IN THE CONSTITUTIONAL COURT OF ZAMBIA
AT THE CONSTITUTIONAL REGISTRY
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

APPEAL NO. 4 of 2017
2016/CC/A040

IN THE MATTER OF: THE PARLIAMENTARY ELECTION PETITION RELATING TO PARLIAMENTARY ELECTIONS FOR MWANSABOMBWE CONSTITUENCY HELD ON THE 11TH OF AUGUST 2016.

AND

IN THE MATTER OF: ARTICLE 118 OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA AS AMENDED BY ACT NO. 2 OF 2016.

IN THE MATTER OF: SECTION 28, 81, 97 AND 106 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016.

IN THE MATTER OF: SECTION 93 OF THE ELECTORAL ACT NO. 12 OF 2016 (REPEALED).

AND

IN THE MATTER OF: THE ELECTORAL CODE OF CONDUCT 2016

BETWEEN:

SUNDAY CHITUNGU MALUBA — APPELLANT
AND
RODGERS MWEWA — 1ST RESPONDENT
ATTORNEY GENERAL — 2ND RESPONDENT

CORAM: Chibomba PC, Sitali, Mulembe, Mulonda and Munalula JJC on 19th June 2017 and 17th November, 2017

For the Appellant: Mr. Mataliro of Mumba Malila and Partners
For the Respondent: Mr. Mulenga of Iven Mulenga and Company

JUDGMENT

Munalula JC, delivered the Judgment of the Court.

Cases referred to:

1. Stanley Mwambazi v Morester Farms Limited (1977) Z.R. 108 (S.C.)
2. Zambia Revenue Authority v Jayesh Shah S.C.Z. Judgment No. 10 of 2001
3. Augustine Kapembwa v Danny Maimbolwa and Attorney General (1981) Z.R. 127
4. Hakainde Hichilema and another v Lungu and another (2016/CC/0031) [2016] ZMCC 4
5. Josephat Mlewa v Eric Wightman (1995-1997) Z.R.171
6. Brelsford James Gondwe v Catherine Namugala Appeal No. 175 of 2012
7. Leonard Banda v Dora Siliya S.C.Z. Judgment No. 127 of 2012
8. Henry Kapoko v The People 2016/CC/0023
9. Raila Odinga and others v Independent Electoral and Boundaries Commission and others (2013) E- KLR (Kenya)
10. Century Enterprises Limited v Greenland Bank (In Liquidation) (HCT-00-MA-0916 of 2004) (Uganda)
11. Twampane Mining Co-operative Society Limited v E and M Storti Mining Limited S.C.Z. Judgment No.20 of 2011
12. Nkuwa v Lusaka Tyre Services Limited (1977) Z.R. 43
13. Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others (2005) Z.R. 138
14. Attorney General v Marcus Achiume (1983) Z.R.1 (S.C.)
15. Wilson Masauso Zulu v Avondale Housing Project (1982) Z.R. 172 (S.C.)
16. Ilunga Kabala and John Masefu v The People (1981) Z.R. 102 (S.C.)
17. Carver Joel Jere v Shamayuma and Attorney General (1978) Z.R. 204 (S.C.)
18. Mwalimu Simfukwe v Evaristo David Kasunga Appeal No.50 of 2015

Legislation referred to:

The Constitution of Zambia (Amendment) Act No. 2 of 2016

Electoral Act No. 12 of 2006

Electoral Process Act No. 35 of 2016

Work referred to:

WH Smith Concise Oxford Dictionary, Eighth Edition

Halsbury's Laws of England, Vol. 15: Elections

The Appellant, Sunday Chitungu Maluba, who was the Petitioner in the Court below, appeals against the entire Judgment which dismissed his Petition.

The facts forming the basis of this appeal are that the Appellant and the 1st Respondent were both candidates in the August, 11th 2016 Parliamentary election under the tickets of Movement for Multiparty Democracy ("MMD") and the Patriotic Front ("PF") respectively. The 1st Respondent won the election with a total of 7,625, votes as against the Appellant's 2, 929, votes. The 1st Respondent was declared winner and the duly elected Member of Parliament for Mwansabombwe Constituency.

Being dissatisfied with the results, the Appellant filed into the High Court a Petition contending that the 1st Respondent was not validly elected because the said Respondent did not comply with the provisions of the Constitution and the Electoral Process Act No. 35 of 2016 (henceforth referred to as the "EPA, 2016") and the procedures set out therein. The Appellant in his amended Petition of 12th September, 2016 alleged illegal practices and malpractices where the 1st Respondent and his agents between 13th May, 2016 and 10th August, 2016 violated sections 28 (i) (a) (v) of the Electoral Process Act No. 35 of 2016 (henceforth referred to as the

EPA, 2016), providing for the opening and closing of the campaign period and section 81 (1) (c) of the same Act which provides that a person,

> **...shall not make any gift, offer, promise, procurement or agreement to or for the benefit of any person in order to induce the person or to procure or to endeavour to procure the return of any candidate at any election or the vote of any voter at any election.**

That between 13th May, 2016 and 10th August, 2016 which was the official campaign period the Respondent and his agents paid water bills to the Mwansabombwe District Council for the entire community in Mwansabombwe thereby corrupting the people to vote for him. The Appellant in paragraph 7 of his Petition cited Section 83 (1) (c) (ii) and (iv) of the EPA, 2016, pleading undue influence. In paragraph 8 of his Petition, he alleged that on polling day, the Respondent and his agents, used PF branded vehicles to ferry voters to polling stations thereby influencing the said voters. In paragraph 9 of the Petition, the Appellant cited Section 89(1) (f) of the EPA, 2016 which prohibits loitering within 400 meters of the polling station. And in paragraph 10, he alleged that the Respondent was seen dropping off registered voters within 400 meters of the entrance to the polling station thereby influencing the vote. In paragraph 11 he cited Section 110 (2) of the EPA, 2016 which provides that on voting day, a person should promote conditions conducive to the conduct of free and fair elections. And in

paragraph 12 he alleged that the Respondent's conduct both before and during elections did not promote conditions conducive to the conduct of free and fair elections. The Appellant contended that such illegal practices rendered the election process not to be free and fair and that the acts which were committed by the 1st Respondent or his agents with his knowledge prevented or enticed the majority of voters in the constituency and polling stations to avoid electing their preferred candidate or Member of Parliament for the constituency.

The Appellant's prayer was that the Court below should declare that the 1st Respondent was not duly elected and that his election be nullified. He also sought a declaration that the illegal practices committed by the said Respondent and or his agents so affected the election result that it was not free and fair and therefore must be nullified.

