be paid K300,000 he and fourteen others who had neither national registration cards nor voters' cards agreed to be given national registration cards and voters' cards in the names of fictitious persons. He said that on polling day, they were driven by MMD Councillor Kasongo from Chongwe to Ngwerere and there voted in the fictitious names. PW99 was Mr. Lubansa of Chongwe who testified to the same effect and also said they were taken to Ngwerere early in the morning. Cross-examination destroyed him utterly. We have already made reference to the evidence of PWs 98 and 99 when we were considering the allegations of cash gifts made by PWs 84, 90 and 91 and when we noted that the two accounts nullified each other and rendered it highly improbable that Kasongo was way laying voters at various polling stations in Chongwe and paying them to use his pre-marked ballot papers while he was also so far away in Ngwerere. The evidence of these witnesses was discredited and it can not be believable, In the result, there was no credible evidence to support the suggestion that unregistered persons could vote and did vote. We find the irregularity alleged not established.

As to (b), there was firstly the evidence of PW18, Mr. Chita, the parliamentary candidate for ZADECO in Muchinga Constituency. Acting on reports received he went to check where a much-delayed truck carrying election material had parked in the bush. He found a parcel under a Musuku tree in the bush which contained election materials, including the official marks and the ballot paper counterfoils for both parliamentary and presidential elections. These were produced in evidence and estalished beyond any doubt that in the affected constituency – where most of the election materials have to date not been delivered to the Elections Office as required by law – someone threw away these materials in the bush in order to cover up some wrongdoing and a fiddle of some kind. Secondly under this part, there was the evidence from the Bwacha Constituency in Kabwe and which came from PWs 40, 41, 42, 54, 63 and 82. PW40 was Mrs. Febby Ngosa a supporter of Mrs. Nyirongo (PW82) in the Bwacha Constituency. She told the court that on Monday 2nd December 1996 she happened to go to the Recreation Club hall and found the returning officer for Bwacha a Mr. Chintu and two other persons had an open ballot box on which was written the work "parliamentary". They were holding some ballot papers. The witness informed her husband (PW41) about what she had seen and he informed Mrs. Nyirongo. PW41 was Mr Ngosa, a polling agent for Mrs. Nyirongo and he relayed to her what his wife had reported. His other evidence was that there were election monitors from FODEP and ZIMT at the polling station where he was on duty on election day. The presiding officer stopped the FODEP monitor from crossing out the names being called out from his copy of the register. Other than that some MMD cadres wore T-shirts with campaign material on them within the prohibited radius of the polling station, he saw nothing wrong with the voting or the counting at his polling station. However, at the place for the tallying of all the votes, the returning officer, was making alterations to all the results brought to him. Another odd circumstance which he observed was that the parliamentary box from one polling station strangely took five hours to arrive at the counting hall. PW42 was Mr. Chisha, another polling agent for Mrs. Nyirongo. At the polling station where he was, the presiding officer refused to allow the polling agents to sit close to the table where the count took place with the result that they did not properly witness the count by the presiding officer who was miscounting Mrs. Nyirongo's votes. This evidence did not touch upon the election of the respondent as such. PW54 was Pastor Jim Nyirongo, the husband of PW82. He testified

that the returning officer Mr. Chintu was altering all the results when he received them from the polling stations, as the MMD cadres were openly boasting of having played their cards well. Subsequently, the returning officer was caught opening ballot boxes and burning some ballot papers. A report was made to the police. PW63 was Mrs. Edith Banda who said she was a pre-school teacher. She told the court that the returning officer for Bwacha and other officials opened the ballot boxes, sorted out the ballot papers and asked her on 25 November 1996 to burn some ballot papers which were in a carton box and which were for both parliamentary and presidential elections. PW82 was the woman of God Pastor Gladys Nyirongo.

The upshot of her evidence was that she was an independent candidate in the parliamentary elections for the Bwacha constituency. She said that the election officials in that constituency altered the results from the polling stations allegedly in order to balance but they were later caught destroying some ballot papers for both the presidential and the parliamentary elections and this was after she had already lodged an election petition. When she confronted the returning officer, he pleaded for mercy and forgiveness. She reported these happenings to the police.

Related to the foregoing was the evidence of two witnesses called on behalf of the respondent. RW4 was Mrs. Chikoti of Kabwe Municipal Council who produced a file on PW63 showing that she was a general cleaner and not a preschool teacher at the Council's nursery school as she had claimed. RW5 was Mr. Mwale also from the Kabwe Municipal Council who was mentioned as one of the persons who were with the returning officer when destroying some papers. He was an Assistant Returning Officer for Bwacha under Mr. Chintu. He denied ordering PW63, a general worker and others to burn any ballot papers saying that he had only asked them to clean up the hall which was littered with scrap paper and to burn the litter. These were papers used to compute the results and torn posters. He told the court that a verification of ballot paper accounts was duly done from 12 to 30 December 1996 during which the papers were physically recounted to see if there was any overcounting or undercounting from the polling stations. He denied the allegations by PWs 40, 63 and 82 that ballot papers were being sorted out and burnt. He conceded that the official results which were published and reflected in the official documents which were exhibits before the court and which showed that there were no rejected ballot papers in Bwacha were false.

We have considered the evidence from Bwacha Constituency. The records of the verification of ballot paper accounts referred to by RW5 were nowhere to be found. It should also be noted that he described a rather strange way of conducting the verification when there is Regulation 47 in the Electoral (General) Regulations which sets out what ought to be done. In our assessment of the evidence, we find that we are persuaded by the combined weight of the petitioner's witnesses' evidence the substance of which had a distinct ring of truth to it. Mr. Chintu did destroy some papers obviously in an effort to cover up a fiddle. No wonder the results in the official documents were described by RWS as false. We will consider the consequence of this finding after we have discussed the other irregularities.

