

IN THE HIGH COURT FOR ZAMBIA

HOLDEN AT LIVINGSTONE



2002/HP/EP/0006

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IN THE MATTER OF: AN ELECTION PETITION

AND

IN THE MATTER OF: AN APPLICATION UNDER ARTICLE
72(1) OF THE CONSTITUTION OF
ZAMBIA

AND

IN THE MATTER OF: REGULATION 15 MADE PURSUANT
TO THE ELECTORAL ACT, 1991

AND 40

IN THE MATTER OF: THE MULOBETZI PARLIAMENTARY
ELECTIONS HELD IN ZAMBIA ON
THE 27 DECEMBER 2001

BETWEEN:

SIKOTA WINA

1st Petitioner 15

And

MAFO WALLACE MAFIYO

2nd Petitioner

And

GEORGE SAMULELA

3rd Petitioner

And 20

MICHAEL MABENGA

1st Respondent

And

THE ELECTORAL
COMMISSION



2nd Respondent

And

THE ATTORNEY GENERAL

3rd Respondent

Before Honourable Mr. Justice M.E. Wanki in Open Court

For the Petitioners: S. Sikota, Counsel of Central Chambers

For the 1st Respondent: R. Mainza, Counsel of Mainza and Company

For the 2nd and 3rd

Respondents: Mwaba, Principal State Advocate and Haimbe, Senior State Advocate

J U D G M E N T

On the 25 January 2002 Sikota Wina, Mafo Wallace Mafiyo and George Samulela (hereinafter referred to as the Petitioners) filed a Petition challenging the election of Michael Mabenga (hereinafter referred to as the 1st Respondent) as a Member of Parliament for the Mulobezi Constituency.

The Petition was verified by the affidavits that were sworn and filed by Sikota Wina, 1st Petitioner; Mafo Wallace Mafiyo; 2nd Petitioner; and George Samulela, 3rd Petitioner.

The basis of this Petition is as contained in paragraphs 5.1 to 5.8.3 as follows:

- 5.1 The 1st Respondent distributed medical drugs which were obtained from Medical Stores Limited during the election campaign at each of the twenty-seven polling stations as an inducement or bribe for people to vote for him.
- 5.1.1 The 1st Respondent through one DENNIS LYAMBAI collected and signed for the drugs on the 26 November 2001 even though he is the MMD Constituency Secretary and not authorized by the Ministry of Health to deal in or transport drugs.
- 5.1.2 The requisition Voucher for the drugs is in the name of "Hon. Mabenga MP".
- 5.1.3 The drug kits were first stored at the MMD office in Sichili which was used as the Distribution point.

5.1.4 The drugs were all distributed to the various polling stations right up to the date of voting.

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5.1.5 The Police arrested one CRISPIN MATENDE on 27 December 2001, the Headmaster of Kabinga Basic School Lwaimwila who was found distributing drugs and also treating people. Also arrested were BRIGHTON CHINYAMA MUSUMALI and Mr. KALUNDU.

5.2 The 1st Respondent cooconverted a Government house which was supposed to be allocated to a teacher into his MMD campaign post which was clearly a case of abuse of office or authority.

5.3 The Presiding officer at Kamanga Polling Station PATRICK CHARLES NAMENDA was "voting" on behalf of illiterate voters and marking the ballot papers in favour of the 1st Respondent after chasing away the Petitioners election agents. There was also no Policeman at the Polling Station provided by either the 2nd or 3rd Respondents.

5.4 The 1st Respondent distributed 110 blankets and 110 mattresses from Medical Stores Limited Lusaka and distributed them to voters shortly

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before the election and the requisition, voucher number 201398 and 201399 were marked "For Hon. Mabenga MP."

5.4.1 The distribution was done by the 1st Respondent and his agent D.S.

LYAMBAI the MMD Constituency Secretary, SENDOI MATAKAALA AND a Driver by the name of NJAPAU using ^S various vehicles including vehicle Registration Number AAX 1894.

5.4.2 The requisition was made after the dissolution of Parliamentary when the 1st Respondent was no longer MP or Minister and distributed to voters on condition or as an inducement that they vote for the 1st Respondent. ^{LD}

5.4.3 The said DENNIS LYAMBAI has his signature on all the goods intended for medical institutions that were diverted to the 1st Respondent's campaign.

5.4.4 There were also voucher numbers 201211 and 201391 marked for the 1st Respondent for 60 mattresses and 12 medical kits delivered to ¹⁵

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Sesheke Hospital and subsequently, diverted by the 1st Respondent and his agents.

5.5 The 1st Respondent abused the Constituency Development Fund for purposes of his campaign.

5.5.1 Though there were three constituencies in the District which were supposed to be recipients of the constituency Development Fund only the 1st Respondent's constituency received thirty million Kwacha after the dissolution of Parliament when the 1st Respondent had no jurisdiction over the funds.

5.5.2 The funds were collected by the Local Government officials accompanied by the 1st Respondent who had at that time seized to be a Member of Parliament.

5.5.3 The funds were utilized by the 1st Respondent for his election campaign and the 3rd Respondent neglected their duty and aided the 1st Respondent to utilize these Government resources.

5.6 The 1st Respondent used government transport and facilities for his campaign.

5.6.1 The 1st Respondent used a government vehicle belonging to a government department to ferry Indunas to Mwandji for a secret meeting where he advised them to tell their subjects that if they voted for the 1st Petitioner they would lose their land and forests to a white man.

5.6.2 That several vehicles falling under the Ministry of Tourism were used for purposes of the 1st Respondent's campaign in spite of the fact that 2nd Respondent had banned the use of such vehicles during the elections.

5.6.3 The 1st Respondent used a vehicle marked MMD Mulobezi Constituency which was obtained using state funds and not properly cleared.

5.7 The 1st Respondent used widespread bribery and corruption during the election period which included cash offering and in some areas

cooked meat to voters as they entered the restricted area of the Polling Station environs.

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5.7.1 The 1st Respondent gave money as inducement to voters which varied from K5, 000.00 to as much as K40, 000.00 as inducement for them to vote for him especially around Sichili, Bwina and Nawinda Polling Stations.

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5.7.2 The 1st Respondent threatened voters in the Mulobezi Constituency to the effect that Food Relief Maize would only be extended to those who voted for him and the MMD.

5.8 At the opening of some ballot boxes it was found that the ballot papers were not in sealed envelopes and locked boxes thereby facilitating tempering with the ballots.

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5.8.1 The ballot boxes were not properly guarded.

5.8.2 The voting was conducted in some areas in uneffectual lighting as the voting started late and went right past midnight in some areas.

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5.8.3 Counting of votes was done in unadequate lighting conditions.

