IN THE HIGH COURT FOR ZAMBIA **2016/HN/EP/001**
HOLDEN AT NDOLA
(Civil Jurisdiction)

IN THE MATTER OF: **THE ELECTORAL PROCESS ACT, NUMBER 35 OF 2016**

AND

IN THE MATTER OF: **PARTS V AND VI OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT, NO. 2 OF 2016**

AND

IN THE MATTER OF: **THE PARLIAMENTARY ELECTION FOR THE ROAN CONSTITUENCY OF THE LUANSHYA DISTRICT HOLDEN ON THE 11TH DAY OF AUGUST, 2016**

BETWEEN:

ANDREW KAFUTA KAYEKESI **PETITIONER**

AND

CHISHIMBA KAMBWILI **1ST RESPONDENT**

ATTORNEY GENERAL **2ND RESPONDENT**

Before Honourable Lady Justice Emelia .P. Sunkutu in Chambers.

For the Petitioner:	Mr. C. Magubbwi; Messrs Magubbwi & Associates
For the 1st Respondent:	Mr. T. S. Ngulube; Messrs Nanguzyambo & Associates
For the 2nd Respondent:	Mr. B. Chiwala; State Advocate

RULING

Cases referred to:

1. D. E Nkhuwa vs Lusaka Tyre Services Limited (1977) ZR at page 43 (S.C)
2. Hakainde Hichilema and Another vs Edgar Chagwa Lungu and Others (2016/CC/0031) Unreported
3. Matilda Mutale vs Emmanuel Munaile (2007) ZR at page 120
4. Jimmy Dawns vs Jean Kapata and E. C. Z (2016/HP/EP/22) Unreported
5. Twampane Mining Corporative Society Limited vs E and M Storti Mining Limited (Supreme Court of Zambia Judgment No 20 of 2011)
6. Mac Foy vs United Africa Company (1961) 3 All ER 1969
7. The Republic of Botswana, Ministry of Works Transport and Communications and Another vs Mitre (1995/1997) ZR at page 115
8. Leopold Road Zambia Limited vs Uni-Freight Zambia(1985) ZR at page 205
9. Yousuf vs Mahtani Group of Companies (2011) ZR Volume 1 at page 284
10. Aliu Bello vs Attorney General of Oyo State (1986) 5NW Law Report at page 828
11. Zambia Revenue Authority Vs Jayesh Shah 2001 (ZR) at page 60

Legislation referred to:

1. The Electoral Process Act No. 35 of 2016
2. The Constitution of Zambia Act No. 2 of 2016
3. The High Court Act, Chapter 27 of the Laws of Zambia
4. The Judiciary Administration Act, No. 23 of 2016
5. The White Book 1999 Edition.

This is an Application to dismiss, for irregularity, the Petition of **Andrew Kafuta Kayekesi**; which challenges the election of **Chishimba Kambwili** as Roan Member of Parliament. The background to the Application is that the Petitioner was one of the Parliamentary Candidates, for the Roan Constituency of the Luanshya District, in the General Elections which were held on 11th August, 2016. He contested the election on the sponsorship of the United Party for National Development (UPND), while the 1st Respondent contested the said Parliamentary Election on the sponsorship of the Patriotic Front (PF). The other candidates in that Parliamentary Election included **Daniel Chibwe** of the Rainbow Party (RP), **Basilio Mulenga** of the Forum for Democracy and Development (FDD) and **Ditar Munsanje;** an Independent Candidate. The 1st Respondent was duly declared Member of Parliament for the Roan Constituency on 12th August, 2016. The Petitioner lodged a challenge to the election of the 1st Respondent through the Petition that is now before this court.

For the purposes of this Ruling, it is not necessary to go into the full details of the Petition. It suffices to state that Petitioner alleged that the election of the 1st Respondent was characterized by general illegal and corrupt electoral offences; such as acts of bribery and breaches of the Electoral Code. The Petitioner prayed, among others, that it be determined and declared that the 1st Respondent was not duly elected, or returned, and also that it be declared and ordered that his seat be vacated.

The 1st Respondent tendered an Answer in response to this Petition; in which he denied the allegations raised in paragraph 4 of the Petition *in toto*. He averred, instead, that there was no material and deliberate breach of the

Electoral Code or any commission of electoral offences, as alleged by the Petitioner. The 1st Respondent further averred that he won the said election purely on the good works that he did for the people of the Roan Constituency, in Luanshya, whilst serving as their Member of Parliament. That, briefly stated, is the background to the Election Petition from which this Application arises.

The Petition was scheduled for hearing on 3rd October, 2016. However, prior to that, on 30th September, 2016, the Petitioner filed an Amended Petition into court. The amendment to the Petition was made pursuant to Order 20 Rule 3 of the Rules of the Supreme Court of 1965 (the White Book, 1999 Edition). In the Amended Petition, it was stated that the Petition was being brought pursuant to part VII (sections 81 and 89) and part IX (sections 97, 98, 99, 100, 107 and 108) of the Electoral Process Act No. 35 of 2016. The Petitioner also extended paragraph 4 (c), at page 4 of his Amended Petition, by deleting the words *'Kalulu Primary School'* and substituting them with *'Milyashi Community Centre'*. The Amended Petition also added a further relief, at page 5 thereof, that it be declared that the Petitioner was duly elected as Member of Parliament for the Roan Constituency.

Still prior to the hearing of the Petition, the 1st Respondent filed Summons to Dismiss the Petition for Irregularity and for an Order to Strike Out portions of the Petition; pursuant to Order 14A of the White Book, 1999 edition, and sections 97 and 100 (1) and (4) of the Electoral Process Act, Number 35 of 2016. The Summons were accompanied by an Affidavit in Support, thereof, sworn by the 1st Respondent; who averred, *inter alia*, that this Election Petition was irregularly before this Court; in that it did not state the specific

section under which it was brought, namely part IX of the Electoral Process Act; which was expressly provided for, and not the Republican Constitution. Further, that where the provisions of the law provided for the manner of bringing an action, any departure there-from was fatal.

It was the 1st Respondent's averment that this Petition was very irregular in almost all the portions of paragraph 4, in that it raised allegations against the State, and Teachers in particular, when the Attorney General had not been made a party to the proceedings. Further, that paragraph 4 raised allegations against **Hakainde Hichilema** who was not a Parliamentary Candidate; but was a candidate for the Presidential Race. The Affidavit of the 1st Respondent further states that the said paragraph 4 of the Petition also raised allegations on behalf of **Geoffrey Bwalya Mwamba**, who, similarly, was not a candidate in the Roan Parliamentary Constituency, but was a Running Mate.