As to (c), that is regarding some voting twice or even having two identities, we heard evidence from PWs 19,22, 44, 75, 78, 79 and 81. PWI9 informed the court-and there is no reason to disbelieve her - that she was properly in possession of a national registration card in the names of Theresa Kalo but that in 1995 she got a second national registration card while posing as a much, younger person by the name of Evelyn Mutale. She registered as a voter twice using the two national registration cards and actually voted twice using the two sets of documents. She said that she had registered twice at the request of the MMD constituency Chairman for Mandevu and that she had decided to come forward and testify because the rewards promised by the MMD official did not materialise. PW22 was Mr. Musonda from the Elections Office. He confirmed the assertion made by PWI and others about a Mr. Zgyambo: The official documents showed that Zgyambo registered three times in three different places and was in three registers. He actually voted twice. PW22 explained that the Electoral Commission had authorised the issue of voters' cards to two or three people having identical national registration card numbers provided some other detail was different, such as name or date of birth or an address. Zgyambo exploited this and it is a matter to which we will return later when we come to consider some of the flaws in the system. Next, there was PW44 Mr. Chimbukuma whose evidence we have already discussed and discounted. PW75 was Mr Munamwela of the Lima Party. He testified that four MMD officials were caught having been allowed to vote twice each by the presiding officer at one of the Bweengwa polling stations. He was supported by PW78 Mr. Miyanda who was the election agent for the Lima Party candidate in Monze. He said at that polling station three people were apprehended who had voted twice. The presiding officer even apologized. The matter was reported to the police. PW79 Mr. Moonga was the polling agent for the ZDC candidate at the same polling station. His evidence was the same as that given by PWs 75 and 78 saying that some MMD chaps were caught having voted twice each; at first using their voters' cards and later using voting certificates. PW81 Mr. Hampondo also testified to the same event. He said that at Bweengwa

three people were caught voting twice: in the daytime with a vote's card and at night with a voting certificate.

The instances of double voting were well proved. In the case of PW19, it is understandable that the dishonest could device this method of cheating by posing as two different persons. In the case of Zgyambo, a decision of the Electoral Commission facilitated the fraudulent multiple registration and double voting. In the Bweengwa incident, the electoral process was deliberately massaged by the dishonest voters with full collaboration of a dishonest and partisan presiding officer. We will consider the consequence of this finding on the nationwide election later.

As to (d), that is, that some election officials at polling stations were partisan and allowed wrongdoing, we considered the evidence of PWs 20, 24, 45, 46, 49, 58 68 and the witnesses from Bweengwa whom we have just talked about. PW20 was Mr. Sinyangwe, the ZDC candidate for Mpulungu Constituency who said that polling assistant issuing ballot papers would in the course of explaining to the illiterates keep overstressing on the MMD symbol and telling the voters they could vote on the clock if they wished without similar stress or suggestion for the other parties. He also said that the MMD were allowed to sing and dance and to campaign freely within the prohibited radius at some polling stations. PW24 of ZDC in Mbala also testified similarly both in relation to the MMD being allowed to campaign within the prohibited radius and to the polling assistant issuing the ballot papers explaining who the candidates were but stressing the desirability of voting for the respondent's side. PW45 was Mr. Mwila of Kabwe, a supporter of the candidate Mrs. Nyirongo. He saw a woman police reservist and an MMD official using their wrist watches to campaign for the MMD at and within a polling station. Upon his complaint, the offenders were expelled from the polling stations by the presiding officer. PW46 Mr. Kandeke voted at a polling station in Kabwe which was established at a beer tavern belonging to the local MMD Chairman who sat within the prohibited radius wearing an MMD campaign T-shirt. He said that the police officers on duty at that polling station confisticated wrist watches. PW49 was the ZDC candidate in Sinjembela. She testified that the MMD campaigned too near the polling station where she voted and at other stations. She said that at several polling stations some election officers were openly campaigning for the MMD and describing other political parties in derogatory terms. PW58 Mr. Nyemba was a polling agent for ZADECO at Mufuchani polling station in Kitwe. He said that prior to election day, the MMD candidate Mr. Newstead Zimba used his official government vehicles on his campaign tours and in his attempts to disrupt ZADECO meetings. On polling day, one polling assistant kept on stressing the desirability of voting for the MMD candidates while an MMD official campaigned on the voters' queue and was not stopped. PW68 Mr. Wayoya who was an election agent for the ZDC candidate in Lukulu spoke of some polling assistants who consorted openly with MMD officials at campaigns and elsewhere. He told the court that on election day, one polling assistant did not stamp the official mark on the ballot papers of all those he knew to be ZDC members and this affected ten (10) voters out of the over 250 voters at that polling station. Upon consideration and careful evaluation of the evidence, we are satisfied that some election officials at polling stations were indeed partisan in an overt fashion and unfit for election duties. The evidence itself, however, disclosed that such officials were largely countered by the vigilance of the polling agents and any other election monitors there may have been. Above all, we take judicial notice that the Zambian voters are extremely intelligent and enlightened; only an insignificant proportion can be so fickle as to allow any official at a polling station to subvert their freedom of choice. However, with regard to the consequence of the finding on the presidential election, this we will discuss after we have dealt with all the irregularities.

As to (e), which is that voting procedures were not followed properly, we considered the evidence of PWs 46, 58 and 97. PW46 who voted at a polling station in Kabwe established at a tavern belonging to the local MMD Chairman complained that his voter's card was not perforated. PW58 who was at Mufuchani polling station in Kitwe informed the court that of the nine voting certificates which were issued, some were issued to officials on election duties who are registered in a different constituency. This was, of course, quite wrong and contrary to the relevant Regulations. PW97 was Mr. Sumaili of Petauke who was on duty at a polling station. He told their Lordships of one registered voter, a lady, who was allowed to vote without her voter's card. We considered this type of irregularity to have been insignificant. The instances deposed to by PWs 46, 58 and 97 were not shown to have been so widespread that the elections could no longer be considered as having been conducted in substantial conformity with the lawful procedures.

