

IN THE HIGH COURT FOR ZAMBIA

2016/HP/EP/O35

AT THE PRINCIPAL REGISTRY

HOLDEN AT MANSA



**IN THE MATTER OF: THE PARLIAMENTARY ELECTION RELATING TO
MWANSABOMBWE CONSTITUENCY HELD ON 11TH
AUGUST, 2016**

AND

**IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA, THE
CONSTITUTION OF ZAMBIA ACT, CHAPTER 1,
VOLUME 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, CONSTITUTION OF ZAMBIA ACT,
CHAPTER 1, VOLUME 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
(ELECTORAL CODE OF CONDUCT) NO.35 OF 2016
OF THE LAWS OF ZAMBIA**

AND

**IN THE MATTER OF: SECTION 96, 97, 98, 100, 107 AND 108 OF THE
ELECTORAL PROCESS (ELECTORAL CODE OF
CONDUCT) NO.35 OF 2016 OF THE LAWS OF
ZAMBIA**

AND

IN THE MATTER OF: THE ELECTORAL CODE OF CONDUCT 2016

BETWEEN:

SUNDAY C. MALUBA

PETITIONER

AND

**RODGERS MWEWA
ELECTORAL COMMISSION OF ZAMBIA
ATTORNEY-GENERAL**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

For the Petitioner: Mr. Matalilo – Mumba Malila & Partners.
For the 1st Respondent: Mr. Iven K. Mulenga – Iven Mulenga and Company.
For the 2nd Respondent: Mr. D. D. Chileshe & Mr. D. Kamfwa, Attorney-General's
Chambers.

J U D G M E N T

Legislation Referred to:

1. *The Electoral Process Act, No.35 of 2016.*

Cases Referred to:

1. *Bresfold James Gondwe v. Catherine Namugala, SC Appeal No.175 of 2012.*

Introduction

1. On 26th August 2016, the Petitioner, Sunday Chitungu Maluba, presented a Petition against the election of the 1st Respondent as Mwansabombwe Member of Parliament. The Electoral Commission of Zambia was sued as 2nd Respondent.
2. The Petition was filed pursuant to section 97 of the Electoral Process Act, No.35 of 2016. The purpose of the relief sought in the Petition was to void the election of the 1st Respondent as the duly elected Member of Parliament for Mwansabombwe Constituency.
3. The record shows that before hearing commenced, the 1st Respondent raised a preliminary issue with regard to whether the Petitioner had complied with the legal requirements concerning Petitions, having failed to endorse his residential address on the Petition and sought for its dismissal.
4. After hearing argument from both parties I ruled that the irregularity complained of did not go to the root of the case and could be cured by amendment. I ordered that the Petitioner cure the irregularity as

vehicle on the polling day to ferry registered voters to polling stations and was actually caught doing so within 400 metres from the entrance to a polling station.

Background

10. The Petitioner and the 1st Respondent were candidates in the 2016 parliamentary elections which were part of the general elections held throughout the country on 11th August 2016. The Petitioner stood on the ticket of the Movement for Multiparty Democracy (“MMD”) while the 1st Respondent stood on the ticket of the Patriotic Front (“PF”).
11. The 1st Respondent was declared as duly elected Member of Parliament for Mwanabombwe Constituency. He was said to have won by 7,625 (Seven Thousand Six Hundred and Twenty-Five) votes as against the Petitioner who got 2,929 (Two Thousand Nine hundred and Twenty-Nine) votes.

The Petition

12. Not being satisfied with the above results, the Petitioner filed the Petition before this Court contending, among other things, that the 1st Respondent was not validly elected because the Respondent did not comply with the provisions of the Constitution, and the provisions of the Electoral Process Act No.35 of 2016 and the procedures prescribed under the said Act.
13. The illegal practices and malpractices alleged by the Petitioner, were that the 1st Respondent and his agents between 13th May 2016 and 10th August 2016 violated section 28 (i) (a) (v) and section 81 (c) of the Electoral Process Act No.35 of 2016 by paying water bills to Mwanabombwe District Council for the entire community in Mwanabombwe thereby corrupting the people to vote for him.