It was the 1st Respondent's contention that the Petition additionally raised allegations against public media institutions and that, unless the stated portions of the Petition were struck off, he would be embarrassed in his defence and responses. He further contended that he would be prejudiced since he did not represent the State in legal matters, as that was the preserve of the Attorney General. The 1st Respondent prayed that the Petition be dismissed for irregularity or, in the alternative, that paragraph 4, thereof, be struck out. In addition to his Summons and Affidavit, the 1st Respondent also filed Skeleton Arguments in support of the Application to dismiss this Petition for irregularity.

In addition to the Amended Petition and the 1st Respondent's Application to dismiss this Petition, Summons for Non-Joinder of Party were filed by the Attorney General. On 5th October, 2016, the Court heard and allowed the Application for Non-Joinder of party; thereby making the Attorney General the second Respondent. The Court, thereafter, proceeded to hear *viva voce* submissions in support of the Application to dismiss the Petition. The learned **Mr. Ngulube** submitted lengthily, on behalf of the 1st Respondent, that this Petition ought to be dismissed mainly for three reasons; namely:

i. That the Petitioner purported to amend his Petition without leave of the Court; as the leave granted for that purpose expired;
ii. That the purported amendment introduced new causes of action and new reliefs which were not in the original Petition;
iii. That Security for Costs was not paid into court within the time frame allotted in the Order for Directions issued by the Court on 21st September, 2016; and as such the Petition stood dismissed.

The arguments in support of the Application, before the Court, were not presented in the order that they are listed above. With regard to the issue of payment of Security for Costs, the learned Mr. Ngulube submitted that the Order for Directions issued by the Court, on 21st September, 2016, directed that the Security for Costs be paid before the 26th of September, 2016. However, as at that day, that money had not been paid by the Petitioner. It was only paid on the 27th of September; two days after the Petition had been dismissed on account of non-payment of Security for Costs; as stipulated in the Order for Directions. Mr. Ngulube further submitted that the receipt, which was on record, showed that it was issued on 27th September, 2016. He added that from the Bank Deposit Slip, on record, that payment could have

been in respect of any other Petition or, indeed, any other matter that was being handled by the firm of the Petitioner's Lawyers. It was strongly contended that the non compliance with the Court's Order, to pay Security for Costs before 26th September, 2016, entailed that the Petition was dismissed on the 26th of September, 2016; a day before the Security for Costs was paid.

With regard to issue of amendment of the Petition, it was submitted, on behalf of the 1st Respondent, that the Petitioner attempted to file an Amended Petition without leave of Court; in that he was granted leave to amend the Petition before the 23rd of September, 2016; and that leave was not renewed; meaning that any amendment made thereafter was a nullity. Mr. Ngulube argued that the Order for Directions did not grant liberty to the Parties to make amendments after the stated date and the matter was, therefore, dismissed on the 26th of September, 2016; and even if it was argued that the Petition was not dismissed, the 'Unless Order' of the Court had taken effect. It was submitted that the amendments were done on the 30th of September, 2016 and should not be allowed.

Still on the issue of amendments to the Petition, the learned Counsel for the 1st Respondent submitted that the amendment that was done on the 30th of September, 2016 did not just introduce new sections, it introduced new reliefs at page 4; by the inclusion of paragraph C and C (i). He contended that the said amendment had altered the initial allegations raised against the 1st Respondent in that page 5 of the original Petition, filed on the 23rd of August, 2016, had only four reliefs and the fifth claim was added after the prayer for costs in the Amended Petition; which prayer was not initially in the original Petition. It was submitted that the law clearly provided that an amendment to an Election Petition shall not introduce a new cause of action or change or add

fresh relief thereto; and it was, for that reason, that the 1st Respondent prayed that the entire Amended Petition be expunged from the record.

In augmenting his *viva voce* submissions, Counsel for the 1st Respondent referred the Court to the Skeleton Arguments filed on behalf of the 1st Respondent on 3rd October, 2016; wherein it was suggested that the Petitioner had gone to lengths to show that he had liberty to amend his Petition. To counter that contention, Counsel cited the case of **Matilda Mutale vs Emmanuel Munaile (2007) ZR at page 120** in which it was held that a Petition was not a Pleading.

On the question of whether or not the Court could dismiss the Petition on technicalities, Mr. Ngulube submitted that the rules of procedure and manner of proceeding with litigation were not targets to be met by litigants. The Court's attention was, in this regard, drawn to the case of **D. E Nkhuwa vs Lusaka Tyre Services Limited (1977) ZR at page 43 (S.C)** in which it was held that Rules prescribing times within which steps must be taken must be adhered to strictly and practitioners who ignore them will do so at their own peril. With regard to the matter in hand, it was submitted that the Court had already exercised its discretion to waive technicalities by granting leave to the Petitioners to amend and perfect their Petition before the 23rd of September, 2016; and the Court could not, therefore, give the Petitioner a second bite at the cherry. It was Mr. Ngulube's contention that it would not be proper, in that regard, to argue that the Petition could not be dismissed on technicalities. He contended that this Petition was fraught with irregularity and that the Court could not proceed to determine a Petition that was improperly before it as was stated in the case of **Twampane Mining Corporative Society Limited vs E and M Storti Mining Limited (SCZ Judgment No. 20 of 2011).**

It was submitted that Order 20 Rule 7 of the White Book did not relate to Election Petitions as they were not Pleadings and, as such, an Election Petition was not amenable to an amendment after fourteen (14) days of it being lodged into Court. Counsel further submitted that the preamble of the Electoral Process Act was very clear and the White Book could not over-ride the provisions of the Electoral Process Act; which has expressly stated the scope within which Petitions should be heard. He argued that nothing in the Act grants the discretion to the Court to vary the mandatory provisions of this Act and, as such, the Petition having been dismissed for the failure by the Petitioner to pay Security for Costs, the 'Unless Order' had taken effect in that the said Petition was not perfected within the stipulated time. Consequently, the Petitioner having willfully gone against the Order for Directions, there was, legally no Petition that was subsisting before this Court.

Revisiting the issue of technicalities, Mr. Ngulube challenged the mode of commencement of this Petition and submitted that Section 97 (1) of the Electoral Process Act of 2016 was not in conflict with Article 73 (1) of the Republican Constitution and that Section 97 (1) excluded all other pieces of legislation except under this Act; and that provision was not subject to debate. He urged the Court to make a finding as to whether, under Article 97 (1) of the Electoral Process Act, the Court could grant the discretion for a Petition to subsist if brought under any other law; including the Republican Constitution. The Court was also urged to make a finding on whether the words *'shall not be questioned'* should be waived.