As to (f), that is, that the results were altered without proper justification or explanation there was the evidence of PWs 49, the Bwacha group (including PW54), PW93 and PW96. PW49 Mrs. Ruth Emelio informed us that her returning officer had altered her results from one of the polling stations from 80 to 30 and only corrected the records after protests on her behalf. We have already dealt with the Bwacha group of witnesses who talked of the returning officer Mr.

Chintu routinely altering almost all the results as he received them from the polling stations. We propose to set out the evidence of PWs93 and 96 when we come to deal with the flaws in the system but for the moment mention only that in their analyses, they had identified the alterations which were made to the results in various places. This related to the variances between the initial results released by the Electoral Commission and subsequent results released by the same authority. We are satisfied that the irregularity contended for was established.

As to (g), which is that some people were wrongfully prevented from voting, there was the evidence of PWs 50, 67, 75 and 92. There was a category of voters who could not vote because of various flaws in the system which we propose to come to when we consider such flaws. However, under the present subheading, PW50 Mr. James Mulenga Chasaya of Ndola informed us that despite being duly registered as a voter to vote at Chintu polling station in Ndola, the officials refused to allow him to vote because the particulars on his voter's card had faded off. PW67 Mr. Muteba of ZDC in Lukulu spoke of a polling station where the voting opened late in the afternoon but closed early, leaving many voters stranded outside. PW75 Mr. Munamwela of the Lima Party in Bweengwa said that he had seen a 53 years old voter and a 45 years old voter turned away as being underaged, despite being on the register. In the course of the hearing, we had asked an official from the Elections Office who confused that the officials were not allowed to use their common sense to allow such voters to vote on the basis that they were registered and their national registration cards showed that they were not toddlers, as shown on the register. They were needlessly prevented from voting when the mistake was that of the persons who compiled the register. We are satisfied that this type of irregularity was established. For completeness, we should also mention that there were some voters who were wrongly prevented from voting by some of the petitioners, especially from the parties that had decided to boycott the elections and had gone further to collect the voters cards. Thus, PW92 Mr. Lukonde, Deputy Commissioner of Police, produced 28,000 unused voter' cards which the police had retrieved from a house in the Chilenje township of Lusaka.

As to (h), which is that voting certificates were wrongly used or wrongly issued, there was firstly the general allegation voiced by PW35 Dr. Chongwe that voter certificates "flew like flies" at the polling stations. Then there was the evidence of PW58 Mr. Nyemba to which we have already made reference. His complaint was genuine to the extent that the wrong kind of certificate of authority to vote was given to the officers on duty, and in some cases for the wrong constituency. There were only nine certificates issued at Mufuchani. We have also already dealt with the Bweengwa group of witnesses (i.e. PWs 75, 78, 79 and 81) whose evidence established that three or four MMD officials who had already voted during the day time using their voters' cards were again issued with voters' certificates in the evening to enable them each to cast a second vote. Again there was the evidence of PW76 Mr. Joseph Tembo, a polling agent for Dr. Guy Scott, the Lima candidate in Chongwe. His testimony which was fully corroborated by the registers and the documents in court established that three people were wrongly allowed to vote at his polling station using certificates of authority to vote when they were not on official duties there; and in the case of one of them, when the person was a voter in Rufunsa which was a different constituency altogether. Then there was the evidence of PW31 Mr. Kabinda, the election agent for Mr. Pikiti the Lima Party parliamentary candidate in the Munali Constituency of Lusaka. Mr. Kabinda complained that there was misuse of the certificate of authority to vote at a polling station and the voting certificate. He said that some voters were even filling in their own certificate and they were allowed to use the certificate to vote obtained on the very voting day instead of at least four days before election day as required by the regulations. On the latter point other evidence received in the case from the officers of the Elections Office showed that the Electroral Commission had authorised the issue of certificates even on the polling day in order to counter the boycott and the burning of boters' cards by the United National Independence Party. PW31 said that his candidate was trounced so badly that he the witness wept. CW1 Mr. Kalale of the Elections Office was called to open the marked registers for Munali when it transpired that there were relatively only a few voting certificates. They were not as rampant as PW31 had alleged. In fact, it turned out that some people who got them were bona fide registered voters who were otherwise entitled to vote while others were officials on elections duties. The Court learnt from CW1 that the Electoral Commission allowed certificates to be issued up to 10% of the total registered voters which was in the case of Munali up to 4,300 although only 135 certificates were actually used in the constituency. This we consider was an insignificant number. In the case of the Munali Constituency, a verification exercise ordered by this court and carried out by the Registrar of the High court in the presence of the advocates for the parties established that only 135 voters' certificates were completed and used. The marked registers for two of the Munali polling stations were not available at the verification, otherwise for the remainder it was established that the total number of names cancelled in the marked registers was 23,377 while the total number of ballot papers actually used for the constituency was found to be 25,388. We are satisfied that in the examples given and most probably countrywide as well, certificartes did not fly like flies; they were used in moderation and in all instances well within the range of quantities acceptable to the Electoral Commission. There was thus no rampant misuse of the voting certificates and therefore it can not be said that the

respondent was in anyway unduly assisted to win through the use of voting certificates.

As to (I), which is that premarked ballot papers were in use, there was firstly the evidence of the Chongwe group of witnesses who alleged that MMD Councillor Kasongo waylaid them and gave them pre-marked bsallot papers. We have already dealt with their evidence which we have discounted as unbelievable. This is the group which included PW90 Mr. Nkalamu who was actually Mr. Mwansomeka testfying under a fictitious name. Then there was the evidence of PW60 Mr. Katunasa, ZDC parliamentary candidate in the Chembe Constitutency. He told the court that acting on a report he had received and with the help of a police officer who was on duty at one of the polling stations, he chased and caught an MMD gentleman who had a bag containing 350 pre-marked presidential ballot papers. The police took those papers. At another poliing station, he found that his younger brother who was his agent had been in a fight with some MMD gentlemen from whom he had confiscated eight premarked presidential ballot papers. He said the eight ballot papers were kept by his younger brother. The younger brother was not called to testify and this court has not been shown either the eight or the three hundred and fifty premarked papers as none were produced in evidence. The non-production of at the very least the eight ballot papers said to have been in the custody of PW60's young brother detracted quite considerably from his credit, rendering his story to be unbelievable.