The Petitioners prayed that:-

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1. That it may be determined and declared that the Respondent was not duly elected as Member of Parliament for the Mulobezi Constituency.
 2. That it may be determined and declared that the Electoral Commission willfully neglected its statutory duty to superintend the election process thereby allowing a fraudulent exercise favouring the Respondent.
 3. That it may be determined and declared that the electoral process was not free and fair and that the election was rigged and therefore null and void.
 4. That it may be determined that the corrupt practices and electoral regulation breaches so affected the election result that they ought to be annulled.
 5. That it be ordered that a scrutiny of the Parliamentary Ballot papers
 6. That the Petitioner may have such further or other relief as may be just.
 7. That the Respondent be condemned in the costs of and occasioned by this petition.

On the other hand Michael Mabenga, 1st Respondent filed an Answer to the Petition on 20 February 2002. 67

This petition was presented under Article 72(1)(a) of the Constitution of Zambia Chapter 1 of the Laws of Zambia which reads:-

"72(1). The High Court shall have power to hear and determine any question whether — 5

- (a) Any person has been validly elected or nominated as a member of the National Assembly or the seat of any member has become vacant;"

However, an election of a Member of the National Assembly shall be declared void on any of the grounds under Section 18(2) of the Electoral Act, Chapter 13 of the Laws of Zambia. The Section reads: 10

"18(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; or
- (b) subject to the provision of subsection (4), that there has been a non compliance with the provision of this Act relating to the conduct of elections, and it appears to the High Court that the election was not conducted in accordance with the principles laid down in such provisions and that such non compliance affected the result of the election
- (c) that any corrupt or illegal practice was committed in connection with the election by or with the knowledge or consent or approval of the candidate or of his election agent or of his polling agents;
- (d) that the candidate was at the time of his election a person not qualified or a person disqualified for election.

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Considering the grounds of this petition I am convinced that the provisions of Section 18 of the Electoral Act Chapter 13 of the Laws of Zambia (hereinafter referred to as the Act) under which this petition is based is 18(2)(a)(b) and (c). The Petitioners' case was in summary alleging that there was corrupt practice or illegal practice committed in connection with the election or other misconduct committed by the 1st Respondent or committed with his knowledge in terms of Section 18(2)(a) and (c) and that there was non compliance with the provisions of the said Section 18(2)(b) of the Act.

It is therefore incumbent upon the Petitioners to prove their case on a balance of probabilities by proving the allegations they are relying on.

In support of the Petition the Petitioners gave evidence at the hearing and called 18 witnesses. The summary of the Petitioners' case was that the Petitioners and others who included Honourable Michael Mabenga, 1st Respondent contested the Parliamentary Elections that were conducted on 27 December 2001 in the Mulobezi Constituency. Following the said elections the 1st Respondent was on 29 December 2001 declared the winner

The 1st Petitioner stumbled on information that there were people who were in possession of drug kits and who were dispensing drugs during the

election campaign period. Since he got interested in the information, he instituted investigations that led him to the Medical Stores in Lusaka where they discovered from the documents supplied to them by the Management of the said Medical Stores that one Lyambai who described himself as Constituency Secretary for the Mulobezi Constituency between 26 and 27 November 2001 obtained 27 small drug kits, 12 big drug kits, blankets and mattresses on behalf of Honourable M. Mabenga, MP, one of the Parliamentary candidates for the Mulobezi Parliamentary Constituency. That surprised them because the said Lyambai was not a Medical person and was not trained to handle drugs and further because at the time the said items were obtained the said Honourable Mabenga was not a Member of Parliament for the area, Parliament having been dissolved and further that it was not the duty of a Parliamentary candidate to obtain drugs and other supplies from Medical Stores. The said Lyambai who obtained the items in addition to his functions as Constituency Secretary for the Movement for Multiparty Democracy's Mulobezi Constituency was also the campaign manager for Honourable Mabenga.

Back in Mulobezi the discovery of drug kits in the hands of teachers and other people not authorized to possess drugs and the irregular supply of

drugs and blankets to health institutions provoked further investigations by Medical staff from Sichili Mission Hospital with the assistance of police officers from Sichili Police Post led by the officer in charge. Sergeant Sijabu. Those investigations which were aimed at recovering drugs in wrong hands led to the recovery of more drug kits and blankets which were in wrong hands and irregularly supplied to medical institutions. Further the said investigations revealed the extent of the irregular distribution of drugs and blankets during the campaign period. It also showed to what extent the Mulobezi Constituency Movement for Multiparty Democracy Party officials were distributing and dispensing drugs and further distributing blankets to medical institutions and individuals. There was further evidence to the effect that more drug kits and blankets would have been recovered if the officer in charge, Sesheke Police Station did not stop the investigations by the team of medical officers from Sichili Mission Hospital and police officers from Sichili Police Post.

It was also revealed that during the campaign period 6 Indunas or Sub-chiefs from Mulobezi Constituency were transported in a vehicle that was suspected to be Honourable Mabenga's official vehicle for a secret meeting at the Mwandi Royal Establishment which was addressed by the

Lyanshimba. In his address the Lyanshimba was said to have directed the Indunas to inform their subjects to vote for Honourable Mabenga who originated from the area and not to vote for Sikota Wina who did not originate from the area. They were further directed to inform their subjects that if they voted for Sikota Wina, he would get their land and sell it to a white man. S

It was further the Petitioner's case that because during the elections money among the Movement for Multiparty Democracy campaigners was flying around so much that they did not know where it was coming from. Subsequently it was discovered that about K29 million was withdrawn from the Mulobezi Constituency Development Fund Account held at the Finance Bank Scsheke Branch by Gabriel Mubalu who was accompanied by Honourable Mabenga on 3 December 2001. It was later discovered that during 2001 it was only Mulobezi Constituency Development Account, which was funded. Evidence was further adduced relating to the procedure relating to drawing funds from the said Account. According to the Petitioners the said procedure was not followed. They therefore suspected that the money that was drawn from the said Account on 3 December 2001 was not used for the purpose such account was set up but to further Honourable Mabenga's campaign. 20, 45

The Petitioners' further adduced evidence relating to the use of government properties by Honourable Mabenga. They contended that he converted a teacher's house at Sichili Day Secondary School as his Command Post. It was further contended that Honourable Mabenga was during the campaign period using a government vehicle, namely GRZ 5 757BP. That government vehicle was used to convey the Indunas for the said secret meeting at Mwandu and that the government vehicle was being used for campaigns and that it was nearly damaged by the opposition cadres at one time. It had to be taken to Sichili Police Post for safe custody.

Further evidence was adduced to the effect that food and drugs were 10 being distributed by the Movement for Multiparty Democracy cadres at or near some Polling Stations on the Election Day.

The Petitioners further contended that there were a lot of breaches of electoral rules. Voting took place for more than a day at some Polling Stations and at night without proper lighting and that counting at some 15 places took place at night without proper lighting. Voting at some Polling

led to the effect that there were no security officers at some Polling Stations.