14. The Petitioner contended that the said illegal practice or malpractice rendered the election process not to be free and fair.
15. That because of the said illegal practices and malpractice committed by the 1st Respondent or his agents with his knowledge, the majority of the voters in the constituency and polling stations were prevented or enticed to avoid electing their preferred candidate or member of parliament for the constituency.
16. This is the context in which the Petitioner challenges the declaration of the 1st Respondent as the duly elected Member of Parliament for Mwansabombwe Constituency. In the Petition before this Court, the Petitioner seeks the following relief:
 - (i) A determination to the effect that the 1st Respondent was not duly elected and that the election be nullified.
 - (ii) A declaration that the illegal practices committed by the 1st Respondent and or his agents so affected the election result that the same ought to be nullified.
 - (iii) Costs of and incidental to this petition.

The 1st Respondent's Answer

17. The 1st Respondent opposed the Petition and denied all the Petitioner allegations contained in the Petition and contends that to the best of his knowledge, the Mwansabombwe Parliamentary Election of 11th August 2016 was conducted freely and fairly and that neither him or his agents conducted themselves in a manner contrary to the provisions of the Constitution and or the Electoral Process (Electoral Code of Conduct) Act.

Issues for Determination

18. Having stated the positions by the parties in this suit, the issue that falls for determination is whether the 1st Respondent engaged in corrupt

practices, illegal practice or misconduct and violated the electoral laws and the majority of voters in Mwansabombwe Constituency were or may have been prevented from electing the candidate whom they preferred.

19. The following documents were agreed upon:

- 19.1 Receipts from Mwansabombwe District Council contained in the Petitioners paginated bundle of documents from page 1 to 3.
- 19.2 Copy of the Petitioner's letter of complaint to the District Electoral officer dated 11th August 2016, page 4.
- 19.3 Declaration of the Result Poll – Mwansabombwe Member of Parliament, page 5 in Petitioner's Bundle of Documents.
- 19.4 Photos contained on page 6 to 10 in the Petitioner's Bundle of Documents
- 19.5 Copies of National Registration Cards for Chungu, Edmond Lengwe, Raywinton Mpweto and Mwape Billyton on pages 11 to 14 of the Petitioner's Bundle of Documents.

Matters not in Dispute

20. The following matters were not in dispute:

- 20.1 Both the Petitioner and the 1st Respondent contested the Parliamentary General Elections for Mwansabombwe Constituency held on 11th August 2016.
- 20.2 The Petitioner stood on the Movement for Multiparty Democracy (MMD) ticket while the 1st Respondent stood on the Patriotic Front (PF) ticket.
- 20.3 Apart from the Petitioner and the 1st Respondent, there were other candidates who contested the 11th August 2016 Parliamentary Elections in the Mwansabombwe Constituency as follows:
 - Chitonge Samuel - UDF
 - Kamangala Mable - UPND
- 20.4 Of the four candidates who contested the Mwansabombwe Parliamentary seat, the 1st Respondent, Rodgers Mwewa, was declared as the duly elected Member of Parliamentary for Mwansabombwe Constituency.

The Evidence

A. Petitioner's Case

21. **The Petitioner, Sunday Chitungu Maluba, in addition to his affidavit evidence gave oral testimony in Court as PW1.** His testimony is summarized in the paragraphs following.
22. Mr. Maluba informed the Court that he was one of the candidates participating in the Presidential and Parliamentary elections of August 2016. He contested the Mwanabombwe Parliamentary seat on the MMD ticket. The 1st Respondent was declared winner.
23. He said that he chose to petition the results for Mwanabombwe Parliamentary elections because the same were marred with so many electoral malpractices on the part of the 1st Respondent. That the said electoral malpractices were committed by the 1st Respondent during the campaign period between 13th May and 10th August 2016.
24. He informed the Court that there were 112 boreholes in Mwanabombwe Constituency that serve water needs for the entire community in Mwanabombwe Constituency. The boreholes are run by the local authority such that the community, using a particular borehole, pays K50.00 per month to the local authority for that particular borehole.
25. That during the campaign period, the 1st Respondent while being a candidate for Mwanabombwe Constituency parliamentary elections corruptly paid for water for the entire community in the constituency for the entire campaign period by settling monthly bills for each of the 112 boreholes for and on behalf of the community and receipts to that effect were issued by the local authority. That he used this gesture to corrupt the voters and urged them to vote for him.

He conceded that it was possible that the people who told him lied to him.