Some of the irregularities which we have found to have been established by the evidence were quite serious, though not widespread. They revealed that there were those who were prepared by dishonest means to massage the elections, oblivious of the risk that the elections might thereby be nullified to the disadvantage of the candidates who might themselves have been quite innocent and free of any personal wrongdoing. On a perusal of the whole of the evidence reviewed under this part, we have not found any evidence that the respondent personally or by lawful electoral agent was privy to the irregularities and malpractices described. In the event and having regard to the type of constituency concerned, which is nation-wide , it was not established to our satisfaction that the proven irregularities were such that nationally the majority of the voters were or may have been prevented from electing the candidate whom they preferred or that the extent, frequency and nature of the irregularities was such that they must have affected to any significant extent the national result of the election. It is clearly not possible to hold that by reason of the irregularities the result of the election nationwide was not substantially the true reflection of the free will and choice of the voters who went and cast their votes.

(iii) **FLAWS**

This brings us to the flaws in the system. From the evidence, we identified that there were raised or alleged some flaws associated with (a) national registration cards (b) voters cards (c) the registers (d) the polling districts (e) the siting of the polling stations and (f) the results.

(a) **NATIONAL REGISTRATION CARDS**

As to (a), that is national registration cards, we considered the evidence of RW3, PW22, CW1 and also PWs93 and 96 who analysed the registers. Apart from RW3, the other witnesses covered other aspects apart from the question of national registration cards and it is perhaps more convenient to set out the precis of all their other evidence at this point in time. RW3 was Mr. Mwiinga from the National Registration Department. We learnt from him that the problem of the same national registration card number being held by two persons surfaced in 1988 when registration forms were printed which bore old or repeat numbers which were pre-printed on the forms. There were shown to the court examples of sets of forms printed by the Government Printer which contained numbers which had already earlier been issued to other citizens. Apparently, the department even ignored the district codes when issuing a repeat booklet. Mr. Mwiinga told us – and we have absolutely no reason to doubt his word – that the situation country-wide is very bad and that there could be more than 500,000 duplications since 1987. The witness told us that, upon a query from the Electoral commission in 1996, the department deleted the last applicant's name from the list supplied but as other evidence showed, the Commission itself decided to keep both sets of persons on the registers.

PW22 was Mr. Musonda from the Elections Office. His evidence which touched upon the question of national registration cards also dealt with the other flaws which we will be considering and it is now convenient to summarise all his evidence at once. In his testimony, Mr. Musonda described the voters registration process conducted by the Electoral Commission, including the attempts to correct the mistakes made. He explained that the Electoral Commission authorised NIKUV who were doing the data processing to issue voters' cards to two or three people having identical national registration card numbers provided some other detail was different, such as names or date of birth. He also explained that some registration

officers made mistakes in the coding of the polling districts which necessitated the making of corrections and the issuance of replacement voters' cards. It was in evidence that because of such replacements some voters ended up with two voters' cards where the first card was not physically withdrawn. Mr. Musonda explained that where corrections were made, the voters could not use the earlier card and could not vote twice, but only once and in the corrected register. The witness admitted that massive misplacement of voters occurred due to wrong coding but that attempts were made to effect corrections. He also readily admitted that the voters, especially those in the rural areas, may not have heard about the corrections and they certainly did not read the Gazette notices which described the polling districts. Mr. Musonda conceded that in the process of correcting the registers, some voters were put in polling districtsd where they did not register. In part because of such confusion, some voters never collected their voters cards. The witness also asserted, and we agree with him that registration officers and not NIKUV made the errors and that the inclusion of duplicated national registration cards was a decision of the Electoral Commission, not NIKUV. We accept Mr. Musonda's evidence.

CWI Mr. Daniel Kalale of the Elections Office also explained that the duplicate national registration card cases had been allowed by the Electoral Commission to remain on the registers, He said there were on the registers 52,703 duplicate national registration cards cases with different names and 9,540 duplicate national registration cards with the same names but different dates of birth. We also learnt from this witness that they were 33,444 double registrations by a person where the decision made by the Electoral Commission was to leave him or her where he or she registered first. He further informed us that there were 3,545 duplicates of the same person but with different serial numbers, a mistake by the assistant registration officers: The Commission removed one and left one, We accept the evidence of this witness. CWI also informed us that some Polling districts returned a nil registration.

From the evidence of Messrs Mwiinga, Musonda and Kalale, it seems to as that there is a much more serious problem with the national registration cards than with duplicate voter registrations. We will comment further on this matter a little later but for the moment we do have to observe that even the statistics show that we should be really worried about the national registration cards which was supposed to be but apparently no longer is the most distinctive and the most reliable means of identifying each other for all manner of purposes, including elections.

PW93 talked about the national registration cards problem and also covered all the other flaws to be discussed. It is appropriate to set out the summary of the whole of his testimony at this stage. PW93 was Dr. Steven Moyo. He had carried out, on behalf of the petitioners (especially UNIP) a detailed faulty – finding analysis of the electoral process and found flaws in three areas, namely the polling districts, the registers and the results. With regard to the POLLING DISTRICTS, he queried the discrepancies in the official documents as to numbers of polling districts in 1996 when compared to the position in 1991. He said that the gazette notices did not reflect all the polling districts and in any case queried why the Electoral Commission had chosen to increase the number of polling districts. He informed the court that his research uncovered the fact that there were nineteen (19) polling districts which were not reflected in the official electoral documents but which were in the gazettes while there were sixteen (16) polling districts which were reflected in the official electoral documents but which were ungazetted. The witness further informed the court that some polling districts had been shifted from one constituency to another without the sanction of a delimitation Commission. He gave the example of ten (10) polling districts in Ndola which had been shifted farm Chifubu to Kabushi without a delimitation Commission. With regard to the shifting or non-gazetting or listing of some polling districts, the witness gave other examples from Nakonde and Isoka and also from Kabwe and Petauke. His research had even uncovered two unnamed polling districts in the Southern Province; one in Mapatizya and the other in Itezhitezbi. Dr. Moyo also complained that some polling districts though accounted for were not numbered in logical serial sequence. He queried the logic of creating so many new polling districts in some areas of very low voter population.