Because of the foregoing numerous irregularities committed, the petitioners felt that the elections were not free and fair. That being the case they prayed that the results for the Mulobezi Parliamentary Constituency be declared null and void and that the seat be declared vacant. The foregoing is the summary of the evidence supporting the Petitioners' case on the alleged irregularities.

In rebuttal the 1st Respondent gave evidence and called 35 witnesses.

The summary of the 1st Respondent's case was that he ordered the drugs from Medical Stores because as Member of Parliament for Mulobezi he received reports of an outbreak of a mysterious disease that caused many deaths during July 2001 and because he received complaints of lack of medicines in his Constituency during his visits. When the said drugs were transported to Mulobezi he called and handed them over to Mwayanguba, PW7 and Nyanbe Mwakamui, PW8 both from Sichili Mission Hospital, however the two complained of lack of transport. As such he had to ask his

people to assist in transporting the drugs. He denied any wrongdoing and that he did not use the drugs for his political campaign. He also denied distributing the drugs to un-authorized people. The drugs were ordered for the use and benefit of the community at large. S X

The 1st Respondent's case was further that he did not utilize any government vehicles during his election campaign. He had four vehicles at his disposal, namely his own personal vehicle, a vehicle he borrowed from a friend in Mongu, and a vehicle he borrowed from a friend in Lusaka and the Movement for Multiparty vehicle. He left the government vehicle which he used from Lusaka in Livingstone, namely GRZ 757BP in the custody of the Chief Personnel Officer Mr. Mubanga. It was only driven to Mulobezi for the use of the security officers during the Presidential visit on 20 December 2001 and was returned to Livingstone on 21 December 2001 immediately after the President's departure. Further, he denied knowledge and transporting the Sub-Chiefs to Mwandi for a meeting. The house at Sichili Day Secondary School was not used as his party's campaign post, but as his residential house where he used to reside. Before they were given the house it had been abandoned and the house was given to them on conditions that he fulfilled before and after the elections. 18

The 1st Respondent refuted the allegations that he was distributing blankets that he obtained from Medical Stores. He contended that the blankets that his team distributed to Health Institutions in Mulobezi were donated by a None Governmental Organisation. He further refuted the allegations that he distributed the blankets to individuals and that he distributed the blankets to further his campaign. S

Concerning the alleged use of funds that were withdrawn from the Mulobezi Constituency Development Fund Account, the 1st Respondent adduced evidence refuting the allegation. The evidence was further to the effect that the 1st Respondent had no knowledge of the said withdrawal and he and his team had nothing to do with the withdrawal and the money that was withdrawn. Evidence was further adduced to the effect that the money was withdrawn for projects that were approved by the Committee. However, due to information that was received the money was not given out for the projects. The Committee at its meeting that was held on 7 December 2001 decided that the withdrawn money be kept by Gabriel Mubalu RW6 the Chairman who had been keeping it pending the elections. Following the 45

election the said Mubaru decided to keep the money,
was linked to the Movement for Multiparty for Democracy campaign.

The 1st Respondent further adduced evidence to the effect that he and his team were not involved in the dishing out of any food, drinks and money to the voters. He also refuted the allegations that he gave K100, 000.00 to Rodwell Nalubanga Sakulubwa, PW5 and indeed any other person during the campaign period. According to the evidence adduced, the 1st Respondent and his team were not involved in any wrongdoing that would justify the nullification of the results of the elections held on 27 December 2001. He therefore maintained that he was duly elected and declared the winner.

The Electoral Commission, 2nd Respondent and the Attorney General, 3rd Respondent did not adduce any evidence as the Plaintiffs discontinued the Petition against them after studying their answer which was filed after the Petitioners closed their case.

Following the close of the evidence the Court received written submissions that were filed on behalf of the Petitioners and the 1st

Respondent which submissions I have read and would refer to later in my judgment.

The following facts were not in dispute.

1. That the Petitioners and the 1st Respondent and others were candidates for the Mulobezi Parliamentary Constituency during the elections held on 27 December 2001.
2. That the 1st Respondent was the declared winner in the poll.

In determining this Petition I propose to consider each of the grounds separately as they appear in the Petition Ground.

Ground 5.1:-

The 1st Respondent distributed medical drugs, which were obtained from Medical Stores Limited during election campaign at each of the 27 Polling Stations as an inducement or bribe for people to vote for him.

The 1st Respondent's response is as stated in paragraphs 5, 6 and 7 of his Answer.

From the evidence adduced before the Court I have found that there is no dispute that the drugs were obtained from Medical Stores Limited on 26

November 2001 and 27 November 2001 by Denis Lyambai, the Movement for Multiparty Democracy Constituency Secretary for Mulobezi and campaign Manager for the 1st Respondent and the Requisitions were clearly marked "Hon. Mabenga MP. It is also not in dispute that at the time the drugs were requisitioned and obtained from Medical Stores Honourable Mabenga, 1st Respondent was not Member of Parliament for Mulobezi Parliamentary Constituency as Parliament was dissolved on 21 November 2001.

The issues in dispute are the purpose for which the drugs were obtained and distributed. As stated above there is no dispute that the drugs were obtained by Honourable Mabenga from Medical Stores. The issue that I will have to determine is the purpose for which Honourable Mabenga obtained the drugs.

According to paragraph 6 of his Answer which for easy of reference I will quote:

"6. The 1st Respondent will further aver that the said Medical drugs were procured by him in good faith after a tour conducted by him of the Constituency revealed that there was an outbreak of a mysterious disease in the said Constituency between the month of August and September 2001".

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Further in his evidence in Court, Honourable Mabenga stated that he procured the drugs for two reasons; during his tours as Member of Parliament he received complaints of lack of medicine and the reports he received of a mysterious disease from his brother Raphael Mabenga RW32 which led to the death of people. S

From the evidence adduced on behalf of the Petitioners (particularly that from Nyambe Mwalamui, (PW8) and the 1st Respondent (particularly that from Raphael Mabenga, (RW32) and from Mutoloki, (RW21) the mysterious disease that caused the said deaths occurred in July 2001. Further according to the evidence on record Medical authorities had 10 investigated and identified the mysterious disease as pneumonia in accordance with the procedure and had contained the disease. It is therefore difficult to believe the 1st Respondent's contention. It would be unreasonable for one to wait for about 4 months after the occurrence of the said mysterious disease before ordering the drugs on 17 November 2001. 45 Further it could not be said to be a coincidence that drugs meant to treat the mysterious disease that occurred in July could be obtained in November after 1st Respondent had ceased to be a Member of Parliament for the area and during campaign. If the said drugs were ordered for the treatment of the said

mysterious disease

have informed the Medical authorities to collect the drugs or he would have delivered the whole consignment to Sichili Mission Hospital other than keeping the drugs at the house at the school.