31. The Petitioner also confirmed that he did not make a complaint to the Electoral Commission of Zambia regarding what he had heard on the PA system. That he did not think it necessary to report and that he did not report the incident's during the entire period of June to August 2016 either to ECZ nor to the police.
32. The Petitioner also admitted that in April and March 2016 he paid water bills for the people of Mwansabombwe because the people asked for that favour. He said that this was before the campaign period and that he used Mr. Chama to pay for the water bills. Mr. Chama was also his campaign manager.
33. **Temoh Mwape Chungu (PW2)** was the Petitioner's first witness. PW2 testified that on 11th August 2016, he saw a Toyota Hilux vehicle branded in PF colours with the picture of the PF candidate moving up and down campaigning. That he followed the vehicle and effected a citizen's arrest. Two people were in the vehicle dressed in PF regalia and the vehicle was taken to the police station where it was impounded by the CIO Mr. Phiri. That he took pictures of the vehicle and the people at the place where the vehicle was apprehended near Koni Polling station.
34. Under cross-examination, PW2 confirmed that the 1st Respondent was not in the vehicle. He admitted that he did not know the registered agents of Rodgers Mwewa. He admitted that the registered election agents of Rodgers Mwewa were not in the vehicle. That he did not bother to verify with Rodgers Mwewa if he was aware about this, and in any case he did not have his phone number. That he did not know where the vehicle was coming from nor where it was going. But that the two occupants in the vehicle were looking for airtime to purchase. That he did not know Mr. Mwewa's election agents.

35. **John Katumbo was presented as PW3.** He informed the Court that he was Chairperson for community based management for water. He testified that in June 2016, in Mwansabombwe Ward, he attended a meeting chaired by Rodgers Mwewa where he heard him telling the people that he had paid for water bills for all and that they should not forget to elect him on 11th August 2016. He stated that he went to Mwansabombwe District Council and met with the officer in charge of the water sector who confirmed that Rodgers Mwewa had paid for all the Residents. He said he collected the receipts reflecting the amount paid being K50.00 each for June and August. The receipt did not indicate who had paid.
36. Under cross-examination, he admitted that the receipts produced in Court were for August 2016 only. That he did not have the receipts for June and July because he was not told that there was an issue about water. He conceded that the Petitioner was his young brother and he would do anything possible for him to win an election.
37. **Kangwa Maxwell was PW4.** He told the Court that he was the Chairperson in charge of the borehole in Kazembe village. That in June 2016 he received the 1st Respondent, Rodgers Mwewa, with his agents who told him that he should stop charging people for water and he even stopped. A few days later, the 1st Respondent brought him receipts from Mwansabombwe District Council as proof of payment for the water bills for June, July and August in 2016. That he took the receipts to the Treasurer for safe keeping.
38. Under cross-examination, he confirmed that he was in-charge of borehole No.3 Matabishi Section. That he was given the receipts for each month reflecting K50.00. That the 1st Respondent approached him in June 2016 in the company of other people who he could not remember but would identify. He stated that when the receipt for the month of

June was brought he gave it to the Petitioner who collected it. That he knew the Petitioner since him and the Petitioner hailed from the same village. That in the August 11th elections, he supported the President and his Member of Parliament Rodgers Mwewa. That even when he saw the receipts he did not change his mind. That he was approached by the Petitioner to come to Court and had not been paid anything.

39. **PW5 was Kanyembo Charles.** His testimony was to the effect that he was a V. Washer for ZAMTEL borehole. That he knew the 1st Respondent as candidate for the Mwanabombwe Parliamentary elections in August 2016. That he used to see the 1st Respondent campaign. That the 1st Respondent would gather the people at the ZAMTEL borehole and his message was that he had paid for water bills and that they should not forget to vote for him on 11th August 2016.
40. Under cross-examination, PW5 admitted that it was only once that Rodgers Mwewa came to the borehole. That he came with some people in a Canter but he did not manage to see all of them. That the people came from Chipita Ward. He admitted that it was not Mwewa who gave him the receipt for payment but told them to collect the receipts from the Council. That he went to the Council and collected the receipt. That he was the one who was responsible for paying the water when money is collected from the community. That he never left the receipt at the Council each time he paid for the water bills.