It was additionally submitted that Section 99 of the Electoral Process Act restricted the reliefs that may be claimed in an Election Petition; and the

prayers in both the initial and Amended Petition violated that section in that the Petitioner was seeking to be declared winner of the polls without election; when the position was that the Electoral Commission of Zambia would have to hold elections in order for this relief to be tenable. The Court was urged to disregard the amendments to the Petition because its 'Unless Order' of 21st September 2016 was never set aside or varied. Counsel prayed that the Petition be dismissed with costs to the Respondent.

At the close of the submissions on behalf of the 1st Respondent, the Court invited the Attorney General, despite only just having been joined to the proceedings, to make submissions, if any, with regard to the Application before Court. The learned **Mr. Chiwala** informed the Court that the Attorney General joined issue with the 1st Respondent.

In replying to the submissions, made on behalf of the Respondents, the learned **Mr. Magubbwi** submitted that contrary to the submissions by the learned Mr. Ngulube, the Security for Costs was paid into Court on 21st September, 2016 and a Notice to that effect was filed on 27th September, 2016. He stated that the Order of the Court was pre-emptive and, as such, there was conformity, to it, and the Petition could not, therefore, be dismissed. It was further submitted that in the event that the Security for Costs was not paid, this Court is only mandated to stay hearing, and not to dismiss the Petition, as provided for under Section 102 (3) of the Electoral Process Act of 2016; which clearly stated that the Court could not dismiss a Petition but only stay it and, as such, this ground by the Respondents sat on quick sand.

With regard to the aspect of amendments to the Petition, and specifically on the question of whether the Court had authority to order the amendment of non-substantive parts of the Petition, Mr. Magubbwi submitted that Section 102 (1) of the Electoral Process Act provided that the Rules of Procedure were to be determined by the Chief Justice; and currently there were no rules to be followed, inclusive of rules of amendment of Petitions, since the same had not yet been determined by the Chief Justice. Consequently, what rules the Court should follow when there is need to amend a Petition were provided for in Section 106 (4) of the Electoral Process Act which provides that:-

'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.'

Counsel contended that the argument that the rules in ordinary civil jurisdiction were beyond the hands of the Court was untenable as the section he had referred to, namely 106(4) of the Electoral Process Act, empowered the Court to import Rules of Procedure from the High Court Act and the White Book, when hearing and determining an Election Petition. It was added that, with respect to the 1st Respondent's contention that the Amended Petition introduced new evidence; this Court had the discretion to allow amendments in a Petition for the purposes of the interests of justice. However, on a concessionary note, Mr. Magubbwi submitted that he was in agreement that the Court should not allow amendments that brought in new grounds and reliefs to be sought under a Petition. He added that by that admission, the amendments at page 4 of the Amended Petition should not be allowed and should be expunged from the record; as should the claim at page 5 of the Amended Petition. Mr. Magubbwi conceded that the fifth claim was of a

substantive nature, which would be caught up by the date the Election Petition was returned.

In further pursuing the argument on amendments, Counsel disagreed with the Respondents' argument that the **Mutale Vs Munaile** case took away the Court's jurisdiction to allow amendments to Election Petitions on the ground that they were, *per se*, not Pleadings. He, instead, enjoined the Court to the contents of Order 20 Rule 7 of the White Book which, he submitted, classified a Petition as one of the Pleadings which could be amended in the same manner as a Writ. Mr. Magubbwi added that what set the Petition in the **Munaile** case apart, and which he personally agreed with, was that it was a *suis generis* case, in that the settler needed to sign the Petition, and that was the issue in that case; which is distinguishable from the case in hand. According to Counsel, the decision in the **Munaile** case did not apply, in a wholesale manner, to the case before this Court and the Petitioner had, thus, taken the liberty to amend the Petition pursuant to Order XVIII of the High Court Rules, Chapter 27 of the Laws of Zambia.

Mr. Magubbwi submitted that in the event that the Court Order allowing the amendments had expired, it was still within the Court's province and jurisdiction to extend the period in which amendments could be permitted under Order 20 Rule 3 of the White Book; and the Court should grant leave to allow the Amended Petition; without the withdrawn parts. Counsel argued that even in its original format, the Petition contained no irregularity which made it available to the use of a draconian Order dismissing it; since it had been brought under the Electoral Process Act of which Section 97 (1) is part, and not just under any law.

With regard to the submission that the Petition had been brought under the Constitution, it was submitted that that argument may have had basis if the Electoral Process Act was not cited in the Petition. It was argued, to wit, that the part of the Constitution cited complimented the Electoral Process Act and did not oust the provisions of Section 97 (1) of Electoral Process Act at all. Further, that in any event the Petitioner's Skeleton Arguments argued against dismissal of the Petition. In concluding his submissions, the learned Mr. Magubbwi stated that for the avoidance of doubt, there was no new paragraph 4 (c) brought; as the error in the original Petition was that it contained two paragraph 4 A's, namely paragraph 4A and A and, with the exception of the admitted amendments and in line with the spirit of the Constitution, under Article 118, thereof, this Petition should be heard.

In reply to the Petitioner's submissions, it was submitted that Part V of the Constitution and did not allow the Court to question the election of a Member of Parliament; as it spoke about the Legislature and had nothing to do with the powers of the Court in Election Petitions. It was pointed out that the Petitioner's decision to cite irrelevant portions of the Constitution did not empower the Court to question the validity of an Election Petition. Flowing from that, the Court was requested to make a finding as to whether this Petition was brought under Part IX of the Electoral Process Act and whether non conformity defeated the provisions under Article 97 (1) of the same Act. It was contended that that omission was fatal as rules and laws were not targets for parties to choose whether to comply or not. Mr. Ngulube submitted that while Mr. Magubbwi had conceded that certain portions of the Petition needed to be withdrawn, his application to withdraw those portions of the Petition could not stand; as it amounted to an application within an application.

With regard to Section 106 (4) of the Electoral Process Act, the Respondents' reply was that that section talked about '*trial*' and not '*amendment*' to Election Petitions. Counsel reiterated that Section 102 (3) of the Electoral Process Act had nothing in it that said the Court shall stay proceedings. He maintained that the section terminated proceedings out-rightly in that it was a provision of finality. Mr. Ngulube supplied that if it was the intention of the Legislature to stay proceedings, then the wording of that section should have been that '*the Court shall stay all proceedings until Security for Costs is paid*'. It was submitted that Section 102 (3) should be given its literal meaning; unless an ambiguity arose.