With regard to the REGISTERS, Dr. Moyo analysed twenty-four (24) constituencies which were randomly selected. He set out to make a comparison between the provisional registers and the final registers. He told us that he carried out a statistical analysis between the provisional and the final registers and this showed that they tallied. He said he detected a number of faults and drew our attention to examples in the documents. These related to omissions of voters' names where for instance only one name would be given; duplication of voters' national registration cards and multiple listing of some voters which to him indicated the possibility of double-voting. The other faults related to misplacement of voters in certain polling districts and, incomplete particulars against certain voters. The witness agreed that in some cases, the final registers showed that corrections had been made though some faults persisted into the

final registers.

With regard to the RESULTS, the witness referred the court to a document containing provisional results and another containing what he termed- the final results. He drew attention to the altered results as well as to the initial results which had reflected identical scores for the candidates in various constituencies. The witness informed us that there were variances between the provisional and the final results so that the Copperbelt had a variance of 4,857 votes; the Eastern Province 1,185 votes ; Luapula nil; Lusaka Province 1,741 votes; Northern Province 279 votes; North- Western Province 64 votes; Southern Province 1,679 votes; and Western Province 1,302 votes. The witness found that the variances totalled country wide 16,788 for the rejected ballot papers and 52,857 for the total votes cast. Dr. Moyo had truly gone to great lengths to find faults. Thus, he gave examples of altered results between the provisional and the final results and he gave the national variance total of 62,037. The witness then drew attention to the identical results which were initially given. These were the pair of Chipata and Luangeni Constituencies where the first results were identical but corrected to different figures in the final results. Then there were the pairs of Lukashya and Malole; Liuwa and Lukulu West; Kankoyo and Kafulafuta; and Shiwang'andu with Isoka East. In all cases, the final results reflected that corrections had been made and the results were now different. The witness also drew attention to Mansa and said that the votes cast exceeded the maximum number of registered voters by 2,000. He also gave examples of what he considered to be an odd coincidence of the presidential candidates getting the same number of votes in various places.

All the foregoing was during his examination in chief. PW93, and to lesser extent PW96, can be credited with provoking and inspiring much of the distruct of the registers and the electoral processes during the last general elections. However, when Dr. Moyo was cross-examined he wilted completely in many respects and had to concede - very graciously we must say - that many of the major faults he had highlighted were as a result of his having formed a view on insufficient evidence or inadequate research or that he had taken a view of the facts which can infact not reasonably be entertained. Thus , for example, in relation to the polling districts in Ndola which were allegedly wrongfully shifted from one constituency to another, Dr. Moyo had to concede when shown the gazettes and the maps that the polling districts in question were infact PHYISICALLY LOCATED in one place though inadvertently listed under another in some 1991 Elections Office documents. The witness very propery admitted that he had seen the gazettes and the maps and he would not have made the allegation as he had done. The witness was also shown some gazettes which established that the allededly ungazetted polling districts were infact gazetted in various government gazettes containing corrigendar, which Dr. Moyo had not previously seen. This obliged him to withdraw his earlier assertions. Again, it was shown to the witness that the allegedly unlisted polling districts were in fact reflected in various documents, including the gazettes and that the Electoral Commission bad simply made a few mistakes in listing some polling districts for one place under another. When it came to the results, the witness was shown the voter registration figures for Chembe and Mansa and it was demonstrated that the results were transposed by error so that there were infact no 2,000 extra votes beyond the maximum number of registered voters. In the typical fashion of the gentleman that he proved himself to be, Dr. Moyo graciously conceded this; just as he readily admitted that there were no pairs of identical results in the results acknowledged as authentic by the Elections Office. It was also shown to the witness that there were indeed duplicate national registration cards entries on the registers due to a decision of the Electoral Commission as well as due to the mistakes of the Department of National Registration so that different people shared the same national registration card and registered as voters in different places. We should mention in fairness that the witness was on firm ground on some points, such as the fact that in the final registers there were still a few uncorrected errors of polling districts which had been shifted to the wrong place, for instance in Mumbezhi..

PW96 was Mr. Phiri of the Post Newspapers who had actively collaborated with some of the petitioners.His evidence disclosed in effect that he and his newspaper wrote a number of stories whipping up suspicion about the whole electoral process including, "Ghost voters" on the electoral rolls (which was a reference to duplicate national registration cards). They wrote that the Electoral Commission was partisan and that there were pre-marked ballot papers which would be used. Like PW93, he too analysed the results from an initial document availed him by an officer from the Elections Office when compared with the final results released later. He noted the discrepancies and the odd coincidence of having idential pairs of results affecting ten constituencies and the odd coincidence of having identical pairs of results affecting ten constituencies, that is five pairs. He also drew attention to the instances in more than forty constituencies where the results were later varied or altered. The witness also attempted – without much succcess – to show that there was a predetermined set pattern in the number of votes received by (or perhaps "allotted" to) each of the presidential candidates.

As previously indicated we have digested and made some comments upon the whole of the evidence of PWs93 and 96 only for convenience at this stage since the specific item being discussed pertains to the problems associated with national registration cards. On the evidence of the witnesses reviewed, we consider that the situation and the state of affairs revealed amounts to a near national disaster. It is unacceptable and improper, indeed it is contrary to the plain intention of the legislature which enacted the National Registration Act, that there should be any, let alone hundreds of thousands of, national registration card with identical numbers shared by two or three Zambians. The franchise and the electoral system's integrity has relied quite heavily on the national registration cards as a means of identifying and vouching for the Zambian voter. We take judicial notice that the national registration card plays a major role in identifying a person in connection with many other things, such as employment and social security. It seems to us that, as long as the concerned Department and the authorities do not correct this anomaly, the electoral system will continue to be seriously undermined and questioned. The statistic for duplicate national registration cards reflected in the voters' registers given by Mr. Kalale pale into insignificance in camparison with the far worse problem of national registration cards revealed by Mr. Mwiinga. At the end of the day, however, it can not be said that the flaws associated with the national registration card – which are harmful to the system as a whole – benefitted or disadvantaged any one of the presidential candidates any more or less than the others.