On 26th September, 2016 the 1st Respondent filed summons for further and better particulars in the form of details of the motor vehicles referred to in paragraphs 8 and 10 of the amended Petition, and the Court below ordered the Appellant to provide and serve the 1st Respondent with the further and better particulars requested not later than 13th October, 2016. However, when the matter came up for hearing on 17th October, 2016, the 1st Respondent raised a preliminary issue drawing the Court's attention to

the aforementioned Court order and applied that the Petition be dismissed on account of the Appellant's failure to obey and comply with that Court order.

In keeping with the spirit of article 118(1) (e) (which we deemed 118 (2) (e)) of the Constitution, the Court below ruled that Paragraphs 8 and 10 of the Petition be expunged from the record together with the relevant paragraphs from the accompanying verifying Affidavit. Additionally, the trial Court extended the time in which the 1st Respondent was to file an answer and directed that it would proceed to hear the Petition.

After trial had commenced, the Appellant applied for leave to issue a *subpoena duces tecum* for the production of a receipt book in the custody of Mwansabombwe District Council as well as the issuance of a *subpoena testificandi* to compel an official from the Council to appear before the Court to testify and to produce the receipt book in question. The trial Court granted leave for the issuance of the *subpoena testificandi* but refused to grant leave for the issuance of the *subpoena duces tecum*.

After hearing the substantive matter, the trial Judge found that the only allegation before the Court was the alleged illegal or corrupt payment for water bills. However he did not see how the 1st Respondent could be made accountable in the absence of cogent evidence to support the allegation. The

Court further found that even assuming the allegation had been proved, the Appellant had not established that the 1st Respondent's actions had prevented the people from voting for a person of their choice. The Court concluded that in totality, the evidence had shown that the elections were conducted in substantial conformity with the law and dismissed the Petition with costs.

In appealing against the decision of the Court below, the Appellant raised thirteen grounds, which we quote verbatim, as follows:-

Ground One

The learned trial Judge erred in law and in fact when he struck out paragraph 8 and 10 of the petition, which paragraphs contained allegations that the 1st Respondent used branded vehicles on polling day to ferry voters to polling stations and formed the cause of action and expunge them from the record without taking into account the spirit and purpose of Article 118(i)(e) of the Republican Constitution chapter 1 of the Laws of Zambia (sic).

Ground Two

The trial Court erred in law and fact when it ordered for the commencement of hearing of the petition and proceeded to hear a substantial part of the Petition before the 1st Respondent could file his answer into court and serve the same on the Petitioner.

Ground Three

The trial court in the court below erred in law and fact when it refused to grant leave to the issuance of a subpoena duces tecum for the production of a receipt book which was a public document and in possession of Mwansabombwe District council who had ordinarily refused to bring the document to court.

Ground Four

The learned trial Judge erred in law and in fact when he refused to grant an application by counsel for the Petitioner to adjourn the matter to the following day to allow the petitioner serve subpoena on the remaining two witnesses who were supposed to testify on behalf of the petitioner.

Ground Five

The trial court erred in law and fact when it disregarded the provisions of section 106 (1) and (3) of the Electoral Process Act No. 35 of 2016 and restricted the hearing of the Petitioner's case to two days and refused to adjourn the matter beyond the two days to allow the petitioner to conclude calling his witnesses and deemed the petitioner to have concluded his case at the end of the two days even when the petitioner had more witnesses to call and ordered the Respondents to open their defense before the petitioner could conclude his case.

Ground Six

The learned trial Judge misdirected himself in law and fact when he refused to grant an application for an order for search of phone record to determine whether or not the 1st Respondent was interfering with the Petitioner's witnesses who had refused to come to court on alleged threats by the 1st Respondent.

Ground Seven

The learned trial Judge misdirected himself in law and fact when he held that section 97 of the Electoral Process Act No. 35 of 2016 was the same in nature and effect as section 93 of the repealed Electoral Act of 2006 thereby interpreting section 97 of the Electoral Process Act of 2016 in the same way as section 93 of the Electoral Act of 2006 was interpreted in the case of ***Bresford James Gondwe v Catherine Namugala (SC Appeal No. 175 of 2012)*** *without taking into account the major shift in substance and effect created by the changes made in the new section 97 of the Electoral Process Act of 2016 which is different from the usual text found in section 93 of the Electoral Act of 2006.*

Ground Eight

The learned trial Judge erred in law and fact when he found that the people of Mwansabombwe Constituency were not prevented from voting for a candidate of their choice due to allegations of bribery and corruption.

Ground Nine

The learned trial Judge erred in law and fact when he limited the issues for determination by the court to one after expunging paragraphs 8 and 10 of the Petition from record when the remaining paragraphs of the Petition revealed more causes of action than one thereby leaving other causes of action undermined by the court.

Ground Ten

The learned trial court misdirected itself when it held that there was no duty placed on the 1st Respondent to prove his alibi which he raised outside his answer.

Ground Eleven

The learned trial court erred in law and fact when he found that the Petitioner had failed to bring an officer from Mwansabombwe District Council to prove who paid water bills when it was the court itself that stopped the officer from testifying when he closed the Petitioner's case prematurely.

Ground Twelve

The learned trial court erred in law and fact when he held that there was no cogent evidence on record to prove that the 1st Respondent had paid water bills for Mwansabombwe Residents when there was cogent evidence on record where the 1st Respondent was heard at various meetings telling people that he had paid for water bills but the court preferred what he termed 'conventional way of proving payment' to evidence of eye witnesses who heard the 1st Respondent saying that he had paid for water bills for the Residents.

Ground Thirteen

The learned trial court erred in law and fact when he failed to apply the provisions of section 97 (3) of the Electoral Process Act No. 35 of 2016 on the facts on record.

The Appellant through Counsel filed written submissions augmenting his appeal. In arguing ground one, it was submitted that even though the Court below chose to punish the Appellant in the manner alluded to of striking out paragraphs 8 and 10 from the Petition, the particulars had already been served on the 1st Respondent though done on 14th October, 2016 instead of the day before as ordered by the trial Court. He argued that this decision was harsh, irregular and in sharp contrast with the spirit and purpose of Article 118(1) (e) *(sic)* of the Republican Constitution, Chapter 1 of the laws of Zambia as amended by Act No. 2 of 2016 (henceforth referred to as the "Constitution as amended").

It was submitted that although the trial Court purported to refuse the application to dismiss the petition, he actually did that and the action was tantamount to dismissing the said allegations as the paragraphs contained allegations that formed the basis of the petition. Counsel submitted that the Court below acted without regard to the spirit and purpose of administering justice without undue regard to procedural technicalities.