In response to the submission on the issue of payment of Security for Costs, Counsel cited the provisions of Section 102 (2) of the Electoral Process Act and offered that with regard to the manner and form of payment of Security for Costs, this Court did not make any Order that it be paid into a bank account. It was argued that the Petitioner ought to have obtained a receipt showing that payment of the money was made in Ndola; as even in any ordinary civil proceedings, Security for Costs; was paid into Court and normally in the form of cash. Mr. Ngulube added that there was no rule saying that Security for Costs shall be paid into bank. Turning to the issue that there was a directive, by the Assistant Registrar at the High Court, for the Petitioner to pay Security for Costs into a Bank Account; it was submitted that an Assistant Registrar of the High Court had no jurisdiction to make any Order by which Security for Costs could be paid; in fulfillment of Section 102 (2) of the Electoral Process Act No. 35 of 2016. Further, that under section, '*the High Court*' meant the *'High Court'* and not an Assistant Registrar.

It was reiterated that no Security for Costs was paid; as the proof was a receipt; and the receipt of 27th September, 2016, numbered GRZ No. 699074, showed that the money was only received by the court on that date. Further to that, it was argued that the Bank Deposit Slip did not show who the parties, in respect of whom the payment was made, were. Winding his submissions in that regard, Mr. Ngulube stated that the rules of evidence demand that a document speak for itself; and no extrinsic evidence should be adduced to aid a document. He maintained that the Bank Deposit Slip on record could be for any other Petition in the High Court or the Firm in which the Petitioner's Lawyers practiced; and that the directive by the Assistant Registrar of the High Court was not provided for by law. Consequently, the Petitioner should have shown, on record, that the Assistant Registrar refused to accept the Security for Costs or decided that it be deposited in the bank. In any event, only this Court could give such an order.

With regard to the absence of Rules under Section 102 (1) of the Electoral Process Act, it was submitted that the attempt to show that the Chief Justice had not yet made Rules to guide the amendments was untenable; as the Act would have provided for the rules relating to the amendment of Petitions. Mr. Ngulube added that it was not the intention of the Legislature to have amendments to Election Petitions and the rules relating to these Petitions were a strait jacket and must be strictly adhered to. Counsel revisited the **Hakainde Hichilema and Another vs Edgar Lungu and Others** Constitutional Court Judgment, under cause number **2016/CC/003/1,** and stated that the gist of that judgment was that no amendment could be made outside the time within which a Petition could be filed. With regard to the case in hand, Counsel maintained that the Court had granted the Petitioner leave to amend his Election Petition, but that leave was not extended and, as such, the

entire Amended Petition should be expunged from the record, as was done in the **Hakainde Hichilema** case.

On the aspect of the applicability of the High Court Rules on amendments to Election Petitions, the Respondents' reply was that in its decision in the **Hakainde Hichilema** case, the Constitutional Court had referred to the case of **Jyoti Basu and Others vs Deby Ghosal and Others;** a Supreme Court of India Judgment; and another case, namely, **Murathe vs Macharia 2008 KLR (EP) 244 at page 249**, both of which pertained to procedure in dealing with Election Petitions and put the Court in a strait jacket with regard to observing statutes creating special jurisdiction. Mr. Ngulube added that all the authorities cited by the Petitioner related to amendments of Pleadings in ordinary civil jurisdiction and not Election Petitions. He submitted that the **Hakainde Hichilema** holding and the **Mutale vs Munaile** case were both binding on this Court and, unless the Petitioner had shown special and compelling circumstances to allow the Court to offend the sanctity of the Constitution, or to depart from the Electoral Process Act provisions; then the Amended Petition in its entirety could not stand; even if the admitted portions thereof be withdrawn.

Counsel reiterated that the inclusion of sections that were omitted at the time of filing the original Petition could not stand. He also maintained the position that the Petitioner willfully went against the rules of practice and procedure in Election Petitions and had not cited any authorities that would allow this Court the jurisdiction to grant amendments to the Petition. Mr. Ngulube stated that the Petitioner had not demonstrated that he attempted to vary the Order for Directions or enlarge the discretion given under Order No. 2 of the Order for Directions given by this Court on 21st September, 2016 and it was,

therefore, the Respondents' submission that the Petition should be dismissed, with costs, for the reason purely that even without the proposed amendment, this Court would still have an irregular Petition before it. In concluding his reply, Mr. Ngulube submitted that even if this Court was to allow the amendment, the Petition was dismissed on 26th September, 2016 a day before Security for Costs was paid.

I have very carefully considered the arguments in support of this Application. I have given equal consideration to the arguments in opposition, thereto. I begin by stating that I am indebted to both Counsel for the various authorities cited in their Skeleton Arguments, even though some are decisions by the High Court, which I shall treat as being of persuasive value only. Returning to the matter in hand, the point of departure is that having painstakingly gone through the Affidavits and Skeleton of Arguments pertaining to this Application, it immediately becomes clear to me that although the Respondents have cast their net quite wide and raised various issues, they are relying on the issue of the payment of Security for Costs as the primary ground for seeking the dismissal of this Petition. This conclusion is drawn from the several references, in the Respondents' submissions, to the Petition having been dismissed on 26th September, 2016, upon the Petitioner not having paid Security for Costs paid by that date. For that reason, I must give depth to the consideration of the issue of Security for Costs.

Perusal of the record shows that this Court, indeed, gave an Order for Directions, with regard to the conduct of this Petition, on the 21st of September, 2016; wherein it directed that the Petitioner pay Security for Costs by the 26th of September, 2016. Notably, this Order is silent on the actual mode of payment of that sum of money. It was categorically submitted, on

behalf of the Respondents, that the Petitioner did not comply with the directive to pay Security for Costs within the period set by the Court; as the record shows that there is a Bank Deposit Slip, by which the sum of Two Thousand, Four Hundred Kwacha (K2, 400) was paid into the Ndola District Registry Account Number 0426480300124, held with the Zanaco Bank in Ndola, on 21st September, 2016. The Respondents attacked this mode of payment of Security for Costs, contending that the High Court Rules did not provide for that manner and form of payment of such monies. They argued that the Bank Deposit Slip displayed, on the Court's record, could be for any other Petition, or indeed matter, being handled by the Firm of the Petitioner's lawyers. The Respondents equally expressed discontent with the submission, by the Petitioner, that payment of his Security for Costs by way of a Bank Deposit, was at the discretion of the Assistant Registrar of the High Court.

It was the Court's view that the concerns raised by the Respondents, as to the manner in which the Petitioner had made payment of Security for Costs, were worthy of investigation; and it took the liberty to delve into that issue. In doing so, the Court called for the Ndola High Court Registry records to ascertain the manner in which the Security for Costs, for this particular Petition, was handled. An explanation was rendered to the effect that it had become an administrative practice, in the Judiciary, for Court monies to be paid directly into a bank account in the name of the Ndola District Registry. For ease of reference the explanation given to this Court, by way of an internal Memorandum, is reproduced as follows:

MEMORANDUM

TO : THE JUDGE-IN-CHARGE, NDOLA

FROM : ***THE ASSISTANT REGISTRAR***
CC : ***THE REGISTRAR, NDOLA***

DATE : ***6TH OCTOBER, 2016***

SUBJECT : ***PAYMENT OF SECURITY FOR COSTS IN CAUSE NO. 2016/HN/EP/001***

The above subject matter refers.