Regarding the contention that he procured the drugs because of the complaints he received of lack of drugs. If he received those complaints while he was Member of Parliament for Mulobezi why did he wait after he ceased to be Member of Parliament to order the drugs. If the 1st Respondent procured the drugs to treat a mysterious disease or because of the complaints he received while Member of Parliament, one does not understand the logic of involving the Movement for Multiparty Democracy officials. particularly Lyambai, RW31 the Constituency Secretary and his campaign Manager and Simasiku RW29 the Constituency Chair man to obtain the drugs from Medical Stores and to convey the drugs to Mulobezi. As a Minister and if those drugs were meant for the purpose, 1st Respondent told the Court, one would have expected him to use Government Personnel from his Ministry to get the drugs from Medical Stores using a Government vehicle and to transport them to Mulobezi.

I would agree with the Petitioners that the purpose for the drugs by the 1st Respondent was to further his political campaign. No wonder according to Sergeant Sinjabu PW9, the 1st Respondent asked the former President to donate the drugs at the public meeting at the briefing. I do not believe what 1st Respondent and Simasiku, RW29 said about PW9 not attending the briefing because he was junior. PW9 did not attend the briefing in his capacity as a Police Sergeant but as an officer in charge of Sichili Zambia Police Post. As officer in charge, PW9 was the most senior Police Officer in Mulobezi. If PW9 was not allowed to brief the President on security matters in the area, who else could brief the President on the issue? Could Simasiku and the other party officials brief the President on security matters. Unless, if Honourable Mabenga, 1st Respondent and Simasiku could say that the police were not represented which I doubt. In fact what PW9 said about the request to the President to officially donate the drugs was confirmed by Simasiku in his statement to the Police, part of exhibit P.16, when he said and I quote:

"----- We were given partly materials and cartons of drugs to bring to Sichili Hospital and then Hon. Mabenga told us not to hand over the same until he arrives to Sichili and he further said the same will be

officially handed over by the Republican President when he comes to
Sichili.-----”

It was therefore the intention of Hon. Mabenga that the drugs be
officially handed over by the President at a Public Meeting. That supports
the finding that the drugs were procured to further Honourable Mabenga's
campaign. I would therefore dismiss what Honourable Mabenga told the
Court as reasons for obtaining the drugs as a mere afterthought. The drugs
were obtained to further 1st Respondent's campaign.

Concerning the distribution of the drugs and its purpose. There was
evidence adduced to the effect that the drugs were distributed by the
Movement for Multiparty Democracy officials notably Lyambai, RW31 the
Constituency Secretary who was also the 1st Respondent's campaign
Manager and Ndala who was the 1st Respondent's Agent on the instructions
of the Honourable Mabenga 1st Respondent. The drugs according to the
evidence were distributed to individuals and medical institutions in
Mulobezi Constituency. According to Simasiku RW29, when the two
Nyambes were called and handed over some of the medicines, they said they
had no transport. It was then that Honourable Mabenga, 1st Respondent

directed Lyambai and Ndala to assist. This was ~~the~~
Respondent in his evidence. According to the evidence by witnesses called
by both Petitioners and Respondents, the drug kits were not only distributed
to medical institutions but to individuals at large. It was because of the
distribution to individuals that raised the concern of the Medical officials. S
The Petitioners have proved that the drugs were distributed in Mulobezi
Constituency not necessarily that they were distributed at Polling Stations.

Coming to the purpose for which the drugs were distributed. The
Petitioners allege that the drugs were distributed for the purposes of
campaign. On the other hand the 1st Respondent in paragraph 7 of his 10
answer and in his evidence contended that the drugs were not intended for
campaign purposes but the same were meant to benefit all members of the
community who were at the time in danger of contracting the mysterious
disease. I have dealt with the issue of the mysterious disease above, there is
therefore no need of my repeating, except to say that there was no risk of 15
numbers of the community contracting any mysterious disease in December
2001.

Both oral and documentary evidence before the Court particularly the statements in exhibit P.16 have shown that the 1st Respondent was distributing the drugs at times at Public meetings he held. That is evidence that the 1st Respondent had a motive. Further if the drugs were meant to benefit the community, one would have expected the drugs to be taken to medical institutions where there were qualified personnel and where people went for treatment and not at schools. Schools are meant for educating children and teachers are qualified to teach and not to dispense drugs. Further if the drugs were not meant for campaign purposes, why did the 1st Respondent involve his campaign Manager and Agent and his party Constituency Chairman one may ask. From the overwhelming evidence adduced before the Court I have found that the drugs were intended to further Honourable Mabenga, 1st Respondent's campaign and to induce voters. I do not accept the 1st Respondent and his witnesses' Lyambai, RW31 and Simasiku RW29's denials. Infact I did not find the two said witnesses impressive and as party officials they had interest to protect as such they were capable of telling lies to protect the 1st Respondent.

In light of the foregoing I have found that the Petitioners have proved on a balance of probabilities that the obtaining and distribution of the drugs

were intended to further the 1st Respondent's campaign and as inducement for to voters.

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Concerning the second ground, namely 5.1 - the 1st Respondent through one Denis Lyambai collected and signed for the drugs on 26 November 2001 even though he is the MMD Constituency Secretary and not authorized by the Ministry of Health to deal in or transporting drugs. The 1st Respondent's response is as contained in paragraph 8 of his answer. From the answer one would notice that the 1st Respondent does not dispute that the said Denis Lyambai collected and signed for the drugs on 26 November 2001. He however, denied that Denis had no authority from the Ministry of Health to deal and transport the said drugs. He further contends that the said Lyambai was lawfully issued with the drugs by the Ministry of Health to deal and transport the said drugs. He further contends that the said Lyambai was lawfully issued with the drugs by the Ministry of Health through Medical Stores and the same were transported by the 1st Respondent as the Rural Health Centres and Community Health care units on whose behalf the said drugs were obtained had no transport.

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I will have to determine whether the said Lyambai had authority from the Ministry of Health. Since that issue was peculiar to Lyambai, it was up to him to show that he had the said authority. In his evidence Denis Lyambai, RW31 informed the Court how Honourable Mabenga, 1st Respondent asked him to do him a favour by collecting some items from Medical Stores. He then went to Medical Stores where he signed for and obtained the drugs on behalf of the 1st Respondent which he took to his house. The said Lyambai in his evidence did not say he had authority to handle the medicines. The evidence by the 1st Petitioner that drugs were not supposed to be handled and transported by an unauthorized and unqualified person has not been disputed. There has not been any evidence adduced to prove that the said Lyambai was authorized and qualified. The evidence before the Court has shown that Lyambai other than being a Movement for Multiparty Democracy Constituency Secretary was also a Teacher. There has been no evidence to show that Lyambai had any training in medicine. In the circumstances I have found that the Petitioners have proved the second ground.