Counsel further submitted that the failure to serve the particulars on 13th October, 2016 was procedural and directory as opposed to being substantive but that what was struck out was substantive when the failure to comply with the initial Court order was not fatal. The case of **Stanley**

Mwambazi v Morester Farms Limited[1] **was cited** where the Supreme Court opined that:-

> ***It is the practice in dealing with bona fide inter-locutory applications for courts to allow triable issues to come to trial despite the default of the parties; where a party is in default he may be ordered to pay costs, but it is not in the interests of justice to deny him the right to have his case heard.***

In furtherance of this, the Appellant referred this Court to the decision in **Zambia Revenue Authority v Jayesh Shah**[2] where it was indeed stated that:-

> ***"Cases should be decided on their substance and merit. The rules must be followed, but the effect of a breach will not always be fatal if the rule is merely regulatory or directory. "***

Counsel proceeded to argue ground two by stating that the Appellant was highly prejudiced where his petition was substantially heard before the 1st Respondent filed in his answer. It was submitted that on 17th October, 2016 the day the order to have the two paragraphs struck out from the Petition was made, the trial Court ordered the 1st Respondent to file in his answer on 19th October, 2016 and yet the Court proceeded to hear the petition where 5 witnesses including the Appellant testified on that day. Counsel contended that it is common practice that trial only commences after pleadings have been closed and a defaulting party in pleading has judgment

entered against them. He submitted that it was highly prejudicial to the Appellant for the Court below to have proceeded into trial before the answer was filed.

It was also argued for the Appellant in ground three, that the trial Judge fell into grave error when it refused to grant an application for the issuance of *subpoena duces tecum* for the production of a receipt book which was in custody of Mwansabombwe District Council and a *subpoena testificandi* compelling a named Council official to come and testify as well as produce the document before that Court. Counsel argued that the refusal was highly prejudicial to the Appellant and an affront to the course of justice. He cited section 27 (1) of the **High Court Act Chapter 27 of the Laws of Zambia** which provides that:-

> ***(1) In any suit or matter, and at any stage thereof, the Court, either of its own motion or on the application of any party, may summon any person within the jurisdiction to give evidence, or to produce any document in his possession or power, and may examine such person as a witness and require him to produce any document in his possession or power, subject to just exceptions.***

It was submitted that there was no legal basis upon which the trial Court had refused to grant an application for the production of the receipt book. Counsel argued that the ruling by the trial Judge that the issuance of

the subpoena was a backdoor way of production of the document to have been prejudicial as the provision cited above allows for the production of documents at any stage of the proceedings. He argued that this was highly prejudicial and requested this Court to order a retrial.

Counsel proceeded to argue in ground four that the refusal by the trial Judge to have granted an adjournment to the following day to allow the Appellant to serve a subpoena on the remaining two witnesses to have been a travesty of justice as Order 33 rule 1 and 2 of **the High Court Rules of Chapter 27 of the Laws of Zambia** gives the Court power to adjourn a matter especially when there is a good reason advanced and the time sought is reasonable. He argued that the Appellant had both a good reason and had requested a reasonable amount of time. He submitted that as the record of proceedings shows, the Appellant had failed to serve the subpoena on 18th October, 2016 as it was a public holiday. Hence on 19th October, 2016 the Appellant had requested for more time as the subpoena could only be served on that particular day which entailed that there was need for an adjournment to the following day.

Counsel argued that the Court below reasoned that the Appellant only had two days to present his case and insisted that his witnesses be brought the same day in order to conclude. He averred that the reason for the

application for the adjournment was good and referred this Court to the decision in the case of **Augustine Kapembwa v Danny Maimbolwa and Attorney General**[3] where it was held that where material evidence had not been disclosed on discovery, the court should offer an adjournment and if counsel has been taken by surprise the costs are to be paid by the defendant and allow the production of the evidence. It was also put forward that the Appellant could not appeal against the interlocutory order when trial was ongoing as the trial Judge had advised that such recourse would not be available until trial had ended.

We take note that there is a discrepancy in the Appellant's submissions as on 19th June, 2017, Mr. Mataliro informed this Court that in fact the Appellant had remained with 6 witnesses and only 8 had testified. Counsel further cited section 106 (3) of the EPA, 2016 without specifying which Legislation the said provision is drawn from; however from the wording we were able to take judicial notice that it must be from the EPA, 2016 which provides that:-

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

The Appellant's argument in ground five centered on the said section 106(1) and (3) of the above mentioned Act and it was submitted that in as

much as the orders for directions were issued as to the time within which each party was to present its case, the same were not immutable or absolute. Counsel argued that the only limitation appears under section 106 (1) (b) of the EPA, 2016 which provides that:-

> **(1) An election petition shall be tried and determined by the High Court or a tribunal in open court—**
> **(b) in the case of the election of a candidate as a Member of Parliament, within ninety days from the date of filing an election petition.**

It was argued that had the 90 days lapsed when the Appellant sought for an adjournment, then the trial Court would have been justified to deny the application for adjournment and cited the case of **Hakainde Hichilema and another v Lungu and another[4].** He submitted that the need for the matter to be adjourned to the following day outweighed the need to insist on the orders for directions that the two days were enough for hearing the Appellant's case. He argued that the petition was filed on 24th August, 2016 and the date when adjournment was refused was 19th October, 2016. It was submitted that the Appellant had requested for an adjournment to 20th October, 2016 and all in all the 90 days would have expired on 24th November, 2016.

In relying on Order 19 rule 1 of the **High Court Rules**, Counsel argued that the said Order does not include anything giving power to the trial Court

to restrict time within which a matter can be heard but it does give to the Court power to vary the period within which a particular action can be heard. He submitted that it was therefore illegal for the trial Court to have restricted the period within which the petition was to be heard to the extent that the Appellant was denied chance to present his case before that Court.

Counsel submitted in ground six that the refusal by the trial Court to order that a search be conducted on the 1st Respondent's phone record was equally prejudicial to the Appellant as his efforts to bring witnesses was being defeated by the conduct of the 1st Respondent and that it was therefore prudent for the Court to have allowed the investigations.

In augmenting ground seven, Counsel argued that it is common knowledge that section 97 of the EPA, 2016 is not the same as section 93 of the **Electoral Act No. 12 of 2006** although both sections provide for avoidance of an election. In comparison, counsel referred to the two sections and stated that in the drafting of section 97 of the EPA, 2016 changes were made to section 93 of the **Electoral Act of 2006**.

Counsel submitted that the section of interest in this appeal is section 93 (2) (a) and (c) of the **Electoral Act of 2006** and section 97 (2) (a) of the EPA, 2016. Counsel interpreted section 93 (2) (a) of the **Electoral Act of 2006** to mean that an election of a candidate can be voided where it is proved

that a corrupt practice or illegal practice was committed in connection with the election or that there was some misconduct and that because of any such act the majority of voters in a constituency were or could have been prevented from electing the candidate whom they preferred. He submitted that in this instance, it does not matter who committed the wrong and cited the case of **Josephat Mlewa v Eric Wightman[5].**

Counsel further contended that section 93 (2) (c) of the **Electoral Act of 2006** means that the corrupt act or illegal practice was committed by the Respondent or his/her election agent or polling agent or committed by some other person but with the knowledge and consent or approval of the Respondent himself/herself or his/her election agent or polling agent. He cited the **Mlewa v Wightman[5]** case as well as the case of **Brelsford James Gondwe v Catherine Namugala[6]** as authority for the said interpretation.