Following your Ladyship's inquiry with the matter for payment of Security for Costs in the Election Petition of ***Andrew Kafuta Kayekesi and Chishimba Kambwili 2016/HN/EP/001.***

My Lady, am informed by the Clerk of Court, Mrs. Mercy Jere Sinkamba, that payments for Security for Costs in the sum of Two Thousand, Four Hundred Kwacha (K2, 4000) was deposited into the Ndola High Court District Account by Mr. Wesley Mumba an Accounts Assistant from Messrs Magubbwi and Associates on 21st September, 2016. He was directed to deposit the money by the Court Official, Namwezi, who is responsible for issuing of receipts in the Registry. The delay by the Petitioner to bring the deposit slip and a Notice of Payment into Court to be issued with a receipt is what has caused the current status in this matter.

I made further inquiries and have discovered that the issue of clients or members of the Public depositing monies directly into the Court Accounts, then bring the deposit slip for the receipt to be issued, is as a result of the recommendations made by the Inspectorate team led by Senior Accountant, Mr. Azell Banda, from the Judiciary Lusaka, and this was made to avoid registry staff from being implicated in misappropriation of Public Funds as per attached report on the re-

organization of Ndola Subordinate and Small Claims Courts Accounts; see page 7 bullet 7.1 (i) dated the 27th of February, 2014. This concept was recommended following serious Audit queries in Ndola which even the Parliamentary Accounts Committee (PAC) is fully aware of, involving client's account.

In line with what was and is now fully happening with other sister Ministries, such as the Passport Office, the Inspectorate Team recommended that the same process be implemented in Ndola, Mufulira and Luanshya as Pilot Districts and this is currently happening in the Districts mentioned so as the scenario in the is matter.

In the same year, during the Copperbelt tour by the former Chief Administrator Mr. A. Dzikamunenga, he directed that the Inspectorates' recommendations be implemented and even in the queries raised by PAC, this position was explained as an intervention measure taken to avoid case of misappropriation of public funds. It was made verbally by the former Chief Administrator during the meeting at Ndola with the members of staff as there were no minutes recorded.

The former Deputy Director of Court Operations at Ndola Mr. Kelvin Limbani called the staff in the registry and instructed them to implement the directives from the former Chief Administrator Mr. A. Dzikamunenga.

I enclose a report from the Judiciary Inspectorate team, a letter from the Clerk of Court and an explanation letter from Magubbwi and Associates to the Deputy Registrar.

Thank you.

AARON CHIFUWE (Signed)

In addition to the explanation rendered to the Court, by the Assistant Registrar, as to the reason why the Petitioner's Security for Costs was paid into a bank account as opposed to being directly paid in cash at the High Court premises, the Court was availed with the Judiciary Report, referred to, on the Re-organization of the Ndola Subordinate Court and Small Claims Court Accounts, dated February 2014, and in particular at page 7, thereof, where under Clause 7.1(i) it is stated thus:

'Clients will with immediate effect be required to deposit money directly into the Clients' Account and then be issued with a receipt upon verification of the deposit slip by the Senior Clerk of Court or the Provincial Accountant.'

It was brought to the attention of the Court that this procedure was extended, to the Ndola High Court Staff dealing with receipt of Court monies, by way of direction by the then Chief Administrator and the learned Deputy Registrar, as per the letter of explanation by the Assistant Registrar, and is currently the practice in use at the Ndola High Court.

It will be noted that while this written explanation, by way of a memorandum, is not outlined in the High Court Rules, it offers sufficient explanation, administratively, as to why the Petitioner's Security for Costs was allowed to be paid into the Ndola District Registry Bank Account, as opposed to being paid directly at the High Court. In further addressing the concern, by the Respondents, that payment by way of bank deposits is not provided for in the High Court Rules and is, therefore irregular, I took the liberty to refer to the Judiciary Administration Act, No. 23 of 2016; which is the successor of the Judicature Administration Act, Chapter 24 of the Laws of Zambia. Section 17 of that Act, which relates to the funds of the judiciary, and in particular section

17(1) (b), thereof, just like section 6 (1) (b) of the old Act, upon which the explanation of the Assistant Registrar, is premised, is silent on the exact mode through which Court fees shall be paid into Court by litigants. Instead, the mode of payment of such monies is provided for under Rule 1 Rule 5 of the High Court Rules which stipulates that:

'The Court fees or any other fees payable under these Rules shall be paid by stamps, cash, postal or bank certified cheque.'

This provision establishes that monies paid to the court may be in the form or manner provided for in the High Court Rules. Sections 5 (1) (a) and (b) of the Judiciary Administration Act provide, inter alia, as follows:

'The Chief Administrator shall-

(a) be the Chief Executive Officer of the Judiciary;

(b) be responsible to the Chief Justice for the day to day administration of the judiciary...'

Marrying this provision to the explanation rendered to the Court, namely that the mode of payment of Security for Costs was effected in pursuance of administrative measures implemented in the judiciary, at the instigation of the Chief Administrator, I find that the manner in which the Petitioner's Security for Costs was accepted by the Ndola High Court cannot be said to have been irregular, and neither does it not negate the fact that payment was, in fact, made within the time ordered by the Court. In addition to this, I am constrained to find, as argued by the Respondents, that the Assistant Registrar of the Ndola High Court exercised jurisdiction that he did not have by directing that the Security for Costs be paid into a bank account. This is

because the record and the explanation received by the Court, in that regard, clearly show that the Assistant Registrar did not issue any such directive, in this particular matter. As such, he cannot be held to have clothed himself with jurisdiction that he did not have; with regard to the payment of Security for Costs into court. Flowing from this, I am compelled to mention that while the Respondents are absolutely on course in their submission that Section 102 (2) of the Electoral Process Act, No. 35 of 2016, provides only for a Court, and not an Assistant Registrar of the High Court, to make an Order for the payment of Security for Costs, which in any case has been established to be a non issue in this matter, that section does not oblige the Court to make an administrative follow up on how that Security for Costs is actually paid into court. It suffices that an Order to that effect is made and complied with. Consequently, the fact that this Court did not specify the manner and mode of payment of the Petitioner's Security for Costs is in no way a departure from the said Section 102 (2) of the Electoral Process Act. In the result, I accept that Security for Costs was paid, by the Petitioner, on 21st September, 2016 and I accordingly find. This, effectively defeats the Respondent's argument that the Petition was dismissed on 26th September, 2016 for want of Payment of Security for Costs as decided by the Court.