1st Interlocutory Application

41. After PW5 had concluded his testimony, Counsel for the Petitioner made an application for an adjournment to Wednesday 19th October 2016 and sought leave to issue a Writ of Subpoena on the CIO of Mwanabombwe Police Station and to an officer of the District Council, one Morgan Mambwe, to come and testify on the Petitioner's behalf. In relation to the Officer of Mwanabombwe District council, the further application was

that the person brings the receipt book for the period May to August 2016 for inspection by the Court.

42. The Respondents did not object to the application for Subpoena of the witnesses but objected to the production of the documents, in particular the receipt book and considered it as an ambush by the Petitioner and would prejudice the Respondents. In my ruling, I granted the application for adjournment and also leave to issue the Subpoena to the two officials to attend Court. I refused the application for leave to Subpoena the documents on grounds that it was a fishing expedition for evidence by the Petitioner and an ambush on the Respondents given that the Petitioner had all the time before the hearing to do that.

43. **Resumption of the Petitioners Case**

When the Court reconvened on 19th October 2016, the Petitioner's Counsel informed the Court that he was ready to proceed except that he wanted to file in some documents and applied for a 15 minute short adjournment, which was granted.

44. On resuming the proceedings at 09.45 hours, **Katebe Evelyne was presented as PW6** who testified that she was a Treasurer for Washa Committee which was responsible for the borehole in Mondo Village. She told the Court that it was the duty of the Committee to ensure that the borehole was working well and also to collect a levy on the borehole per household. That in June 2016, the 1st Respondent held a meeting at Chilanje Primary School at about 16.00 hours where he told the people gathered to vote for him and promised good things. He further told the people that he had already paid for the borehole and people were free to draw water without paying.

45. She stated that after some days she was told to collect the receipt from the Council as proof of payment that was made by Rodgers Mwewa. That

she collected the receipt from the Council from a Mr. Kalobwe, who was responsible for writing receipts. She got the receipt and informed the people that the bill for the months of June, July and August had been paid. That she was given 3 receipts each reflecting K170.00 for each month. That she did not have the receipts in question with her because she did not know that they would be required in Court. That she was just informed about the case on a Sunday and, on Monday, she was here in Mansa.

46. In cross-examination, she said that she collected the receipts from the Council for the months of June, July and August 2016. That the receipts produced in Court were dated 4th August 2016. She conceded, that the 1st Respondent was not the one who gave her money to go and pay. She admitted that she did not see the 1st Respondent pay for the water bills. That she had no evidence to show that the 1st Respondent paid for the water bills.
47. **PW7 was Grace Mweemba**, who testified that she was the Treasurer for the Washa Committee for the borehole at Ndila Village. She told the Court that in June 2016, Rodgers Mwewa came with other people to address meetings at Yamba Village. The message at the meeting was that the people should vote for him and the people were reminded that he, Rodgers Mwewa, had paid for water bills on their behalf. That after a few days, a Councillor brought the receipts for payment and gave them to the village headwoman, Paulina Mwenge, who passed them on her. That the said receipts represented payment for three months by Rodgers Mwewa for June, July and August 2016.
48. That the money was paid directly to Mwansabombwe District Council. Each receipt was for K50.00. That she could not remember the dates of the receipts as she had not brought them with her since she did not

know that they would be required. That she was only told about the case on Monday this week.

49. Under cross-examination, she stated that at the said meeting, the 1st Respondent was urging people to vote for him because he had paid for the water. She admitted that she was once constituency vice-chairlady for the MMD previously. She denied that she was in the Petitioner's campaign team. She stated that she had known the 1st Respondent since 2012 when he was the area Member of Parliament. She agreed that the Petitioner has previously lost elections to the 1st Respondent having stood in 2011. She conceded that as MMD, they were not happy that the Petitioner had lost these elections and they would want him to be a Member of Parliament and that was why she was in Court.
50. **PW8 was Eliza Ilunga** from Mumbolo village who testified that she was in-charge as Treasurer of the borehole at Mumbolo village, where she lived. She stated that she received two receipts for the month of June from two gentlemen who she did not know. That the two gentlemen gathered people at the borehole and announced that the borehole bills had been paid for and people were free to draw water. That the two gentlemen said the receipts were from the Council and that Rodgers Mwewa had paid for the water. She stated that the 3rd receipt for the month of August 2016 was brought by the Ward Chairman for Mulele Ward, Mr. Kaluba, who belonged to the Patriotic Front party.
51. In cross-examination, she stated that she was born and bred in Mwansabombwe. That she had previously belonged to the MMD but in 2016 she was not supporting any particular candidate. That she did not know the two gentlemen that brought the receipts. That the receipts she was given were left in the village. That she did not know about the case until Monday. That she was told by the two gentlemen who brought the receipts from the Council that Rodgers Mwewa had paid for the water.