The Appellant's Counsel proceeded to analyse section 97 (2) (a) of the EPA, 2016 and submitted that the said section seems to combine section 93 (2) (a) and (c) changing the meaning of the said provision completely. He interpreted the said section 97 (2) (a) and submitted that it now means that an election can be voided in two circumstances only one of which is when that candidate, in connection with the election has committed corrupt practices, illegal practices or misconduct and that it does not matter which

candidate as it can be the petitioner, Respondent or any other candidate who participated in the said election. The other instance, he submitted, is where it is proved that some other person has committed corrupt practices, illegal practices and other misconduct with the knowledge and consent or approval of a candidate or his/her election agent or polling agent and that additionally, the majority of voters in the constituency were prevented from electing the candidate whom they preferred.

Counsel further submitted that under section 97 (2) (a) of the EPA, 2016 an election cannot be voided if it is an election or polling agent who commits the vice unless it is some other person who commits the said act with the knowledge, consent or approval of the election agent or polling agent and not necessarily the said agents committing the vices personally. He therefore argued that the trial Court was at fault to have relied on the interpretation in the **Brelsford James Gondwe v Catherine Namugala**[6] case to interpret section 97 (2) of the EPA, 2016 as the circumstances upon and under which an election can be voided are now totally different from the ones provided for under the **Electoral Act of 2006**. Similarly, he argued, given a proper analysis of the two provisions, the trial judge would have come to the conclusion that the election of the 1st Respondent was voidable.

Counsel contended that the trial Judge misled himself when he stated that subsection 3 of section 97 of the EPA, 2016 comes into question only after anyone of the grounds set out in subsection 2 of the same Act has been established. He submitted that subsection 3 is a standalone provision which *must be* looked at alone and independent from subsection 2 and that the said subsection 3 empowers the High Court to nullify elections where corruption or illegal practices have been proved without necessarily requiring further proof that the electorate were prevented from electing the candidate of their choice.

In arguing ground eight, Counsel relied on the **Mlewa v Wightman**[5] case and referred the Court to **Leonard Banda v Dora Siliya**[7] arguing that in determining whether or not people in a constituency were prevented from voting for the candidate they preferred, the courts will look at the type and scale of wrongdoing. In establishing whether the 1st Respondent had committed the act of bribery, it was submitted that bribery refers to the act of offering, giving, soliciting or receiving of any item of value as a means of influencing the actions of an individual. He urged this Court to look at the evidence in totality and consider whether or not there is no cogent evidence to prove that there was corruption and that the same was at a higher scale that would be seen to have adversely affected the election.

Counsel proceeded to argue in ground nine that the trial Court was in grave error when it limited the issues for determination to one after it had struck out paragraphs 8 and 10 of the petition which contained allegations that the 1st Respondent had on polling day, ferried voters in his branded *motor* vehicle and had campaigned within the precincts of 400 meters of the polling station. It was argued that the other paragraphs 7, 9, 11, 12 and 13 all raised allegations different from that of corruption which the trial Court restricted itself to as issues for determination.

Counsel also submitted that the trial Court misdirected itself when it held that there was no duty placed on the 1st Respondent to prove his alibi which he raised outside his answer. Counsel argued that since the 1st Respondent had filed in his answer after the Appellant had already begun his case and had not raised the said alibi in his answer, the Appellant did not have an opportunity to challenge it.

It was also submitted for the Appellant that the trial Court's finding that the Appellant had failed to bring an officer from Mwansabombwe District Council to prove who had paid the water bills was an error as it was the Court itself that had stopped the officer from testifying when he closed the Appellant's case prematurely. It was argued that the trial Court created the very problem when it failed to grant the applications prayed for.

It was also contended that the trial Court erred when it failed to find that there was sufficient evidence to prove the allegation that the 1st Respondent had paid water bills for the people in the constituency in question in order for them to vote for him in the Parliamentary elections. Counsel argued that all 7 witnesses testified that the 1st Respondent had bribed the electorate and that in rebuttal, the 1st Respondent merely gave a bare denial that he was in not Mwansabombwe without any evidence in support.

Counsel ended by submitting that the trial Court erred in law and fact when he failed to apply the provisions of section 97 (3) of the EPA, 2016 to the facts on record as it had found that the Appellant had failed to prove that the 1st Respondent had engaged in corrupt practices.

The 1st Respondent countered the Appellant's grounds of appeal through Counsel who begun by referring this Court to **Henry Kapoko v The People**[8] where this Court stated after referring to the **Raila Odinga and others v Independent Electoral and Boundaries Commission and others**[9] in adopting the interpretation of Article 118(2) of our Constitution that:-

> ***the essence of the provision is that a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties. This principle of merit,***

however, in our opinion, bears no meaning cast in stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of processes of justice, is called upon to appreciate all the relevant circumstances of a particular case and consciously determine the best course.

It was submitted that a party to proceedings should not fail to observe rules of procedure and established principles and then shield himself in the provisions of Article 118 (2) (e) of the Constitution as amended. He further referred the Court to **Century Enterprises Limited v Greenland Bank (In Liquidation)**[10]to show that the said provision instructs the Courts to administer justice without undue regard to procedural technicalities but it does not do away with the rules of civil procedure. It was argued that after the Court made the order for further and better particulars to be furnished, the Appellant was at liberty to apply for variation of the same order but instead breached it without justification. It was further argued by the 1st Respondent that the Appellant, having been at fault for filing a defective petition, cannot expect to be protected by the provisions of Article 118 (2) (e) of the Constitution as amended. Counsel ended arguments in ground one by citing **Twampane Mining Co-operative Society Limited v E and M Storti Mining Limited**[11] as well as **Nkuwa v Lusaka Tyre Services Limited**[12] to

show that Court rules must be adhered to strictly and that those that ignore rules of the Court do so at their own peril.

It was submitted for the Respondent in ground two that an election petition is distinguishable from the other civil actions where judgment in default may be entered and a court cannot proceed to void an election where no answer is filed. It was put across to the Court that it was proper for the case to have proceeded even though the 1st Respondent had not filed an answer as it is for the Appellant to have adduced evidence to prove the allegations he made in his petition and not to see what defence the Respondent would put up and hope that it would fail. The case of **Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and others**[13] was cited in this regard. It was submitted that the Appellant was therefore not prejudiced due to the aforesaid.