Concerning the third ground, namely 5.1.2, the Requisition Voucher for the drugs is in the name of "Honourable Mabenga, MP". The 1st

Respondent's response is contained in paragraphs 11 and 12 of his answer. /7U
not much dispute concerning this ground. It is a matter of fact that does not need evidence to prove or disapprove it. After examining the said Voucher I have found that it is so marked.

Concerning ground 4, namely 5.1.3 – the drug kits were first stored at S MMD office in Sichili which was used as the distribution point. The 1st Respondent's response is as contained in paragraphs 11 and 12 of his answer.

The evidence that has been adduced before the Court on behalf of the Petitioners and the 1st Respondent particularly that from Simasiku, RW29 10 was that the drugs were stored at the Teacher's house at Sichili Day Secondary School. It was to that house that Nyambe PW8 was called to be handed with Sichili Hospitals' share of the drugs. Further the 1st Respondent admitted in his evidence that the drugs were stored at the house at Sichili. It is therefore a fact that has been admitted and supported by the evidence on 45 record.

Concerning ground 5, namely 5.1.4 – the drugs were all distributed to various Polling Stations right up to the date of voting. The 1st Respondent's

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response is contained in paragraph 13. This ground is supported by the evidence on record that was adduced by the Petitioners as well as the 1st Respondent. The said evidence showed that the 1st Respondent and his men distributed the drugs up to the voting day. In fact the 1st Respondent in paragraph 13 of his answer does not dispute the distribution of the drugs was S up to voting day. The only issue disputed is the allegation that distribution was done to Polling Stations. In the circumstances I have found a fact that the distribution of the drugs was done up to the date of voting. was however, not done at Polling Stations but in Mulobezi generally.

As regards ground 6, namely 5.1.5 - the arrest of Crispin Matende on 10 December 2001 the Headmaster Lwamwila who was found distributing drugs and also treating people. Also arrested were Brighton Chinyama, Msumali and Mr. Kalundu. The 1st Respondent's response is as contained in paragraph 15 of his Answer. According to him the arrest of the three was lawful as the three were members of community health care committees 15 had authority to process and to treat people using drugs that had been supplied to them lawfully by relevant authorities.

From the foregoing answer it would seem the arrest of the three for being found distributing and dispensing drugs is not disputed. What is in dispute is whether the three had authority to distribute and to dispense drugs. 7 2

The evidence adduced before the Court especially that of PW7 and PW8 has shown that the three were not community health workers as such they had no authority to distribute let alone dispense drugs. According to the evidence adduced on behalf of the Petitioners the three had no training in dispensing drugs and were not registered by Sichili Mission Hospital. The evidence has further shown that the three who were Teachers were not members of the community health care committees. According to the 1st Petitioner and PW1 even if the three were members of health care communities, membership of such committees did not authorize them to distribute and to dispense drugs. 5 10

From the evidence and the undisputed issues. I am satisfied that the Petitioners have proved that the three were arrested for distributing and dispensing drugs. I am further satisfied that the three did not have authority to distribute and dispense drugs. The Petitioners have therefore proved ground 6. 15

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Concerning ground seven, namely the 1st Respondent converted a Government house which was supposed to be allocated to a Teacher into his MMD campaign post which was clearly a case of abuse of office or authority. The 1st Respondent's response is contained in paragraphs 17 and 18 of his Answer. The 1st Respondent according to his answer denied converting a house which was supposed to be allocated to a Teacher into his MMD campaign post and that he was guilty of abuse of office and authority, however he admitted that the house was vacant at the time he converted it and it was not ear marked for allocation to any teacher as all the Teachers at the school strongly believed that the said house was haunted following the death of two Teachers who previously occupied the same. He further contended that he used the house in question for the purposes of lodging only with the consent of the Headmaster in charge of the school while the 1st Petitioner was accommodated in a Guest house belonging to the Hospital the property of GRZ.

From the answer I have found that the occupation of the Government house at Sichili Day Secondary School by 1st Respondent is not disputed. There is evidence both oral and documentary to the effect that the 1st

Respondent and his party asked for the house from the Headmaster Mr. Mumeka who authorized them to use the house which according to the circular from the Ministry of Education was not proper. In both his evidence and his answer the 1st Respondent contended that he was only using the house for lodging and denied that he was using the house as MMD campaign post. The evidence adduced on behalf of the Petitioners and the 1st Respondent has however, shown that the MMD cadres and senior party officials used to meet at that house. The evidence has also shown that the storage and distribution of drugs was done there.

It is therefore not true that 1st Respondent only used the house for lodging purposes. Even then since he was on political campaign in my view his occupation and use of the Government house was not proper and contrary to the spirit of the circular from the Ministry of Education. As to the contention that he used the Government house because 1st Petitioner used the Guest house at Sichili Hospital. In my view that is not a proper comparison. The Guest house is used for commercial purposes and there was nothing to restrict its use, whereas the Teacher's house is not used for commercial purposes. Further the evidence has shown that 1st Petitioner paid for the use of the Guesthouse, whereas on the evidence adduced by the

1st Respondent I have found that there is a doubt whether he paid for the use of the Government house. T →

In the circumstances I have found that the Petitioners have proved the seventh ground.

As to ground eight, namely, 5.3 – the Presiding officer at Kamanga Polling Station Patrick Namenda was voting on behalf of the illiterate voters in favour of the 1st Respondent after chasing away the Petitioner's Election Agent. This ground fell away as the Petitioners' discontinued the action against 2nd and 3rd Respondents. S

Concerning ground 9, namely 5.4 – the 1st Respondent distributed 110 blankets and 110 mattresses from Medical Stores Limited Lusaka and distributed them to voters shortly before the election and the requisition voucher numbers 201398 and 201399 were marked "for Mabenga MP". The 1st Respondent's response is as contained in paragraph 22. There is evidence that is not in dispute that Lyambai, RW31 signed for blankets and mattresses on the said vouchers. However, according to him though he signed for both mattresses and blankets due to the capacity of the vehicle he was using, he 10 15

could not get the mattresses. He only obtained 60 blankets leaving the mattresses and the rest of the blankets at the Medical Stores. That is supported by the evidence of the witnesses from Medical Stores who said that the mattresses were delivered in January 2002. That evidence is not disputed and the Petitioners did not adduce any evidence to the effect that the 1st Respondent collected the mattresses and the blankets that remained and delivered them to Mulobezi during the campaign period. In the circumstances the allegation regarding the delivery of the mattresses is found to be baseless. 10