(b) **VOTERS CARDS**

As to (b), that is voters cards, we considered three areas of concern raised by the witnesses. firstly there was the problem of fading which PW2, PW50 and others spoke about. We saw such cards and we accept that it is a weakness of the new card that it fades and can even be rubbed clean. We note that the problem of fading cards could be mitigated by the facility of the voting certificate – when not misused – and replacement during a revision exercise. However, the mischief which was not acceptable and which could have been avoided had the officials used some common sense was the unwarranted refusal to allow voters like PW50 the chance to exercise their right to vote on account of the fading of the card. The second problem concerning the voters' cards was that some people ended up with two voters' cards each, leading to the suspicion on the part of the petitioners that they could vote twice. We saw such cards which were produced by the witnesses. However, it was also explained to us by the witnesses from the Elections Office (notably PW22 Mr. Musonda) that there had been a lot of misplacement of voters in the wrong provisional registers on account of errors of the coding of polling districts which were committed by the officials at the time of completing the registration forms. This necessitated corrections which entailed the issue of replacement cards and the transfer of voters' names to the correct final registers. In the process, some voters ended up having tow voters' cards because the earlier one was not always physically withdrawn. This confusion also resulted in many affected voters not collecting their replacement cards and not voting. In some cases, the corrections were still not made in final register. We accept the evidence of PW22 and find that where a second voters' card was issued in replacement of an earlier one affected by misplacement in the registers on account of the wrong coding, the result was simply that the whole process become rather untidy. However, we accept that the concerned voters could not vote twice; they could not use the first card. The mischief of double voting which was apprehended can safely be ruled out.

The third problem regarding voters' cards concerns the category of crooked and dishonest persons like Zgyambo and Ms Kalo who had more than one voter's cards and successfully voted two or more times. This category are illustrated not a flaw in the system but a fraud on the system. The sad part is that Zgyambo's tricks were facilitated by an official decision to accept the same national registration cards and treat it as representing different persons even when obviously not.

(c) THE REGISTERS

As to (c), that is the registers, the evidence much of which we have already outlined pointed to four main complaints. We should first make the observation, which is trite, that the exercise of the right to vote in periodic, genuine, free and fair elections is predicated upon the availability of a decent and acceptable register of voters in which all the eligible Zambians who took the trouble to register should be reflected. It is a fact also that while a provisional register can have mistakes which are expected to be corrected through the process of the publication of such registers, the final registers should generally reflect a high degree of accuracy so that no registered voter is disenfranchised. We should also make the observation that in this trial, there was no single witness who was a potential voter who came to say that he was refused registration. The only examples of unjustified disenfranchisement we heard were of the two voters in Bweengwa who were reflected as toddlers and the many who were the victims of uncorrected misplacements due to wrong coding. Otherwise the frontal attack on the integrity of the registers came mostly from PW93 as we have already seen. He spent a lot

of time on the provisional registers but his criticisms were valid only in respect of any mistakes which were not corrected.

Of the four areas of complaint, the first related to the unpopular decision of the Electoral Commission to authorise identical national registration cards to remain on the registers. This was confirmed by PW22 and CWI as well as the provisional and final registers exhibited in the case. This resulted in 52,703 duplicate national registration card cases with different names representing different individuals. We also accept that there were 9,540 other duplicate national registration cards with the same names but different dates of birth and which could conceivably mean that some people appeared twice and had potentially two votes. We also accepted the evidence of CWI who told us that there were 33,444 double registrations by the same individuals where a correction was made in the final register by leaving them where they registered first. In the last case, although leaving a person where he/she registered last would be more logical, we accept that the necessary correction had been made to prevent double voting. In relation to the whole complaint of duplicates remaining on the registers, we note that all of them put together do not exceed or even reach 100,000 which, when looked at proportionately and in the context of a nation-wide election which a presidential election is, speaks for itself. We have already made reference to the fact that the decision to allow duplicates also facilitated multiple registration by crooks like Zgyambo who must have been assisted by partisan officials. PW93 also gave instances of multiple listing of a voter, a phenomenon which was so isolated and so rare that it required the keen-eyed vigilance and virtually microscopic scrutiny of this witness to spot it.

The second area of complaint related to the use by some election officials of provisional or final registers indiscriminately at the polling stations. The complaint was voiced by PW93 and the phenomenon was confirmed by PWs 21 and 22. Apart from showing carelessness and untidiness in the performance of the election officials' duties, no specific mischief or baneful consequence was shown to have resulted.

The third area of complaint related to the misplacement of voters in the registers which was not corrected in the final registers. PW93 spoke about this and was on firm ground on Mumbezhi. There was other evidence suggesting that some voters were affected by this in the Isoka, Mbala and Mporokoso areas. There was also the evidence of PW39 Mr Andrew Bwezani Banda, one of the ZADECO Vice Presidents and a candidate in the Chipata Central Parliamentary Constituency. His evidence touched on a number of aspects, including the flaws resulting from the misplacement of voters. Mr. Banda complained about the MMD's use of government motor vehicles in their campaigns when they were also distributing medicines in the rural clinics in the Lumezi Constituency in neighbouring Lundazi. He talked about how the leaders dished out money to schools and other public projects and also how the respondent visited Chipata and announced sale of council houses at give-away prices, urging the voters to vote for him. We have already dealt with these aspects of the case. However, Mr. Banda also informed the court that a lot of polling stations (which he named) were wrongly listed or misplaced. We learnt that there was much confusion due to the misplacement of polling districts and polling stations belonging to Chipata Central into Luangeni which resulted in some voters not voting. Some of the voters ended up having two voters' cards while the gazetting of any corrections made was not brought to everyone's attention. The confusion was, needless to say, attributable to the elections administrators and there was no suggestion that this flaw in the system benefitted any particular candidate or disadvantaged one any more than the other.