Turning to the question of amendments to the Petition being untenable, the learned Counsel for the 1st Respondent raised a number of issues in that regard. The first was that leave to amend the Petition expired and was not renewed; within the timeframe that was given in the Court's Order for Directions. It will be noted that the said Order did, as rightly pointed out by the Respondents, grant the Petitioner leave to amend and perfect his Petition and serve the same on the Respondents by 23rd September, 2016. The

Petitioner filed his Amended Petition a week later on 30th September, 2016; contrary to the direction given by the Court. This, undoubtedly, was an error of non-conformity, with regard to a time-frame, on the part of the Petitioner. However, the overriding question that arises is whether the error was fatal and affected the validity of the Petition.

The learned Mr. Ngulube submitted that the non-conformity to the Court's order for leave was fatal to the subsistence of the Petition. He based this argument on two judicial precedents, namely the case of **Mutale Vs Munaile**, decided by the Supreme Court of Zambia in 2007, and the more recent case of **Hakainde Hichilema and another Vs Edgar Chagwa Lungu and Others** which was recently decided by the Constitutional Court of the Republic of Zambia. In arguing on the fatality of non conformity to the Court's Order for leave, Counsel placed heavy reliance on the **Hakainde Hichilema** case and took the liberty to point out that this Court is bound by the decision of both the Constitutional Court of Zambia and the Supreme Court. I hasten to agree entirely, on this score, with Counsel. This Court is most alive to the fact that it is bound by the decisions of the Constitutional Court and the Supreme Court, which are superior Courts. However, I equally hasten to add that the guidance rendered by these two superior Courts should not to be taken out of context. It must be taken and adhered to in the spirit and letter of the law in which it is given; depending on the facts of a particular case.

Returning to the matter in hand, I took the liberty to read through the Constitutional Court's decision in the **Hakainde Hichilema** case; the Ruling having been graciously availed to the Court by Mr. Ngulube. I paid special attention to pages R32 and R33; which Counsel read out in buttressing his argument. In considering the submission that amendment to an Election

Petition was, by virtue of that Ruling, not permitted, I focused on pages R31 to R34; which are specific segments of the Ruling under which the learned Mr. Ngulube's argument falls. Reading the holding in the cited pages of the Constitutional Court's Ruling, it is apparent that the Petitioners in that case, had proposed extensive amendments which raised totally new allegations; and by which totally new reliefs were sought. This may be seen from the learned lady Justice Sitali's observation at page R31 where she stated, inter alia:

'A scrutiny of the amended Petition and the amended Affidavit verifying facts reveals that extensive amendments are proposed to be made to the initial Petition filed by the Petitioners, which amendments raise totally new allegations..'

From this, it follows that the effect of allowing the proposed amendments to that Petition entailed that the Petitioners were filing an entirely new Petition outside the seven days limitation provided for, under the Constitution, for the filing of Presidential Petitions. Based on this rationale, the question that then arises is whether this test is applicable to the case in hand. The view that I take is that the answer would have to be in the negative. This is because apart from the decision of the Constitutional Court relating specifically to a Presidential Petition, whose time limits for hearing and determination are more restrictive than those of other Election Petitions, the cardinal issue which the Constitutional Court was called upon to determine, as it affected Election Petitions such as the one before this Court, was that of extensive amendments which raised totally new allegations. In the case in hand, the Petitioner has, indeed, attempted to include new relief at page 5 of his

Amended Petition. However, it is my considered view that that lone inclusion cannot qualify as '*extensive amendment*' within the scope envisaged by the Ruling in the **Hakainde Hichilema** case. This is because the amendment in this Petition does not affect the main body or substance of the Petition.

The Respondents pointed out that the Petitioner has introduced eight new sections under the Electoral Process Act. The view that I take is that this still cannot fall within the ambit of the extensive amendments referred to in the **Hakainde Hichilema** case; for the reason that this amendment does not relate to new allegations against the 1st Respondent; which can be said to alter the landscape of the Petition. It is noteworthy that this amendment, namely the introduction of new sections of the Electoral Process Act, is made to the Heading of the Petition and it attempts to show the specific provisions under which the Petition is being brought. I must, of necessity, state that much as that amendment certainly contains provisions of the Electoral Process Act, such as Part VII, Sections 81 and 89, which do not relate to the commencement of Election Petitions, the inclusion of those sections cannot, all the same, be deemed to be an extensive amendment which raises totally new allegations against the 1st Respondent and seeks totally new reliefs; with the effect rendering the Petition to be a totally new one filed outside the prescribed limits. This defect is, in that regard, curable, in that the irrelevant portions of the Electoral Process Act that have been cited, may be deleted and disregarded. This being said, I hasten to add that my view would be totally different if the Petitioner had cited repeated law or, indeed, purported to commence this Petition on repealed law. That would be a fundamental flaw for which no redress is permitted.

Regarding the issue of the introduction of new relief at page 5, of the Amended Petition, I find that the Respondents are on firm ground to oppose the introduction of the relief that *'It be declared that the Petitioner was duly elected Member of Parliament for the Roan Constituency'*. However, and in as much as this relief is legally untenable for not having been included in the original Petition, it is still a defect that is curable by the total disregard, thereof, through expunging it from the record. At this point, I am compelled to comment on the rather startling submission, by Counsel for the 1st Respondent, that the Petitioner cannot apply to have inadmissible amendments expunged from the Petition. I deem the submission to be startling because it suggests that the Court is barred, at law, from allowing the Petitioner to concede an error; and this Court is not aware of any such law. In the case in hand, the Petitioner concedes that he fell into error in seeking to introduce a new relief in his Petition. It therefore begs understanding as to why the Court should disallow him from acknowledging that error; whether or not is will aid his cause. If anything, the concession works in favour of the Respondents as it validates their challenge to that particular action by the Petitioner.

Still on the Respondents' submission of amendments to Election Petitions not being allowed, based on the **Hakainde Hichilema** Constitutional Court Ruling, it will be seen that apart from the Ruling barring amendments seeking to introduce a totally new Presidential Petition outside of the time-frame stipulated under the Constitution, the Court disallowed the proposed amendments on the ground that they would be pre-judicial to the Respondents. This can be gleaned from the words of the learned Judge, at page R32 of her Ruling, where she stated as follows:

'To allow the proposed amendments to the Petition at this late hour and after the Respondents have filed the respective Answers would most certainly be prejudicial to the Respondents in defending themselves against the new allegations raised in the proposed amended Petition.'