As to the delivery of the 60 blankets, it is clear from Lyambai's evidence that he obtained the blankets on behalf of the 1st Respondent and took them to his house. However, 1st Respondent was silent as to what happened to those blankets. Lyambai in his evidence said at the time when he and 1st Respondent left for Mulobezi on 28 November 2001, the items that he collected from the Medical Stores were left at Mabenga's house. 11
Simasiku, RW29 in his evidence, talked of transporting only drugs. Concerning the blankets that were distributed to the workers at Sichili Mission Hospital that PW8 talked of in his evidence and those that were distributed to Mulobezi Rural Health Centre that John Nyanga, RW34 talked

of in his evidence both 1st Respondent and Lyambai RW31 stated that those blankets were donated by an NGO known as Women in Health Association. Lyambai went further to inform the Court how they traveled with two women from that organization who carried two bales of blankets on 28 November 2001 which blankets they left at Mulobezi Saw Mills. He also explained that those blankets were later collected by Ndala who distributed them. The 1st Respondent in his evidence did not talk of giving a lift to any women from an NGO who were carrying blankets. He also did not talk of leaving any blankets at Mulobezi. Edina Kabungo, RW24 the National Chairlady of the NGO called women in Health Association of Zambia in her evidence informed the Court that her organization first donated blankets to Mulobezi Constituency through the then Member of Parliament the 1st Respondent in May 2001 when they donated one bale. The last time they donated two bales of blankets was in July 2001. She denied donating any blankets or traveling to Mulobezi in November 2001.

The question that begs an answer is where did the blankets that PW8 and RW34 talked of and which were subsequently recovered by RW9 come from? Further what has happened to the 60 blankets that RW31 obtained from Medical Stores and left at 1st Respondent's house? Could it be

assumed that they are still at 1st Respondent's house? It is difficult to believe that those blankets were still at the 1st Respondent's house. It is further difficult to believe that the blankets donated to workers at Sichili and to Mulobezi Hospital were part of the blankets that were donated by RW24 Organization in July 2001. If they were then one would not be far from truth to assume that the 1st Respondent kept them for the purpose of election. There being no explanation to the questions I have posed, the only reasonable inference to be drawn is that the blankets that the 1st Respondent distributed to the workers at Sichili Hospital and to Mulobezi Rural Health Centre were part of the blankets that Lyambai obtained and left at his house.

In the circumstances, I have found that the Petitioners have also proved this ground.

In paragraphs 23 and 24 of his Answer, the 1st Respondent counter claimed against the 1st Petitioner. He claimed that the 1st Petitioner indulged in malpractice in that he distributed plastic buckets and bowls as well as 2.5 litres empty containers throughout the constituency in order to induce voters to vote for him. The 1st Respondent further claimed that the 1st Petitioner contrary to electoral regulations slaughtered one herd of cattle at Machile a

pieces of meat to voters. The 1st Respondent however, did not adduce sufficient evidence so as to prove his counter claims: / /

Concerning ground eleven, namely, 5.4.2. The requisition was made after the dissolution of Parliament was made when 1st Respondent was no longer MP or Minister and distributed to voters on condition or as an inducement that they vote for the 1st Respondent. The 1st Respondent's response is as contained in paragraph 25 S

After considering the evidence adduced, I have found no evidence to support this ground. It therefore fails. 6

Concerning ground twelve, namely 5.4.3 - The said Denis Lyambai has his signature on all the goods intended for medical institutions that were diverted to the 1st Respondent's campaign. The 1st Respondent's response is as contained in paragraph 27 of the Answer. He denied diverting the goods intended for medical institutions. 15

The evidence adduced before the Court showing that the Respondent obtained the goods, which he kept at the Sichili house, and started to distribute to individuals at Public Meetings he addressed has proved that the 1st Respondent diverted the goods. 81

Further it is a fact that cannot be disputed that Lyambai's signature is on all vouchers from Medical Stores. In the circumstances I have found that the Petitioners have proved this ground. 15

Concerning ground thirteen, namely 5.4.4. - The 1st Respondent's response is as contained in paragraph 28. From the evidence of Lyambai, RW31 which was supported by the evidence of the witnesses from Medical Stores, the mattresses were not collected by him. They were instead delivered to Sesheke District Hospital. That being the case they were not diverted by the 1st Respondent for his campaign. The allegation about the 60 mattresses therefore fails. Concerning the 12 drug kits, as said above those and other drug kits were diverted by the 1st Respondent for his campaign. 20

Concerning ground fourteen, namely, 5.5; 5.5.1; 5.5.2 and 5.5.3 - concerning the Constituency Development Fund. The 1st Respondent's response is as contained in paragraphs 30 and 31 of his answer. 81

There was no direct evidence adduced by the Petitioners to the effect that the 1st Respondent abused the constituency fund or used it for his campaign. They however, adduced circumstantial evidence to that effect through Mwanamukaesi Sipako, PW6. the bank manager with Finance Bank, Sesheke Branch. His evidence was to the effect that they maintained 3 Accounts of Constituency Development Funds which included that of Mulobezi Parliamentary Constituency. He further stated that. that account received an allocation on 21 November 2001. Before they received the allocation he received telephone calls on two occasions from 1st Respondent inquiring whether the account had been funded. On the third occasion that the 1st Respondent rang he was told that the account had been funded. After that on 3rd December 2001 Honourable Mabenga, 1st Respondent went to the bank in company of Gabriel Mubalu who presented and cashed a K29. 900,000.00 cheque which was drawn on the Mulobezi Constituency Development Fund Account. PW6 finally produced the bank statements for 45

the Mulobezi Account and the other accounts and the cheque and were marked as exhibits P.5 to P.9. 0/

The 1st Respondent in his evidence denied any knowledge of the withdrawal and going to the bank in company of Gabriel Mubalu. According to him he only met the said Gabriel Mubalu when he went to buy foreign exchange to enable him go to buy fuel. S

In his evidence Gabriel Mubalu, RW6 said that on 3 December 2001 he went to Sesheke to get money for the projects they as a Constituency Development Committee approved. The Council Treasurer prepared a cheque for K29, 800,000.00 in his name which was signed by the Treasurer and counter signed by himself. He then went to Finance Bank and cashed the cheque. While at the bank he met the 1st Respondent as he was walking out. On 7 December 2001 he convened a meeting of his Committee to brief them about the money. It was at the meeting that one of the members observed that the opposition members were linking the Constituency Development Funds withdrawn to the Movement for Multiparty Democracy Campaign. After debate on the issue the Committee resolved that the K29, 800,000.00 be kept by him as Chairman pending the elections. He then took

the money to his home where he kept it in his safe. After the elections, there was a talk of petitioning the election results. Since the money was linked to the campaign he decided to keep it as an exhibit. He further informed the Court that in March 2002 he received a letter from the Council Secretary dated 12 January 2002 in which he was informed of the dissolution of the constituency Development Fund Committees. However, despite that he still kept the money up to 17 June 2002. 53

The issue in dispute is whether the K29, 800,000.00 that was withdrawn on 3 December 2001 by RW6 was intended to be used for the 1st Respondents' campaign. The withdrawal of the money is not disputed. 60 According to Sipalo PW6, before the Mulobezi Constituency Account was funded, 1st Respondent rang him on numerous occasions inquiring whether the Account had been funded. Shortly after he was informed 1st Respondent went to the bank in company of Mubalu, RW6 who cashed the K29, 800,000.00 cheque. In response the 1st Respondent denied knowledge of the withdrawal of the money and accompanying Mubalu. 45