Finally, PW93 complained of instances of incomplete personal particulars such as a missing first name or an incomplete residential address of a voter.

Having examined the flaws on the registers, we can confirm - and it is our finding - that there were indeed flaws or faults which did not contribute to building confidence in the system and which could and should have been avoided. Flaws which facilitated the possibility of more than one vote per person conduced to illegality since the democratic system we have embraced which is underpinned by the Constitution and the Electoral Act envisages and confers only one vote in each election. However, having reviewed and analysed all the evidence, it is our finding that there is nothing to support the suspicion which was voiced of a built-in majority for the MMD or anyone.

(d) **POLLING DISTRICTS**

As to (d), that is the polling districts, we considered the complaints and the flaws, if any, in the light of the evidence given by PWs 93, 96 and 39. Having carefully considered the evidence, it is our finding that the evidence of the increase in the number of polling districts was not evidence of any flaw in the system. There was nothing in the evidence to warrant the raising of suspicion by PWs 93 and 96 nor was the increase itself evidence of some sinister development

to do with rigging or something of the sort. The other flaw testified to by PW93 was the allegation that some polling districts were not gazetted. As we have already seen, this was shown not to be true and the witness had to concede under cross-examination. Similarly, the suggestion that there were or there may have been sinister and subterranean adjustments to the constituencies was not borne out. Thus, the allegation of ten polling districts in Ndola being shifted from Chifubu to Kabushi when some 1991 documents had listed them under Chifubu had to be abandoned and PW93 conceded he would not have raised the complaint had he seen the maps, the gazettes and the other documents. However, it is to be noted that PW39 at least was on firm ground when he complained about the polling districts and polling stations which were wrongly listed or misplaced in Chipata. It was true to say that the corrections in the gazette, if any, would not have been seen by many. Some of the misplacements persisted up until the polling day, thereby preventing the electorate from voting. The evidence of PW39 Mr. Andrew Banda on this point was not rebutted and the point was well-taken. The misplacements ought to be rectified so that none is disenfranchised and dissatisfaction and unwarranted suspicion avoided.

(e) **POLLING STATIONS**

As to (e), that is flaws associated with the siting of polling stations we heard three types of complaint. The first was that in this day and age when the values of multiparty democracy ought to be evident both in practice and in perception there actually were some polling stations established at premises belonging to party officials. This was obviously wrong and conducive to malpractice, Examples were given by PWs 69, 77 and 46. PW69 was Mrs. Prisca Nkhoma, a polling agent for the Lima Party in Chongwe. We heard from her that her polling station was a tent erected at the local MMD Chairman's house. The Chairman kept telling the people to vote on the clock; his wife offered free traditional beer and drew a clock on the voters' palms before they went in to vote. The witness saw at least one voter who collected her voter's card from the Chairman who was keeping a batch of them. The evidence of PW77 Mr. Machina, a polling agent for Dr. Guy Scott was to the same effect as that of PW69. Apart from the foregoing, we have already alluded to the example given by PW46 Mr. Kandeke who voted in Kabwe at a polling station established at a beer-hall or tavern belonging to the local MMD Chairman. The second type of complaint concerned the misplacement of polling districts which resulted in the loss of polling stations or their own misplacement so that some people could not even vote. This came out of the evidence of PW39. The last kind of complaint under this part was that by PW49 Mrs. Emelio who complained of the vast distances many voters were expected to walk to the polling stations in Sinjembela as a result of which people did not vote. This was a valid complaint of general interest and occurrence and which should be considered by the authorities concerned, notwithstanding that some people - like PW93 - would probably still not favour the creation of any more polling districts.

(f) **RESULTS**

As to (f), that is flaws in the results, the main evidence was that given by PWs 93 and 96 a precis of which we have already given. One complaint related to the initial results announced which had five identical pairs of results farm ten constituencies, provoking the suspicion or allegation that the results were predetermined and cooked up or plucked from the blue. We accept that corrections were made but nonetheless such identical sets were there at first. Whether this was as a result of gross negligence or carelessness or not (in the prevailing climate of political distrust, hatred and mutual dislike), it led to a lot of suspicion on the part of the petitioners. The second complaint related to non-identical results but which were nonetheless altered. We accept that all this weakened confidence and belief in the system and did not redound to the credit of those managing the electoral process. The third complaint we consider not to have been well-taken and this was that candidates got a similar number of votes in a variety of constituencies; suggesting that there was an allocation of predetermined figures which had been conjured up. We examined the evidence very closely and did not discern odd coincidences of the kind to arouse this type of suspicion in an objective observer. The trouble is that there was very little objectivity and too much distrust.

The flaws of all types which we have said were established, of course, did not reflect well on those managing the electoral process. Many of them can and should be addressed in order to enhance our democratic profile and in order to engender greater confidence in the electoral process. Elections, it goes without saying, are the sole lawful, constitutional, and legitimate method for the peaceful and legal acquisition of political power. They are the culmination of the exercise of some of the most basic fundamental rights such as the rights of free association, free assembly and free speech the maintenance of which is vital in order to sustain free political discussion and free political choices. Those in power should govern with the consent and by the will of the governed expressed in periodic genuine open, free and fair elections where the result reflects the exercise of free choice. If it be the will of the people, through the electorate, that there be changes, elections guarantee that the changes desired

shall be obtained by peaceful means. We repeat: The flaws identified need to be addressed by the authorities. However, flaws by their very nature go to the general integrity of the system and do not necessarily suggest that the electoral system has been comprehensively massaged or predisposed to grant an unfair or any advantage or disadvantage to any one, in advance.