It was equally submitted that the trial Court properly exercised its discretion when it refused to issue the *subpoena duces tecum* in respect of the receipt book and relied on section 27(1) of the **High Court Act** to show that granting of the application by the Court was not a matter of right. Counsel further argued that the Appellant was well aware of section 106 (1) (b) of the EPA, 2016, which demands that election petitions be heard and determined within 90 days. It was submitted that from 26th August, 2016 the

day when the petition was filed, the Appellant had ample time to engage the local authority for purposes of securing the documents in question and there was no evidence when the application was made from the Appellant that he had engaged the officials from Mwansabombwe District Council in an attempt to secure the receipt book. It was the 1st Respondent's contention therefore that the Appellant had failed to show sufficient cause to persuade the Court below. It was further submitted that none of the Appellant's witnesses who supported the allegation in question had produced the receipts in the Court below.

Counsel submitted that the Appellant had an opportunity to serve the subpoenas on the day they were issued but due to his own incompetence, he failed to do so. He contended that the trial Court properly exercised its discretion under Order 33 rule 1 and 2 of the **High Court Rules** and section 106 (3) of the EPA, 2016. Counsel reiterated the same arguments in responding to ground five and averred that the refusal by the trial Judge to allow for an adjournment would best have been dealt with through an interlocutory appeal. Further, that the argument pertaining to the six witnesses when the initial ground four only referred to two was an ambush and should not be entertained.

In responding to ground six, Counsel submitted that the arguments for the Appellant therein are misconceived as the witness whose phone records he sought to have searched and brought to Court is the one who was the subject of the subpoena whom the Appellant failed to bring due to his lack of seriousness. Similarly, it was put across that the trial Court had the benefit of observing the happenings during trial and its findings of fact cannot be easily interfered with unless there is manifest injustice on the record.

It was also submitted for the 1st Respondent in ground seven that section 97 (2) of the EPA, 2016 and section 93 (2) of the **Electoral Act of 2006** are similar in effect and application except that section 97 of the EPA, 2016 has widened the types of candidates whose elections can be challenged under it. It was counsel's contention that the trial Court was on firm ground when it adopted the position in the **Brelsford James Gondwe v Catherine Namugala**[6] case in interpreting section 97 of the EPA, 2016 and that as per section 97 (2) (a), the proven illegal or corrupt practices must be attributed to the candidate himself or his election or polling agent. It was therefore his position that the Court below was in order to have declined to void the 1st Respondent's election as Mwansabombwe Member of Parliament as the available evidence showed that there was no corrupt or

illegal practice or misconduct that had been proved against the 1st Respondent or against his agents.

Counsel argued that contrary to the assertions by the Appellant subsection (3) of section 97 would only be properly invoked where any of the wrong doing proscribed under subsection (2) of section 97 is first proved. He submitted that proceeding to consider the provisions of subsection (3) where the petitioner has failed to establish or prove any of the illegalities proscribed in subsection (2) would be otiose.

As for ground 8, it was argued in response that the trial Court would only have been justified in finding and holding otherwise if there had been evidence on record establishing some wrongdoing or electoral malpractice on the part of the 1st Respondent or his election or polling agents and that the said act was of the type and scale that prevented the majority of the electorate from voting for the candidate of their choice. He relied on the **Mlewa v Wightman**[5] case as well as **Leonard Banda v Dora Siliya**[7] case and contended that the 1st Respondent has not pointed to any evidence on record to prove his allegation to a fairly high degree of convincing clarity.

Counsel further cited **Attorney General v Marcus Achiume**[14] and **Wilson Masauso Zulu v Avondale Housing Project**[15] to acknowledge that a trial Court does have a duty to adjudicate upon every aspect of the suit so

that every matter in controversy is determined fully but that a lower Court can be condemned for having failed to resolve all issues raised before it where evidence is led during trial to prove the issues the trial Court failed to properly direct itself to and omitted to rule on thereby leaving some issues unresolved. It was submitted that the Appellant's petition was limited to only four issues but after the trial Court had expunged paragraphs 8 and 10, the only issue left for determination was whether the 1st Respondent did pay the water bills for the whole Mwansabombwe community and whether this did prevent the majority of the electorate from electing the candidate of their choice.

Counsel also submitted that the alibi raised by the 1st Respondent did not shift the burden of proof to the 1st Respondent which was always on the Appellant. He relied on the case of **Ilunga Kabala and John Masefu v The People**[16] and argued that the Appellant had an opportunity to dispel the said defence of alibi during cross examination of the 1st Respondent which he failed to do. He proceeded to refer the Court to the case of **Carver Joel Jere v Shamayuma and Attorney General**[17] to emphasize the point that since the Appellant did not object to the defence of alibi, the Court was not precluded from considering it and it cannot be faulted for the Appellant's own omission.

Counsel reiterated his arguments in response to grounds four and five to show that ground eleven cannot succeed because it was the Appellant himself who had without good reason failed to serve the subpoena on the intended witness on 17th October, 2016 and that even after being given time to do so on 19th October, 2016 he still failed to bring the witness.

In countering ground twelve, Counsel cited the decision in **Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and others**[13] contending that in an election petition, the evidence adduced must establish to a fairly high degree of convincing clarity. He contended that the Appellant should have proved that the 1st Respondent or his election or polling agents had paid the water bills in question by bringing the receipts or the official from the Constituency's district council. It was argued that the receipts produced by the Appellant did not show that it was the 1st Respondent who paid the said water bills and his defence of alibi which went unchallenged by the Appellant shows that there was a possibility that someone else could have paid the water bills.

Counsel ended by submitting that the learned trial Judge was on firm ground when he did not invoke the provisions of section 97 (3) of the EPA, 2016 as there was no basis upon which the Court could have done so. He submitted that the arguments in ground thirteen were over ambitious as the

evidence did not establish any alleged grounds to the standard required and did not connect the 1st Respondent to the said allegations.

We have carefully considered the thirteen grounds of appeal, the record of proceedings in the Court below and the submissions and *authorities* cited by counsel for both parties. We have also carefully read the judgment of the Court below. We are grateful to both counsel for the well-researched and forceful submissions. We find that the appeal raises multiple issues for our determination. For convenience we shall group them as follows. We shall first deal with grounds one, two, three, four, five, six and eleven together. Then Grounds nine and ten individually. After that we shall deal with Grounds seven, eight, twelve and thirteen together.

We begin with the impugned interlocutory orders and alleged procedural omissions of the trial Court set out in Grounds one, two, three, four, five, six, and eleven. The Appellant avers that he did not receive a fair trial because the trial Court made several rulings that prevented him from presenting his case freely and in full and seeks an order for re-trial. First he contends that when the Court struck out paragraphs eight and ten of his Petition which contained allegations that the 1st Respondent used branded vehicles to ferry voters to the polling stations on polling day, the effect was to dismiss other allegations contained in the petition without hearing them.