That she did not go to confirm the information about Rodgers Mwewa paying but that people were happy and praised him. That she knew that it was Rodgers Mwewa who paid because the people who brought the receipts said so.

2nd Interlocutory Application

52. When PW8 concluded her testimony, at about 11.00 hours the Petitioner's Counsel informed the Court that there were two witnesses that the Petitioner had Subpoenaed remaining to testify on behalf of the Petitioner and he applied for an adjournment to the following day on grounds that there had been some challenges with regard to service of the Subpoena and bringing the witnesses to Court.
53. The Respondents opposed the application on the ground that the reasons were not justifiable and the Court should not entertain the application for adjournment due to the failure by the Petitioner to bring witnesses owing to his ineptness. In refusing the application I observed, among other things, that the reasons advanced were not justifiable. That the Petitioner had ample time to prepare and line up his witnesses and that the decision to subpoena the two witnesses appeared to have been made in haste and were an afterthought. That the application was a veiled attempt by the Petitioner to extend the time for the hearing of the Petitioner's case and consequently change the orders for directions that were made by the Court. The adjournment was refused but I agreed to stand down the matter to 16.00 hours, to allow the Petitioner a chance to bring the witnesses.
54. At 16.30 hours when the Court proceedings resumed, the Petitioner's Counsel informed the Court that the witnesses had not arrived and that an affidavit had been filed to that effect. That he was therefore making an application for an adjournment to the following day and relied on paragraphs 9 and 13 of the affidavit. The Respondents opposed the

application. The Court refused to grant the adjournment for the reason that there were no fresh grounds advanced for it to allow the fresh application and directed that the Petitioner should conclude his case as the Court would proceed to hear the Respondent's case the following day in accordance with the orders for directions in force. I further ruled that the Petitioner, having failed to bring before Court the two subpoenaed witnesses, on account of his own omissions, the Court would now deem it that the Petitioner had closed his case.

B. Respondent's Case

1st Respondent's Case (RW1)

55. **The 1st Respondent, Rodgers Mwewa, gave evidence on oath as RW1.** He denied the allegations contained in the Petition and stated that to the best of his knowledge the elections were free and fair. He informed the Court that the Electoral Commission of Zambia had set up a committee to look at conflicts that could arise during the campaign period. This was the Mwanabombwe Conflict Management Committee (MCMC). Its mandate was to ensure that the campaigns were conducted in a free and fair manner. Any party that was aggrieved with anything would report to the MCMC.
56. He stated that none of the allegations against him concerning the payment of water bills were ever reported to the MCMC. He was therefore surprised when he heard about the Petition presented by the Petitioner. That he heard about these allegations for the first time when he was served with the Petition and that none of the issues raised by the Petitioners were ever brought to his attention by the MCMC.
57. He denied having made any payments for water bills on behalf of the community in the constituency. On the alleged PA announcements regarding the payment of water bills he stated that he was not aware of

any such announcements. That in any case he was not in Mwanabombwe in the month of June. That he was on a national presidential campaign trail for most of the campaign period and only came back in August 2016. That he only campaigned for 7 days in Mwanabombwe and his strategy was to move door to door. That he only had one rally which was held on 9th August 2016 during the campaign period. He dismissed as untrue all the allegations against him that he met them in June at various boreholes to address them.

58. He informed the Court that he only had two registered election agents, namely Febby Kapambwe and Humphrey Lukwesa. That he never paid any water bills nor did he authorize any of his agents to do anything of that sort. That he did not prevent anyone from voting for a candidate of their choice. That he was aware that the Petitioner was on record as having paid for water bills on behalf of the community at one stage but that he never complained to the MCMC because he took it that the Petitioner was helping the people.
59. Under cross-examination, he confirmed that he has never been arrested by police and none of his agents were appearing in Court for any electoral malpractice. That in his campaigns, there were only three vehicles he had assembled and only two of them were branded with the President's face and his.
60. He testified that he would not know the people who attended his campaign meetings. That he remembers the message that he delivered at all the meeting and this all concerned developmental programmes that included Rural Electrification, empowerment of women and capacity building. He maintained that he never paid for any water bills in Mwanabombwe. He denied making any announcements to that effect either at campaign meetings or through PA systems mounted on his vehicles.