CONCLUSION

Having reviewed the evidence, it is necessary to conclude. Admittedly, there are some witnesses whose evidence we have not specifically alluded to and which we considered to be unhelpful to the issues before us. Persons like PW70 Mr. Jerade Sekeleti, PW71 Mr. Kayanda and PW72 Mr. Jackson Sekeleti who complained that the MMD candidate Mr. Nkausu visited their polling stations and greeted some people did not make any useful contribution to this case. Neither did PW43 Mr. Tiyaonse Kabwe who - having read the evidence of PWI2 in the Post newspaper - wished to comment on it and to dispute his assertions. There were a number of witnesses from the media who produced various newspaper articles which did not advance the case in any useful fashion. There were other witnesses not specifically mentioned - such as PW37 a polling agent for PW82 - because the point they covered has been adequately dealt with by reference to the evidence of other witnesses.

We should also mention that, from the evidence of the petitioners PWI, Mr Zulu, PW2 Mr. Lewanika, PW8 Mr. Kambaila and PWI6 Mr. Mung'omba, the petitioners had a number of grievances which are largely if not purely of a political nature. The resolution of such political issues would have more naturally sounded in another forum than in a courtroom where the parties have vented their feelings in default of meaningful dialogue among our politicians. Thus, they complained of the manipulation of the constitution by the amendments of 1996 which appeared to them to have been selectively and advisedly targeted. One of the them, Mr. Kambaila, even went so far as to call upon their Lordships to declare the 1996 amendments requiring the parents of a candidate to be citizens as null and void. Such call, of course, went beyond the ambit of an election petition which was not constituted for such a purpose. Some of the petitioners raised concerns about the need for a mutually agreed independent Electoral Commission to manage the elections; concerns about the use of the public media and the limited access to it by the opposition; and concerns about the Public Order Act. There were complaints concerning the use - or perhaps more accurately the misuse - of public or government resources, concerns some of which the Electoral Commission endeavoured to address when it set out a code of conduct (by Statutory instrument 179 of 1996) apparently more honoured in breach than in observance. It seems to us that resolution of political issues in the political arena is to be preferred to litigation. For example, some measures which may be considered offensive, provocative, unjust or unfair in the political arena so as not to be universally acceptable may yet strictly speaking be "legal" as a matter of strict law. It seems to us that in such event where the court may be unable to pronounce upon their validity based on their possible illegality or unconstitutionality, the politicians owe it to the citizens - (who are undoubtedly entitled to peace and the quiet enjoyment of life) - to resolve the political issues and to underight the political well-being of the nation. This we find to be the challenge facing our politicians on some of the grievances brought to our attention by the petitioners. It is certainly not part of the remit of any court (to borrow from the language in the Akar case) to start debating the wisdom or desirability.or fairness of some of the measures if a legal or constitutional challenge is unavailable.

We are also aware that there were allegations made in the petition which have either not been supported by any evidence or not been proven. Examples of this include the allegation 'that at the poll, the polling stations and rooms where people cast their votes had intimidating presence of heavily armed soldiers and policemen there through bullying voters into voting for the respondent and his party in government as the particulars of the voters were also endorsed on their ballot papers thereby ensuring that the vote was not secret, and a voter's choice could be traced." There was not an iota of evidence tendered; not a single witness, of the many who testified 'to events at a polling station, said there were the alleged "heavily armed solders" at all or any police officers bullying any one. Not one person said particulars were written on the ballot papers unless the reference was to the voter's serial number which is written on the ballot counterfoil; a practice which has always been there in Zambia. There was also an allegation that double-voting was facilitated by the provision of substandard ink that could be washed off and by the failure "to put measures in place to detect and stop the use of invisible rubber hand gloves" which allegedly allowed many people with more than one voter's cards to vote as many times as they had cards. While there was some evidence of double voting by the dishonest like Zgyambo and Miss Kalo who washed off the ink, no one came to talk about invisible rubber gloves. We have already dealt with the case of the voter who had two voters' cards because of coding errors and we have already found as a fact that such voters could not vote twice, even if they tried to do so, because their names only appeared once in the final registers in respect of the corrected polling district.

There was yet another allegation that the Electoral Commission created new polling stations which were secretly used. No evidence was led to support this claim. There was an allegation that persons who had died prior to the election somehow voted in the election using MMD cadres who were supplied with the requisite documents. This allegation may have been intended to be proved by the witnesses from Chongwe who claimed to have been given false identities and to have been driven to Ngwerere to vote in those other names. We have already discussed this evidence which was not believable, as already found.

When all is said and done, we accept that there was on the whole reasonable cause for complaint and for bringing this petition which it was in the public interest to ventilate in court. Some of the grievances and issues taken up were certainly well- taken while obviously some could not have been pursued had the complainants been possessed of the full facts or explanations which emerged during the trial. For reasons we have given, we decline to determine and declare that the provisions of Article 34(3) (a), (b) and (e) of the constitution have not been satisfied in respect of the respondent. We find that he was qualified to contest the election. It follows also that we do not find that he falsely swore as to the citizenship of his parents. We were asked to declare that the election process was not free and fair and that the election was rigged and therefore null and void; The election process had flaws and irregularities, as we have already pointed out. The bottom line, however, was whether, given the national character of the exercise where all the voters in the country formed a single electoral college, it can be said that die proven defects were such that the majority of the voters were prevented from electing the candidate whom they preferred; or that the election was so flawed that the defects seriously affected the result which could no longer reasonably be said to represent the true free choice and free will of the majority of the voters. We are satisfied, on the evidence before us, that the elections while not perfect and in the aspects discussed quite flawed were substantially in conformity with the law and practice which governs such elections; the few examples of isolated attempts at "rigging" only served to confirm that there were only a few superficial and desultory efforts rather than any large scale, comprehensive and deep rooted "rigging" as suggested by the witnesses who spoke of aborted democracy.

The petition is unsuccessful and it is dismissed. However, it is clearly in the interests of the proper functioning of our democracy that challenges, to the election of a president which are permitted by the constitution and which are not frivolous should not be inhibited by unwarranted condemnation in costs. In the event, it is only fair that each of the parties should bear their own costs.

Petition Dismissed