The same question posed, earlier, as to whether this test may be applied to the case *in casu* arises. Would the amendments proposed and made by the Petitioner, herein, be prejudicial to the Respondents? I find that the answer, again, has to be in the negative. This is because, with the exception of the newly included sections of the Electoral Process Act in the Heading of the Petition and the new relief which has already been established to be untenable, the other amendments to the Petition are the substitution of the words *'Kalulu Primary School'* with *'Milyashi Community Centre'*. It is, therefore, clear that the amendment only concerns the venue. The allegation is unchanged and still relates to a campaign meeting allegedly held by the 1st Respondent. This *status quo* cannot, therefore, be said to be pre-judicial to the 1st Respondent as he is not called upon to defend himself against any fresh allegation. In essence, the issue of amending the venue does not alter the allegation and, for that reason, the 1st Respondent is not at risk of suffering prejudice on that account. In the result, I find that the submission that the **Hakainde Hichilema** case disallows amendments to Election Petitions cannot be sustained. In any event, perusal of the Ruling in that case does not make any revelation that the Constitutional Court gives a blanket ban on amendments to Election Petitions. Whilst this Court is grateful for the guidance of the Constitutional Court, it has to be stated that despite the spirited submissions, by the Respondents, the **Hakainde Hichilema** case is not on exact fours with the case in hand; in that the circumstances of the two cases are quite clearly distinguishable.

Having rather extensively addressed the submission that the **Hakainde Hichilema** case bars amendments to Election Petition, I turn to another limb of the Respondent's argument on amendments to this Petition. It has been argued that the leave to amend the Petition expired and was not renewed. While it is not in dispute that it is a procedural rule of civil jurisdiction that when leave for a time-frame in which to carry out an order or directive of the Court expires then it ought to be extended, it must be noted that extension out of time is permissible at law, as evidenced by a plethora of authorities to this effect. Perhaps a clearer perspective to this may be gotten by scrutiny of the authority upon which the leave granted to the Petitioner in the Court's Order for Directions was derived. Order XIX of the High Court Rules empowers this Court to make Orders for Directions and such orders relate to the procedure (s) to be observed in the conduct of civil litigation. I bring this to the fore while being very mindful of the submission that has been made, on behalf of the Respondents, that the rules of procedure for amending Pleadings are not applicable to Election Petitions, as the latter are not pleadings. I am grateful for the supporting authorities in this regard.

However, I am also very mindful not to lose sight of the fact that even though Election Petitions are in a class of special jurisdiction the High Court, which is mandated to hear and determine them, operates on rules of procedure by necessity. As such, and contrary to the submission that suggests that the High Court is absolved from this obligation when hearing and determining Election Petitions, the correct position, as I understand it, is that Election Petitions are not totally immune or removed from certain aspects of civil procedure. Notably, with the exception of the **Mutale Vs Munaile** and the **Hakainde Hichilema** cases, all the other authorities cited by the Respondents, in their

Skeleton Arguments, pertain to decisions in civil matters other than Election Petitions. This, in my view, is a clear indication that while the Courts may be under obligation to strictly observe mandatory statutes when dealing with Election Petitions, there is nothing to stop them from recourse to, or employing, relevant civil jurisdiction rules and procedures; for as long as they do not oust the provisions of Electoral Process Act, No. 35 of 2016. This Act, like any other piece of legislation, is not a stand- alone law and perusal, thereof, does not show that it has the ultra special status of not being amenable to any other law. I draw fortitude, in finding thus, from Section 106 (4) of the Electoral Process Act which clothes the High Court with the authority to import other rules in civil jurisdiction and apply them to the trial of Election Petitions. This is in total contrast to the learned Mr. Ngulube's submission that the provisions of the Electoral Process Act are not subject to debate; and the High court has no jurisdiction to import other statutes into the Electoral Process Act.

It is my considered view that the spirit of Section 106 (4) of the Electoral Process Act is complimentary and intended to patch up and cover any lacuna that may impede the hearing and determination of Election Petitions. Having said this, I take the liberty to mention that I found the submission that the Electoral Process Act is not subject to debate quite baffling. It is a basic and long held principle that the law is dynamic and, as such, there will always be debate on upon it when the need to do so arises. Consequently, it is totally incorrect to impute a special cast iron status upon the Electoral Process Act No. 35 of 2016 and decree it to be above debate for whatever reason; including the need to amend it should that become necessary. Quite apart from this, I am at pains to accept that the Legislature would formulate a law

that is deliberately calculated to erode the path of justice by it not being subject to debate.

In any case, the Respondents have inadvertently perforated their own argument by, among others, relying on and referring to other laws and regulations, in lodging this Application; which is brought pursuant to Order 14A of the Rules of the Supreme Court of 1999 and also Sections 97, 100 (1) and 100 (4) of the Electoral Process Act. If the Respondents' argument was to be sustainable, then all and any rules and regulations pertaining to any application under the Electoral Process Act would have been contained in that one piece of legislation; without the option to cite or use any other ordinary civil rules of procedure to augment the provisions of the said Act; especially where a lacuna existed. The contention, therefore, that the exercise of the High Court's civil jurisdiction power is not applicable to Election Petitions, as the High Court is tied only to the Electoral Process Act in determining Petitions is, in my considered view, not only misleading but is gravely erroneous.

Having established that the Electoral Process Act does not operate in isolation, but may be aided by other applicable civil rules and procedures, I return to the issue of the leave granted by this Court under the Orders for Directions. The authority for giving of Orders for Directions is reposed in the High Court Rules under the High Court Act, Chapter 27 of the Laws of Zambia; and any direction given under those Rules is amenable to variation. The High Court Rules and judicial precedents, such as the **D. E. Nkhuwa Vs Lusaka Tyre Services** case cited by the Respondents, and which, incidentally, relates to extension of time to appeal and not to Election Petitions, permit the Court to extend the time frames granted for doing certain things, as long as the discretion is exercised judiciously. The extension of a time-frame may be done

either on application by parties to proceedings, or even *sua sponte.* This, therefore, shows that Orders for Directions are not cast in stone and this Court may extend leave granted under Orders for Directions, which would cure the defect in the case in hand.

Having thus decided, I am impaled to refer to the position taken by the Respondents that Section 106 (4) of the Electoral Process Act refers only to the trial of Election Petitions and not amendments, thereto. In addressing this issue, I have visited the preamble to the Electoral Act which provides, among others, as follows:

'An Act to provide for ...election petitions and the hearing and determination of applications relating to a general election;...repeal and replace the Electoral Act, 2006; and provide for matters connected with, or incidental to, the foregoing.'