61. He denied knowing Morgan Mambwe or the Cashier at Mwansabombwe District Council. He denied intimidating the police at Mwansabombwe. He denied knowing the CIO Mr. Phiri at Mwansabombwe Police station. He admitted knowing the officer-in-charge Mr. Ngandwe. That he was not aware of any intimidation of any of the proposed witnesses for the Petitioner testifying in this case and denied making any phone call to any of the Petitioner's witnesses.

Interlocutory Application

62. At this juncture, Counsel for the Petitioner made an application for an order for the search of Mr. Mambwe's call records with a view to confirm whether or not the 1st Respondent during the Petition hearing had or not phoned the said Mr. Mambwe. The Respondent's opposed the application on grounds that this was merely another attempt by the Petitioner to have another chance to bring the witnesses he had failed to bring earlier. That it was frivolous and vexatious. I refused to grant the application on the grounds that the reasons for the non-attendance of the Petitioner's witnesses were well documented on record and it was clear from the record that it was not as a result of any intimidation by any one. I observed that the record showed that the witnesses were willing to come but were not able to because of the failure or omissions that could only be attributed to the Petitioner's ineptness.

On Resumption of the Proceedings

63. The Petitioner's denied knowing, Kelvin Mwape and Kasongo Mushibwe William. He maintained that he did not nor send anyone to pay money for the water bills.

The Respective Submissions

64. The Petitioner's submissions were in two parts, viz:

- (i) corrupt practices perpetuated by the 1st Respondent and his agents
 - (ii) illegal practices committed by the 1st Respondent and his agents.
- 64.1 The gist of the Petitioner's submission in support of (i) above was to the effect that the Petitioner had proved to the required standard of proof the allegation of corruption against the 1st Respondent by cogent evidence adduced by the 8 Petitioner's witnesses and other evidence on record. He submitted that all the seven witnesses who testified in Court said that the 1st Respondent offered and paid for water bills for the constituents in Mwansabombwe Constituency so that the 1st Respondent is elected during the elections.
- 64.2 Counsel placed reliance on the evidence of PW1, the Petitioner, who stated that on 16th June 2016, he heard an announcement made by the 1st Respondent's agent's using a public address system mounted to a motor vehicle belonging to the 1st Respondent's campaign fleet to the effect that the 1st Respondent had paid water bills for the people of Mwansabombwe and therefore they should vote for him.
- 64.3 Counsel further placed reliance on the testimony of PW3, PW4, PW5, PW6 and PW7 who testified that the 1st Respondent held rallies in their various wards and told them that he, the 1st Respondent, had settled water bills for the people for the months of June, July and August 2016 and therefore they should vote for him.
- 64.4 He submitted that the Respondent's alibi was an afterthought as the same was not pleaded in his Answer. That he did not call any witnesses to confirm his alibi and further did not tell the Court why the seven (7) Petitioner's witnesses could have come to Court to lie that he was in Mwansabombwe campaigning if, in fact, he was not there.
- 64.5 With regard to (ii) above, the thrust of the Petitioner's submission was that the Petitioner committed a lot of illegal practices. That he campaigned through his agents on election day with a branded vehicle that was impounded and this evidence remained unchallenged.
65. The 1st Respondent's submissions were to the effect that the Petitioner had failed to prove his case to a fairly high degree of convincing clarity as

required in election petitions. Counsel cited a number of authorities to emphasise the need for the Petitioner to meet the legal threshold of proof.