The determination of the issue will depend on the demeanor of Sipalo, the Bank Manager, PW6 on one hand and the demeanor 1st Respondent and

Mubalu, RW6 on the other hand. Having considered the evidence of Sipalo, PW6 I found his demeanor excellent. He gave his evidence in straightforward manner and he was not shaken in cross-examination. He gave me an impression that he was an honest witness. Further I found that Sipalo was a witness who had no interest in the case. I therefore had no reason to doubt what he said. Whereas, I did not find the 1st Respondent's demeanor good as a witness. He was shaken in cross-examination and seemed to have difficulties in answering questions. He contradicted himself on several occasions. He gave me the impression that he was not an honest and truthful witness. As for Mubalu, RW6, I found his demeanor poor as a witness. He was also shaken in cross-examination. He gave me an impression that he was not an honest witness and that as a constituency Chairman for the Movement for Multiparty Democracy he was capable of telling lies to save his party's candidate.

In the circumstances I believe what Sipalo told the Court that 1st Respondent rang him on several occasions inquiring whether the account had been funded and immediately he was informed that it was funded he and Mubalu traveled to Sesheke to draw the K29,800,000.00 which they intended to use for the campaign. I do not accept 1st Respondent's evidence

that he did not ring Sipalo inquiring about the money and that he did not travel with Mubalu. His evidence that when he met Mubalu at the bank, he did not have conversation with him, he merely greeted him confirms that they must have been together that morning. If they had not been together that morning, it is Zambian way of life to expect him to spend some time with RW6, asking him how he had traveled and what he had gone to Sesheke for. The 1st Respondent's conduct shows that he knew why Mubalu had gone to Sesheke. S

As for Mubalu's evidence, I found that he was a good storyteller whose story was difficult to believe. 16.

Concerning the alleged constituency Development Fund meeting of 1st December 2001. It was interesting to hear that a constituency Deputy Chairman could imagine to call for a meeting on the nomination day of his candidate. It was even more interesting to hear that the meeting was held without the Secretary Kashumba who according to him arranged for the meeting. If the said meeting had been held one would have expected the minutes of that meeting to be filed by the 1st Respondent knowing very well that the Constituency Development Fund was one of the matters being LS

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challenged. In the circumstances I have found that no such meeting was held on 1st December 2001.

Further, I found Mubalu's story of keeping the K29,800,000.00 in his house for 6 months difficult to believe. In the first place I found the reasons given for the alleged keeping of the money not convincing. The money was only drawn on 3rd December 2001 and there was no one from the Opposition who was present, therefore one wonders how people from Opposition knew or could have known that Mubalu had K29, 800,000.00 Constituency Fund money so that they could complain. It is also doubtful whether the meeting alleged to have taken place where the resolution to keep the money pending elections was alleged to have been passed actually took place. That meeting was also said to have taken place without the Secretary. It is also surprising that Mubalu was only mandated to keep the money by the Committee pending elections; one does not therefore understand where Mubalu got the mandate to keep the money thereafter. There was no evidence that a Committee meeting was held to renew the mandate after the elections. The continued keeping of the money by Mubalu was unlawful and without the mandate of the Committee. Surprisingly, Mubalu continued keeping the money even after his committee was dissolved in March 2002. In what

capacity was Mubalu keeping the money one may ask. That was with the knowledge of the Member of Parliament who happened to be in charge of the Ministry which is supposed to ensure compliance with the guidelines. That inactivity on the part of Honourable Mabenga and his Ministry is evidence that he very well knew that the money was not kept but had been used for his campaign. I have further found that the beneficiaries and projects that Mubalu said were to benefit were none existant. If there were projects that were submitted, one cant believe that a man of Mubalu's caliber who was described as the only businessman in Sichili could fail to know the names of the beneficiaries' Leaders. I, therefore doubt whether the K29, 800,000.00 that was brought in Court on 17 June 2002 which was deposited in the bank on the order of the Court on 19 June 2001 was the same money that was then drawn on 3rd December 2001.

In the circumstances I have found that the Petitioners have satisfied me on a balance of probabilities that the K29, 800,000.00 that was withdrawn on 3rd December 2001 was utilized by the 1st Respondent for his election campaign.

Coming to ground 17, namely, 5.6 - the 1st Respondent used government transport and facilities for his campaign. The 1st Respondent's response is as contained in paragraph 32 of his answer. The Petitioners contended that the 1st Respondent used a government vehicle Registration Number GRZ 757BP in his campaign. It was further the Petitioners case through PW9 and PW17 that the vehicle was being seen in the constituency and that at one time it was nearly damaged by Opposition cadres and that it had to be taken to the Police Post for safe custody. The Petitioners also contended that the use of government vehicles during the elections campaign was unlawful and not allowed. *h*

On the other hand the 1st Respondent and his witnesses refuted the allegation. They argued that they had four vehicles at their disposal which did not include GRZ 757BP. Further the 1st Respondent contended that the said vehicle was left in Livingstone and was only driven to Mulobezi on 20 December 2001 for the use of the Police who had no transport during the President's visit on 21 December 2001. He therefore called Mubanga RW26 to confirm that. The said Mubanga in his evidence said the vehicle was in Livingstone and he was keeping the keys which he only released on 20 December 2001. It was brought back to Livingstone at 1630 hours on 21 December 2001. *20*

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After considering the evidence I have found that the two Police officers, namely, PW9 and PW17 had no interest in the case, that being the case they had no reason to tell lies. On the other hand the 1st Respondent and his witnesses particularly Simasiku RW29 and Lyambai, RW31 had interest in the matter as such had a motive for telling lies. As for Mubanga' RW26 it would seem he was not telling the truth. It was established that the journey from Mulobezi to Livingstone takes 5 to 6 hours during the rain season. It was also the 1st Respondent's case that the President left after 1400 hours on 21 December 2001. The vehicle was said to have left for Mulobezi after the departure of the President. The vehicle could therefore not reach Livingstone at 1630 hours. Further I do not believe the reason given for taking the vehicle to Mulobezi. The 1st Respondent could not be heard to give his official vehicle to such a junior police officer as Sergeant Sijabu, PW9. In fact it was not even suggested in cross-examination of the said PW9.

I have therefore found the evidence given by Sijabu and Miyoba as the truth.

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I accordingly find that the Petitioners have proved that the 1st Respondent used government transport and facilities for his campaign contrary to the laid down rules.

Concerning ground 18, namely, 5.6.1. Ferrying of Indunas to Mwandu for a secret meeting using a government vehicle. The 1st Respondent's S response is as contained in paragraph 33 of his answer.