From this provision, it follows that an Application for leave to amend an Election Petition cannot be considered to be a process that is completely separate from the hearing of a Petition. It is in, fact, part of the process of hearing. Hence, the suggestion that Section 106 (4) of the Electoral Process Act excludes amendments to Petitions is, in my view, an attempt to split hairs and serves no useful purpose; especially since the said Act neither defines the terms *'hearing'* and *'determination'* nor expressly detaches applications amendment of Petitions from the hearing and determination process.

I have been asked to make findings on whether Article 97 (1) of the Electoral Process Act grants the Court discretion to allow a Petition to subsist if it is brought outside it, or is brought under any other law, including the

Republican Constitution. I was also asked to make a finding as to whether the words *'shall not be questioned'* can be waived. In response to this request, I guide that it will be noted that the original Petition simply cites the Electoral Process Act; without specific reference to Part IX thereof. However the Amended Petition does include reference to Part IX of the Act; even though it has also included Part VII, thereof, for some reason. It is my view that general reference to the Electoral Process Act, without making mention of the specific section under which the Petition is brought is, indeed, a flaw in the Petition. However, applying the test as to whether this flaw goes to the heart of the Petition and affects its validity, I reiterate my finding that that this is a curable defect, unlike the position in the **Mutale Vs Munaile** case in which the defect was held to be fatal.

It has been submitted that Section 97 (1) is couched in mandatory terms and any departure, there-from is fatal. I most certainly agree that the term *'mandatory'* means just that in the ordinary sense. However, and has been mentioned above, I am not persuaded that it may be stated, with utmost certainty, that this Petition was commenced outside of the Electoral Process Act. This is because the Heading of the Petition does make reference to that Act, albeit in general terms. This leaves it open ended; with the assumption that it could be referring to any part of the Act, including Section 97 (1) itself. That being the case, and while that is procedurally, undesirable, I opine that this removes the Petition from the realm of having been commenced completely outside of the Electoral Process Act.

With regard to the Petitioner's reference to the Constitution in the Heading of his Petition, I am of the view that proper reference to the Constitution would not invalidate the Petition. It should be noted, here, that I have said *'proper*

reference'. This is because I entirely agree with the Respondents that the articles of the Constitution which have been cited do not aid the cause of the Petitioner, for irrelevance. This being said, I find that this is also a curable defect; as citing relevant provisions of the Constitution, such as Article 73(1), would compliment, and not replace the Electoral Process Act, as the law under which Petitions should be brought.

It is noteworthy that I did mention, at the outset, that the Respondents cast their net quite wide in arguing in support of the Application; which is what necessitated the lengthy consideration of the several issues raised. It will also be noted that some of the arguments were not presented in a particular order of chronology and they ran the risk of straying into the issues pending determination in the substantive Petition. For this reason, that I have omitted to make findings, as requested, on certain questions such as Section 99 of the Electoral Process Act.

Having thoroughly delved into the three reasons tabled as the basis upon which this Election Petition should be dismissed for irregularity, I wish to point out that while I am fully bound by the authorities that place Election Petitions in a class of special jurisdiction, I am of the firm view that those authorities did not envisage a denial of justice even in the face of the need for strict adherence to the rules and procedures governing the conduct of Election Petitions. I am fortified in this by the case of **Zambia Revenue Authority Vs Jayesh Shah 2001 (ZR)** in which it was held that:

"Cases should be decided on the substance and merit where there has been only a very technical omission or oversight not affecting the validity of the process....

the rules must be followed but the affect of a breach will not always be fatal if the rule is merely regulatory or director"'

It being common cause, and as guided by the above - cited case, that Orders for Directions are directory, and therefore amenable to variation, I am satisfied that, in the present case, the non-conformity to the Order for Directions concerning the issue of extension of leave to amend is curable as it is a technical flaw which does not affect the validity of the Election Petition.
In addition to the **Zambia Revenue Authority Vs Jayesh Sha**h case, I stand grateful for the provisions of Article 118 (2) (e) of the Constitution of Zambia Act of 2016; which embraces this principle by providing that:

"Justice shall be administered without undue regard to procedural technicalities".

Although the facts of the Zambia Revenue Authority case may be distinguishable from the case in hand, it is of great import to note that the applicable guiding factor, as endorsed by the Constitution, is the need for dispensation of justice unfettered by procedural technicalities. It is worth adding that since the Constitution is the supreme law of the land, nothing must be done, that is intended to fly in the teeth of Section 118 (2) (e) of the Constitution Act of 2016.

In concluding this Ruling, I find it necessary to point out that while I have gone to some considerable lengths to address the several issues raised by the Respondents, in support of this Application to dismiss the Petition for Irregularity, there have, in fact been procedural errors made by the parties herein. Those of the Petitioner have been the subject of scrutiny by virtue of

this Application. On the part of the 1st Respondent, it will be noted that he filed, into court, an Answer in response to the Petition; without first raising the issue of irregularity of the Petition. This was in breach of Order 2 Rule 2 of the White Book (1999 edition) provides as follows:

'An Application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.'

Procedurally, the application to set this Petition aside, for irregularity, should have been made before the 1st Respondent's filing of an Answer. A Notice to Raise Preliminary issue as to irregularity, or Summons in that regard, should have been brought before the Court and the outcome of that Application would have determined whether or not the Petition was ripe for response through an Answer. But, by filing an Answer, the Respondents effectively waived the irregularity in the Petition. In pointing this out, I bear in mind that this Application is premised on procedural issues and it has been repeatedly submitted that the Election Petitions are a special procedure and the rules applicable to ordinary civil jurisdiction are not applicable.

However, it has been established, and supported by Section 106 (4) of the Electoral Process Act, that nothing bars the High Court from importing other civil jurisdiction rules and procedures in determining Election Petitions. If this Court were to be persuaded by the argument that the Electoral Process Act, by nature of some of its mandatory provisions, excluded all other rules and laws, including the Constitution, as regards the procedural conduct of Election Petitions, then the doors of justice would be firmly slammed shut on both the

Petitioner and the Respondents by disallowing them to be heard on procedural issues.

From the foregoing, I find that the Respondents have not shown that the flaws in the Petition go to the heart, thereof, so as to affect its validity. Further, to this, the Respondents have also not shown that they would suffer prejudice if the defects in the Petition were to be rectified and the matter heard on its merits. It is my decision, in the interests of justice and in adherence to Article 118 (2) (e) of the Constitution of Zambia, that this Petition must be allowed to be heard and determined on its merits.

This Application, therefore, fails and is dismissed. Costs are in the cause.

Leave to appeal is allowed.

Dated at Ndola this 10th day of October, 2016

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HON. EMELIA P. SUNKUTU

JUDGE