66. The 1st Respondent drew the attention of the Court that following an application by the 1st Respondent, the Court had expunged from the record paragraphs 8 and 10 of the Petition which contained allegations that the 1st Respondent used a branded vehicle on polling day to ferry registered voters to polling stations and was actually caught doing so within 400 metres from the entrance to a polling station. It was submitted that this effectively reduced to one allegation of the Petitioner's complaint and that is the allegation of corruptly paying water bills for the entire constituency.
67. It was submitted that the 1st Respondent denied these allegations in his Answer and affidavit in support of the Answer contending that the allegations in the Petition that the 1st Respondent paid for water bills lacked specificity in relation to amounts, dates and places and time. That the Petitioner called a total of 8 witnesses. It was submitted that most of the issues testified on by the witnesses were not specifically pleaded by the Petitioner which made it difficult for the 1st Respondent to specifically traverse the details given in Court during examination-in-chief.
68. In all, the 1st Respondent's submission was to the effect that the Petitioner had failed to demonstrate through credible witnesses that, the 1st Respondent paid water bills during campaigns, for the whole of Mwanabombwe for the reason that:
 - 68.1 The receipts on record were for August 2016 and did not show the 1st Respondent's name or the receipt to indicate that money was received from the 1st Respondent.
 - 68.2 The Petitioner failed to bring witnesses from Mwanabombwe District Council to come and prove that the 1st Respondent or his election agents had paid water bills for the entire constituency.

The Law

69. Before evaluating the evidence adduced before this Court, the Court considers it appropriate to review the law and principles that govern election petitions like the one before me. I set out below the relevant law:

69.1 Election petitions are governed by Section 97 of the Electoral Process Act, No. 35 of 2016. Specifically section 97 (2) (a), (b) and (3) provides (quoting the relevant parts) that:

“(2) The election of a candidate as a Member of Parliament... shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court... 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...were or may have been prevented from electing the candidate in that constituency... 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...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) ...

(3) Despite the provisions of subsection (2) where, upon the trial of an election petition the High Court... 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 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."

- 69.2 The burden of establishing anyone 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. (See ***Bresfold James Gondwe v. Catherine Namugala page 13***).
- 69.3 The grounds must be established to the required standard in election petitions namely a fairly high degree of convincing clarity. (See ***Bresfold James Gondwe v. Catherine Namugala***)
- 69.4 Subsection 3 of section 97 will only come into question after anyone of the grounds set out in subsection 2 has been established. It is not mandatory that in every election petition the High Court must call upon the person whose election petition is being challenged to establish that no corrupt practice or illegal practice was committed by him or her personally or by that persons election agent, or with the knowledge and consent or approval of such person or that person's election agent; or that such person and that person's election agent took all reasonable means to prevent the commission of a corrupt practice or illegal practice at the election.
- 69.5 The High Court will only be duty bound to do so in the event that the petitioner establishes anyone of the grounds aforementioned to the requisite standard in election petitions.
70. The principles set out above were espoused in the case of ***Bresfold James Gondwe v. Catherine Namugala*** when the Court was

interpreting section 93 of the Electoral Act 2006. The cited case is instructive with regard to the nature, scope and application of section 97 of the Electoral Process Act No. 35 of 2016. This is so because section 93 of the Electoral Act of 2006 and section 97 of the Electoral Process Act of 2016 are similar in scope and effect. A comparison of the two reveals that the two sections are the same in nature and effect save for the drafting style. The **Namugala case** was interpreting the said section.

Resolution of the Issues

71. Following the order of this Court to expunge from the record paragraphs 8 and 9 of the Petition, the only issue for determination is whether the 1st Respondent committed the electoral offence of corruptly paying for water bills for the entire constituency and that by his actions, the 1st Respondent prevented the people to vote for a person of their choice.
72. The Petitioner alleges under paragraph 6 of his petition as read with paragraph 11 of his amended verifying affidavit that during the declared period for political campaigns, Rodgers Mwewa, while being a candidate for Mwanabombwe Constituency Parliamentary elections corruptly paid for water bills for the entire community in the constituency for the entire campaign period by settling monthly bills for each of the 112 boreholes for and on behalf of the community and receipt to that effect were issued by the local authority.
73. The Petitioner called PW3, PW4, PW5, PW6, PW7 and PW8 to support his allegations of bribery. The Petitioner's own testimony was that his proof was what he heard from the Public Address system and the reports he received from his agents and well-wishers. He confirmed that he did not see the 1st Respondent pay for the bills nor did he see any of the 1st Respondent registered agents pay for the water. Further none of the

witnesses called by the Petitioner ever saw the 1st Respondent pay for the water nor did any of the receipts produced in Court bear the 1st Respondent's name.