From the answer I have found that there is no dispute that the 1st Respondent made available a government vehicle to enable the Indunas travel to Mwandu. The issue in dispute is whether the Indunas traveled for a secret meeting and whether they were advised to tell their subjects to vote W for the 1st Respondent who originated from the area and not for the 1st Petitioner who if elected would sell their forest to a white man.

The Petitioners called two witnesses, PW3 and PW4 who testified as to what they heard Nduna Sifuwe who was one of the Indunas who attended to brief his subjects about the proceedings at the meeting. LS

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The 1st Respondent despite admitting in his answer to having provided transport refuted in his evidence having provided transport. He also denied knowledge of the secret meetings. The two Ndunas he called informed the Court that they attended the meeting but denied that it was nothing to do with the election campaign and the candidates. According to them the Lyanshimba only advised them about the importance of being neutral. S

It is clear from the evidence that only the 6 Indunas from Mulobezi who were taken to Mwandi for the meeting without any notice. Since the Lyanshimba was also in charge of the Indunas in the other two Parliamentary Constituencies in Sesheke, one would have expected him to summon all the Indunas in the District if it was merely to advise them to be neutral. There was no evidence that only the Indunas in Mulobezi were not neutral, so as to necessitate their being called by the Lyanshimba. I do not therefore accept the story that the Mulobezi Indunas were called to be advised about the importance of being neutral. There must have been something peculiar to Mulobezi Parliamentary Constituency that the Lyanshimba had to advise the Mulobezi Indunas. In my view that should have related to the conduct of elections. That is evidenced by the denial by all those who attended that they did not use the 1st Respondent's official LS

vehicle which was in line with the 1st Respondent's denial that he did not provide the vehicle contrary to his answer. If the meeting was an ordinary meeting one would have not expected the 1st Respondent to depart from his answer. 92

After analyzing the evidence and the circumstances of the case I have found as a fact that the Indunas from Mulobezi were taken for a secret meeting at Mwandi by the 1st Respondent and that the Indunas were advised to tell their subjects to vote for Mabenga who originated from the area and not to vote for Wina and that if they voted for him the latter would sell their forests to a white man. The Petitioners have therefore proved ground 18. 5 60

Coming to ground 19, namely, 5.6.2. The 1st Respondent's response is as contained in paragraph 34.

After considering the evidence adduced before the Court by the Petitioners I have found that the Petitioners have not adduced any evidence to support this ground. In the circumstances I have found no basis in the ground. I accordingly dismiss it. 45

Concerning ground 19, namely, 5.6.3. The 1st Respondent's response is as contained in paragraph 35. 43

From the answer I have found that there is no dispute that the 1st Respondent used the said vehicle. The only issue in dispute is whether the vehicle was obtained using state funds and not properly cleared. S

Having considered the evidence I have found that the Petitioners have failed to prove that the said vehicle was obtained using state funds and not properly cleared. I accordingly find no basis in ground 19.

Concerning ground 20, namely, 5.7. The 1st Respondent in his answer did not respond to this ground. 10

There was only one witness called to support this ground, PW5 who stated that he was called to Nduna Sapinas house where he was offered K100, 000.00 by 1st Respondent so that he could defect from his party namely, UPND.

The 1st Respondent denied offering PWS money,
witnesses who included Lyambai, RW31 and his brother Albert Mabenga,
PW23. 17

I have considered the totality of the evidence and I have found that the
petitioners have not adduced sufficient evidence to support this ground. S
Further it is doubtful whether to request someone to defect from his party
could be considered as being an election offence. This ground therefore
fails.

Concerning ground 21, namely 5.7.1. The 1st Respondent did not
respond to this ground in his answer. He however, denied in his evidence. 10

I have considered the evidence in support of this ground but I have
found that there is no sufficient evidence has been adduced in support of
ground 21. I accordingly dismiss it.

As to ground 22, namely 5.7.2. The 1st Respondent did not respond to
this ground in his answer, however he called..... Evidence in rebuttal. 45

I have considered the evidence in support that has been adduced by the Petitioners; however, I have found that they have not adduced sufficient evidence to support this ground as well. Therefore ground 22 has no basis. 95

Since the action against Electoral Commission, 2nd Respondent and the Attorney General, 3rd Respondent was discontinued the other grounds 5.8; 5.8(1); 5.8.2 and 5.8.3 have fallen away. S

In light of the foregoing I have found that the Petitioners have proved their Petition on a balance of probabilities on 7 main grounds.

It is provided in Section 18(2) of the Electoral Act that the election of a candidate as a Member of the National Assembly should be void on any of the grounds in that Section which is proved to the satisfaction of the High Court upon the trial of an election petition. Subsection (3) of Section 18 of the Electoral Act, provides that the election of any candidate cannot be declared void under the circumstances provided therein. However, in this Petition the provisions of Subsection (3) do not apply as it is clear that 1st Respondent did the acts personally or they were done by Lyambai, RW31, 45

Ndala and the other Movement for Multiparty Democracy,
knowledge and at times under his instructions.

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The provisions of Subsection (2) of Section 18 which are appropriate in this Petition as stated above are (a)(b) and (c).

As it has been established that the 1st Respondent committed a corrupt practice or illegal practice within Section 18(2) of the Electoral Act which provisions are mandatory, I have no option but to declare the election of Honourable Mabenga, 1st Respondent as Member of the National Assembly for the Mulobezi Parliamentary Constituency void. I therefore order a fresh poll to be held in Mulobezi Parliamentary Constituency.

I must mention here that people who aspire for public office especially those who do so on the Ruling Party ticket must be upright in their conduct and further that the Ruling Party with its unlimited resources must refrain at all costs from distributing gifts and making donations during election campaigns. Courts will not take kindly to such conduct. I would further like to mention that the Electoral Commission and the Attorney General allowed what happened in Mulobezi Parliamentary Constituency.

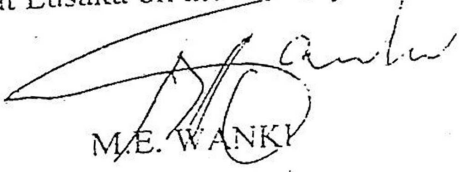
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I would like to take this opportunity to commend Sergeant Sijabu and Detective Sergeant Miyoba both of Sichili Police Post for acting professionally in the face of intimidation and threats to their lives. Police officers like Sergeant Sinjabu and the other are the officers needed in a Multiparty environment. S

Finally, I would like to urge the Ministry of Education to take a bold decision on Teachers' involvement in Ruling party politics. The situation that is happening in Mulobezi Constituency where teachers are holding senior posts in the Ruling Party in my view is not conducive to children's education. U

Costs of this Petition are awarded to the Petitioners which will be subject to taxation in default of agreement.

Delivered in Open Court at Lusaka on the 27th day of August 2002.


M.E. WANKY

JUDGE OS'