In the Appellant's view, the decision was contrary to the spirit and purpose of Article 118(1)(e), which we shall deem to read 118(2)(e), of the Constitution as amended directing that matters be heard on their merits. Secondly, that the Court ordered the commencement and continuation of the *hearing* of the Petition before the 1st Respondent filed and served his answer. Thirdly, that the Court refused to grant leave for the issuance of a *subpeona duces tecum* for the production of a receipt book held by Mwansabombwe District Council after the Council refused to bring the document to Court. Fourth, that the Court refused to adjourn the matter by one day to enable the Appellant serve a *subpoena* and allow his remaining two witnesses to testify. Fifth that contrary to section 106(1) and (3) of the Electoral Process Act, the Court restricted the hearing of the Appellant's case to two days at the end of which it refused to adjourn to allow for testimony from his remaining witnesses and instead deemed him to have closed his case. Sixth, that the Court refused to order the search of phone records which would have demonstrated that the 1st Respondent interfered with the Appellant's witnesses hence their refusal to come to Court and testify.

The sum of the aforestated Grounds is an alleged compromise of due process during the hearing of the Petition. We shall not go into the individual merits of each Ground. This is because they have all been raised too late in

the day. They should have been raised as interlocutory appeals as soon as the impugned decisions were made. We take note that the Appellant sought refuge in Article 118 (2) (e). As this Court has already stated in the case of **Henry Kapoko v The People,**[8] Article 118(2)(e) is not a "one size fits all" answer to all manner of legal situations. In our considered view the Appellant sat on his rights and then cried foul only because the trial Court rendered a final judgment against him. For that reason we see no manifest injustice that will arise from our decision not to go into the merits of the allegations. We find that Grounds one, two, three, four, five, six and eleven have no merit and they are accordingly dismissed.

The Appellant contends in support of Ground nine that the trial Court failed to dispose of all the issues before it in its final judgment. The Appellant argued that the Court's decision to expunge paragraphs eight and ten of the Petition purported to limit the issues before the Court to only one ignoring other remaining paragraphs which revealed more causes of action that were subsequently left un-determined by the Court.

In his submissions, Counsel for the Appellant argued that the trial Court fell into grave error when it limited the issues for determination to one, by striking out paragraphs eight and ten as the other paragraphs namely, seven,

nine, eleven, twelve and thirteen all raised allegations which were different from that of ferrying voters to polling stations using branded vehicles.

In response, Counsel for the 1st Respondent admitted that the trial Court does have a duty, as held by the Supreme Court in **Attorney General v Marcus Achiume[14] and Wilson Masauso Zulu v Avondale Housing Project,[15]** to adjudicate upon every aspect of the suit so that every matter in controversy is determined in full. However, Counsel argued, there must be evidence led during trial to prove the issues and it must be shown that the trial Court did indeed omit to rule on all matters in issue. According to Counsel, after paragraphs eight and ten were expunged, the only issue left for determination was whether the 1st Respondent did pay the water bills for the whole Mwansabombwe community and whether this prevented the majority of the electorate from electing a candidate of their choice.

We have closely examined each paragraph of the amended Petition dated 12th September 2017 and find that paragraphs seven, nine and eleven contain assertions of law - specifically reference to sections 83 (1) (c) (iii) and (iv); section 89 (1) (f); and section 110 (2) of the EPA, 2016, which provisions relate to the expunged paragraphs eight and ten. They do not therefore disclose any additional issues. We however note that paragraph twelve of the amended petition refers generally to illegal practices allegedly

committed by the Respondent during the campaign period and on the actual voting day. No details of the alleged illegal practices are given however paragraph thirteen of the amended affidavit in support of the amended petition reads in part, and we quote: "...Rogers Mwewa and his agents ...campaigned during voting day at polling stations ..."

We note that counsel for the Appellant did not point to anywhere in the record of appeal where evidence was led disclosing other issues purportedly left unresolved by the trial Court. We therefore find that the only remaining allegation that the Appellant is referring to is the illegal campaigning at the polling station on polling day. Further examination of the record of appeal shows that the portion filed begins on 17th October 2017 at 12.05 and appears to omit part of the evidence in chief of the Appellant. However, at page 192 of the record, the issue of campaigning at the polling station deposed in paragraph 13 of the affidavit in support is alluded to. The trial Court allowed evidence to be led on the issue subject to confirmation that it had not been expunged as a consequence of expunging paragraphs eight and ten. Testimony was then led from pages 192 to 195, that on polling day there was campaigning in addition to ferrying PF voters because of the presence of a branded vehicle at a named polling station. That the vehicle was impounded and left at the police station. Further, that a written complaint

about the same matter was made to the District Electoral Officer. Documentary evidence in the form of photographs of the impounded vehicle formed part of the Appellant's bundle of documents. Under cross-examination, it was established that the impounded vehicle was released the day after the incident in question took place and that the ECZ did not summon the parties after receiving the complaint. PW2 confirmed the incident in his testimony at pages 240 to 256 of the record. However, he subsequently admitted in cross-examination at page 256 that the persons in the vehicle that were allegedly campaigning were neither the 1st Respondent nor his agents. There are also no details of the actual campaign activities other than the presence of the vehicle in the vicinity of the polling station. The 1st Respondent's evidence did not address the allegation. The trial Court, alluded to the issue in the summation of the evidence in the judgment but made no specific ruling on it.

We agree with the Appellant that the Court ought to have considered the issue and made a ruling. We take cognisance that we are an appellate rather than trial Court in this matter and can only consider the record. We find the record shows that evidence of campaigning at the polling station is in the testimony of the Appellant and his campaign manager. The two witnesses testified that the 1st Respondent did campaign on polling day.

Further perusal of the record however shows that the evidence on record did not link the alleged campaigning to the 1st Respondent or his agents. Furthermore, the allegation could not on the evidence adduced be said to be widespread so as to support a finding that it affected or could have affected the election result. We, therefore, find that the allegation of campaigning on polling day was not substantiated. Therefore this ground succeeds only to the extent that the trial Court should have pronounced itself on the issue but not as a basis upon which the election can be nullified, as it was not proved to the required standard in section 97(2)(a).

In Ground ten, the Appellant attacks the trial Court's holding that there was no duty placed on the 1st Respondent to prove the alibi raised in his answer. The Appellant argued that it was incumbent upon the 1st Respondent to substantiate his alibi by adducing evidence to show that he was away from Mwansabombwe during the time he was alleged to have held meetings announcing that he had paid water bills for the entire community. That the 1st Respondent ought to have responded to evidence showing he was in Mwansabombwe contrary to his claims.