74. Regarding the alleged campaign meetings in June at the various water boreholes where he is alleged to have told the people about his settling the water bills, the 1st Respondent rebutted this by saying that he was not in Mwanabombwe during the said period. The Petitioner has argued in his submissions that the 1st Respondent has not brought evidence to the fore to prove his alibi. But the Supreme Court has guided that, in election petitions, it is not for the person whose election petition is being challenged to establish that no corrupt practice or illegal practice was committed by him or her personally or by that person's election agent or with the knowledge and consent or approval of such person's election agent. The Court will only be duty bound to require that if the Petitioner establishes anyone of the grounds brought before Court to the requisite standard of proof (see ***Bresfold James Gondwe v. Catherine Namugala***). I am satisfied at this stage that the Petitioner has not met the test for the reasons that:

74.1 Of all the receipts produced in Court to show proof of payment for the water bills, none of them bore the name of the 1st Respondent. Further the evidence given by all the witnesses was to the effect that the bills that were paid were for the month of June, July and August 2016. No receipts were produced in Court representing the months of June and July. All the receipts on record were for the month of August. Further the testimony of all the witnesses regarding the receipts was based on what they heard as none of them saw the 1st Respondent pay for the said water bills.

74.2 The Petitioner further failed to bring to Court the relevant officers from Mwanabombwe District Council who issued the receipts to testify on his behalf as to who paid for the water. On the said allegations of paying for water bills the 1st Respondent denied allegations leveled against him.

75. The Petitioner's witnesses testified that they saw the 1st Respondent in their area address meetings and they heard him tell the people that he had paid for the water bills. But the 1st Respondent has maintained that he was not in Mwanabombwe at the material time. In my view the critical issue is not whether the 1st Respondent was in Mwanabombwe at the material time but whether he paid for the water bills on behalf of the community as alleged.
76. The conventional way of proving payment would be to call the people that saw him transact and produce receipts to that effect. In this case, the Petitioner has failed to produce the right witnesses in the person of the cashier at the council. Further the receipts produced in Court had no name or anything linking the 1st Respondent to the payments. Therein lies my doubts. I cannot dismiss from my mind the possibility that someone else other than the 1st Respondent could have paid for the water bills. I would, therefore, have great difficulty accepting the suggestion that the 1st Respondent should be held accountable for the payment of the water bills in Mwanabombwe.
77. Accordingly, after reviewing the evidence before me as regards the allegation of corrupt practice of paying for water bills, I do not see how the 1st Respondent can be made accountable for the alleged corrupt payment for water bills in the absence of cogent evidence to support the allegations. None of the witnesses saw the 1st Respondent or his agents pay. None of the receipts tendered into Court bore his name. None of the officers responsible for issuing receipts at the council were called to testify. The 1st Respondent testified that he was not in Mwanabombwe during the period that he was said to address the people in the constituency. All the Petitioner's witnesses said, in their testimony, that they were hastily called to come and testify, a day or two before the hearing and that is why they were not able to bring the correct receipts.

I consider the allegation of the 1st Respondent corruptly paying for the water bills as unproven.

78. Assuming for one moment that the 1st Respondent did pay for the water bills as alleged, did that action affect the outcome of the election result as not being a representative of the will of the people? There has been no evidence led to that effect and I would accept the submission by the 1st Respondent that the Petitioner has failed to demonstrate through credible witnesses, including both party aligned and non-partisan witnesses, that the 1st Respondent during campaigns paid water bills for the whole Mwansabombwe Constituency. It has also not been established that the 1st Respondent by his actions prevented the people to vote for a person of their choice. On the totality of the evidence before me, I am satisfied that the election was conducted in substantial conformity with the law and the actions complained of did not affect the result of the whole constituency.

Conclusion

79. For the reasons given above, the evidence on record and on the weight of authority, I find the petition lacks merit and the Petitioner's relief to void the election is refused.

Accordingly, I order and direct as follows:

79.1 The Petition is dismissed with costs.

79.2 It is hereby declared that the 1st Respondent was duly elected as Member of Parliament for Mwansabombwe Constituency.

DELIVERED AT LUSAKA THIS..... DAY OF.....2016.

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HON. JUSTICE M. K. CHISUNKA