Counsel for the 1st Respondent however argued in response that the Appellant did not object to the alibi defence when it was raised. Further, that he could have impeached it during cross-examination but failed to do

so. Therefore that the trial Court was at liberty to take the defence of alibi into account. In dealing with the issue, the Court stated at pages 35-36 of the record of appeal that:

> ***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 first Respondent rebutted this by saying that he was not in Mwansabombwe 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 any one of the grounds brought before Court to the requisite standard of proof. (see Bresfold James Gondwe v Catherine Namugala) (sic).***
>
> .....
>
> ***In my view the critical issue is not whether the 1st Respondent was in Mwansabombwe at the material time but whether he paid for the water bills on behalf of the community as alleged.***

We have seriously considered the issue in Ground ten. The law on who bears the burden of proof is well known and it is in fact trite that he who alleges must prove. In **Mwalimu Simfukwe v Evaristo David Kasunga,**[18] the Supreme Court affirmed that the burden of proof is on the Petitioner to prove all the allegations in the petition. In the circumstances it was

incumbent upon the Appellant to prove his case to the required standard by leading sufficient evidence to show that the 1st Respondent was actually present at the meetings in question and made the statements in issue. At no point did the burden of proof shift to the Respondent. Be that as it may, we agree with the trial Court that what was important to establish, which claim was not proved by the evidence on record, was whether the 1st Respondent paid the water bills for the Mwansabombwe community during the campaign period rather than his whereabouts during the campaign period. We thus find no merit in this ground and it is dismissed accordingly.

We now turn to Grounds seven, eight, twelve and thirteen on the question in both law and fact whether the Court was wrong to find that the Appellant's evidence did not support the allegation that the 1st Respondent paid the water bills for the Mwansabombwe community. At issue is the meaning and effect of section 97 (2) (a) of the EPA, 2016; whether it differs materially from section 93 (2) (a) and (c) of the repealed **Electoral Act of 2006**; the relationship between section 97 (2) (a) and 97 (3) of the EPA, 2016; and the extent to which section 97(3) of the EPA, 2016 differs from section 93 (3) of the **Electoral Act of 2006**. We shall deal with all four issues simultaneously by examining the relevant parts of section 97 in relation to the impugned finding made by the trial Court when it dismissed

the allegation that the 1st Respondent paid the water bills for the Mwansabombwe community or that the majority were prevented or could have been prevented from voting for a candidate of their choice.

For convenience we wish to quote the Appellant's claim verbatim:

Ground Seven

The learned trial Judge misdirected himself in law and fact when he held that section 97 of the Electoral Process Act No. 35 of 2016 was the same in nature and effect as section 93 of the repealed Electoral Act of 2006 thereby interpreting section 97 of the Electoral Process Act of 2016 in the same way as section 93 of the Electoral Act of 2006 was interpreted in the case of ***Brelsford James Gondwe v Catherine Namugala (SC Appeal No. 175 of 2012)*** *without taking into account the major shift in substance and effect created by the changes made in the new section 97 of the Electoral Process Act of 2016 which is different from the usual text found in section 93 of the Electoral Act of 2006.*

Ground Eight

The learned trial Judge erred in law and fact when he found that the people of Mwansabombwe Constituency were not prevented from voting for a candidate of their choice due to allegations of bribery and corruption.

Ground Twelve

The learned trial court erred in law and fact when he held that there was no cogent evidence on record to prove that the 1st Respondent had paid water bills for Mwansabombwe Residents when there was cogent evidence on record where the 1st Respondent was heard at various meetings telling people that he had paid for water bills but the court preferred what he termed 'conventional way of proving payment' to evidence of eye witnesses who heard the 1st Respondent saying that he had paid for water bills for the Residents.

And

Ground Thirteen

The learned trial court erred in law and fact when he failed to apply the provisions of section 97 (3) of the Electoral Process Act No. 35 of 2016 on the facts on record.

It is our understanding that the Appellant's claim in ground seven is that the trial Court should not have found that section 97 of the EPA, 2016 is essentially the same as section 93 of the repealed **Electoral Act of 2006**. And therefore that the Court could not rely on **Brelsford James Gondwe v Catherine Namugala**[6] decided on the authority of the section 93 as such reliance prevented the Court from coming to the correct conclusion and finding that the allegation in issue had been proved. Further, in ground thirteen that the Appellant is claiming that the trial Court failed to apply section 97(3) of the EPA, 2016 to the facts on record thereby missing an opportunity to find that the allegation in issue had been proved.

The Appellant, in his heads of argument proceeded to argue that under section 93 (2) (a) of the **Electoral Act 2006** an election could be voided on account of any act of misconduct committed in relation to the election provided it was proved that the majority were or could have been prevented from electing the candidate whom they preferred. Whereas under section 93 (2) (c) of the same Act, the election could be voided on the basis of misconduct committed by the 1st Respondent or his agent or by someone

else with the knowledge and approval or consent of the Respondent or his agent. That section 97 (2) (a) of the EPA, 2016 seems to combine section 93 (2) (a) and (c) of the **Electoral Act 2006**. Further that under section 97 (2) (a) of the EPA, 2016, an election may be voided either because any candidate taking part in the election had committed an illegal act or because someone else had committed the misconduct with the knowledge and approval or consent of the candidate or his polling or election agent; and additionally that the majority of voters in the constituency were as a result prevented from electing the candidate they preferred. Thus the trial Court should not have applied the **Brelsford James Gondwe v Catherine Namugala**[6] case as the law had changed. That if the Court had correctly analysed the two provisions, it would have concluded that the election was voidable. Further that it was a misdirection on the part of the trial Court to hold that section 97 (3) of the EPA, 2016 can only be invoked after a finding is made under section 97 (2) (a) of the same Act and the illegal activity or misconduct has been established. That section 97 (3) of the EPA, 2016 can be applied on its own to nullify an election by finding that a case of misconduct had been established without requiring further proof that the electorate were prevented from electing a candidate of their choice.

For convenience we will begin by quoting the relevant provisions of the law. Section 97 of the EPA, 2016 provides:

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

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

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

(i) by a candidate; or

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

.....

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

(a) a corrupt practice or illegal practice was not committed by the candidate personally or by that candidate's election agent, or with the knowledge and consent or approval of such candidate or that candidate's election agent; (b) such candidate and that candidate's election agent took all reasonable means to prevent the commission of a corrupt practice or illegal practice at the election; and

(c) in all other respects the election was free from any corrupt practice or illegal practice on the part of the candidate or that candidate's election agent; the High Court or a tribunal shall not, by reason only of such corrupt practice or illegal practice, declare that election of the candidate void.

The relevant portion of the repealed 2006 Electoral Act reads:

93. (1) No election of a candidate as a member of the National Assembly shall be questioned except by an election petition presented under this Part.
(2) The election of a candidate as a member of the National Assembly shall be void on any of the following grounds which is proved to the satisfaction of the High Court upon the trial of an election petition, that is to say—
(a) that by reason of any corrupt practice or illegal practice committed in connection with the election or by reason of other misconduct, the majority of voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred;
.....
(c) that any corrupt practice or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or of that candidate's election agent or polling agent;
.....
(3) Notwithstanding the provisions of subsection (2), where, upon the trial of an election petition, the High Court finds that any corrupt practice or illegal practice has been committed by, or with the knowledge and consent or approval of, any agent of the candidate whose election is the subject of such election petition, and the High Court further finds that such candidate has proved that—
(a) no corrupt practice or illegal practice was committed by the candidate 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 candidates election agents;

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

After considering all the evidence, the trial Court said at page 36 of the record of appeal that:

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 Appellant claims the trial Court erred by citing an authority based on the Electoral Act of 2006. The trial Court adjudged at page 34 of the record of appeal, and we quote: "*...[S]ection 93 of the Electoral Act of 2006 and section 97 of the Electoral Process Act are similar in scope and effect...the two sections are the same in nature and effect save for drafting style.*" The Court used the words "scope", "nature" and "effect" to compare the repealed and the current provision and find similarity in the import of the two provisions. According to the *WH Smith Concise Oxford Dictionary*, these words mean "the range", "extent", "reach", "scale" and "latitude" of

something. We have looked carefully at the ordinary meaning of the words used in the two provisions. We do not agree that relevant portions of section 93 of the **Electoral Act of 2006** mean more or less the same as section 97 of the EPA, 2016.

We find that the trial Court did misdirect itself by stating that there were only drafting differences between the two provisions and that they were similar in scope and effect; that they were the same in nature save for the drafting style. There is a substantive change in the meaning and effect of section 93 of the Electoral Act of 2006 following the enactment of section 97 of the EPA, 2016. However we do not find that the trial Court thereby misapplied **Brelsford James Gondwe v Catherine Namugala**[6] to come a wrong finding in the case at hand.

The Supreme Court stated in **Brelsford James Gondwe v Catherine Namugala**[6] as follows: "*It is our view that the election of a candidate as a member of (sic) National Assembly will be rendered void if any one of the grounds set out in subsection 2(a)-(d) is establis:ıed...*" In our considered view, nullification was possible under the repealed section 93 of the **Electoral Act, 2006** which provided in subsection 2 (a), *inter alia*, that any illegality committed by any person in connection to the election which had the effect or likely effect of preventing the majority from electing a candidate of their choice was a

ground for nullification. This meant any election illegality by any person that could or did affect the majority in their choice of a candidate. The illegality had to be widespread in its effect. Alternatively, an election could be nullified under subsection 2(c) where a candidate or their agent or another person with the candidate or their agent's knowledge and consent was found liable for an illegality.

Under the EPA, 2016 an allegation of misconduct is proved only where it is shown that it was done by the candidate or their election or polling agent or by someone else but with the candidate or their agent's knowledge and consent or approval. **Halsbury's Laws of England,** Volume 15 para 755 defines the Respondent as "...the member of Parliament ...whose election or return is complained of..." The "candidate" referred to in section 97(2) (a) of the EPA, 2016 is in this case the 1st Respondent as the declared winner of the election, a decision challenged by the Appellant because of the 1st Respondent's alleged misconduct.

If a court finds a candidate liable under the said section 97 of the EPA, 2016, it must then also find that by virtue of the illegal act, the majority were prevented or were likely to have been prevented from electing a candidate of their choice. To appreciate what is meant by "the majority", we resorted to its natural and ordinary meaning found in the *WH Smith Concise Oxford*

Dictionary wherein the "majority" is said to be the greater number of a part. It is also pertinent to note that the word is used only with countable nouns. The numerical sense of "majority" has been further elaborated through the use of the term "widespread". In the *WH Smith Concise Oxford Dictionary* "widespread" means widely distributed or disseminated. In **Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others**[13] the Supreme Court shed light on what widespread means by stating that *"since a presidential election involves all the 150 constituencies; the petitioners must prove electoral malpractices and violations of electoral laws in at least a majority of the constituencies."*

We have examined the judgment of the trial Court and the evidence on record in the light of the law. The holding by the Supreme Court in **Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others**[13] is on point. The standard of proof required in an election petition is higher than the civil standard of a mere balance of probability as affirmed in **Mwalimu Simfukwe v Evaristo David Kasunga**.[18] We agree with the trial Court's conclusion that the alleged offence was not proved to the standard required by section 97(2) (a) of the EPA, 2016. No receipts bearing the name of the 1st Respondent or that of his election or polling agent were produced. PW3, PW4, PW5, PW6, PW7 and PW8 testified that they heard the 1st Respondent say that he paid the water bills. However this was not

the best evidence in the circumstances of this case. Receipts would have proved that payment was made and how many boreholes were paid for and whether they indeed serviced the majority of the electorate in Mwansabombwe. The standard of proof demands a fairly high degree of convincing clarity not only that payment was made by the 1st Respondent or with his blessing but that it was also widespread and that it did or could have affected the result. There is simply no material on record to consider under the second limb of section 97(2) (a) of the EPA 2016, relating to the effect on the majority.

The final question is the relationship between section 97(2) (a) and 97 (3) of the EPA, 2016. In **Brelsford James Gondwe v Catherine Namugala**[6] the Supreme Court had this to say:

> *Subsection 3 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 is being challenged...*

This is still the position under section 97 (3) of the EPA, 2016. We therefore agree with the 1st Respondent that there was no basis upon which the trial Court could resort to section 97(3) of the same Act after its finding under section 97(2) (a) of the EPA, 2016. The Court can only proceed to apply section 97(3) of the EPA, 2016 where it finds that the requirements

under section 97 (2) (a) of the same Act have been satisfied. The trial Court must make a finding that the Respondent is liable before it can make a further finding on whether the issue could have prevented or did indeed prevent the majority from exercising their free choice.

Section 97 (3) of the EPA, 2016 provides that despite the initial finding, a court need not nullify where the Respondent's evidence shows that he or she did not commit the wrongdoing personally or through his or her agent nor had knowledge of the act as well as consented to or approved it and took measures to prevent the wrongdoing. Therefore section 97(3) is not a standalone provision couched on the lines of the repealed section 93(2) (a) creating "strict liability". This is apparent from the use of the terms, "subject to (2)" at the beginning of section 97 (3) as well as the subsequent words "further finds" which in our considered view subjects section 97(3) to section 97(2). To argue that it is not so would mean succumbing to flawed reasoning where the law creates two parallel thresholds for the nullification of an election. This could mean that a party who fails under section 97 (2) (a) of the EPA, 2016 could in the alternative, succeed under section 97 (3) of the EPA, 2016 because the provable elements under the latter would be fewer. This would create an absurdity and that cannot be said to have been the

intention of Parliament. Grounds seven, eight, twelve and thirteen are therefore dismissed for lack of merit.

The entire appeal fails and is accordingly dismissed. We uphold the trial Court's declaration of the 1st Respondent as duly elected Member of Parliament for Mwansabombwe constituency. Ground nine having partially succeeded, we order that each party shall bear their own costs.

.....
H. Chibomba
President
Constitutional Court

.....
A. M. Sitali
Constitutional Court Judge

.....
E. Mulembe
Constitutional Court Judge

.....
P. Mulonda
Constitutional Court Judge

.....
M.M. Munalula
Constitutional Court Judge