

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

2021/HP/EP/0004

IN THE MATTER OF: ARTICLE 73 (1) OF THE CONSTITUTION OF ZAMBIA
(AMENDMENT) ACT NO. 2 OF 2016

IN THE MATTER OF: SECTION 97 (2) (A) AND (B) OF THE ELECTORAL
PROCESS ACT NO. 35 OF 2016

IN THE MATTER OF: SECTIONS 8, 9, 83, 98 AND 99 OF THE ELECTORAL
PROCESS ACT NO. 35 OF 2016

IN THE MATTER OF: CODE OF CONDUCT OF THE ELECTORAL PROCESS
ACT, 2016

IN THE MATTER OF: ANY OTHER ENABLING ACT AND REGULATIONS

AND

IN THE MATTER OF: AN ELECTION PETITION TO CHALLENGE THE
ELECTION OF A MEMBER OF PARLIAMENT FOR
ISOKA PARLIAMENTARY CONSTITUENCY

BETWEEN:

JAIRO SIMBEYE

PETITIONER

AND

MARJORIE NAKAPONDA

1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA

2ND RESPONDENT

*Before the Honourable Mr. Justice W. S. Mweemba in Open Court on this
22nd day of November, 2021.*

For the Petitioner : Mr. J. Zulu – Messrs J. Zulu Advocates.

For the 1st Respondent: Mr. J. Kayula – Messrs Lewis Nathan Advocates.

*For the 2nd Respondent: Mr. R. Mwala & Mr. Bobby Macheleta – AMW & Co
Legal Practitioners.*

J U D G M E N T

CASES REFERRED TO:

1. *Lewanika and Others V Chiluba* (1998) Z.R. 79.
2. *Mabenga V Wina and Others* (2003) Z.R. 110.
3. *Mazoka and Others V Mwanawasa and Others* (2005) Z.R. 138.
4. *Raila Odinga and Others V Independent Electoral and Boundaries Commission and Others – Supreme Court of Kenya Election Petition No. 5 of 2013.*
5. *Shri Kirpal Singh V Shri V. V. Giri* (1971) (2) SCR 197.
6. *Margaret Mwanakatwe V Charlotte Scott and Attorney General, Selected Judgment No. 50 of 2018.*
7. *Nabukeera Hussein Hanifa V Kibule Ronald and Another* (2011) UGHC 72.
8. *Stephen Masumba V Eliot Kamondo* (2017) 3 Z.R. 130.
9. *Christopher Lubasi Mundia V Sentor Motors Limited.*
10. *Nkandu Luo and Another V Doreen Sefuke Mwamba and Another, Selected Judgment No. 6 of 2018.*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *Article 73 (1) of the Constitution of Zambia Act No. 2 of 2016.*
2. *Electoral Process Act, No. 35 of 2016.*
3. *Electoral Process Act No. 35 of 2016.*

FACTS

The undisputed facts may be shortly stated. The Petitioner Jairo Simbeye and the 1st Respondent Marjorie Nakaponda were candidates during the Presidential and Parliamentary Elections held throughout Zambia on 12th August, 2021. They and 2 other candidates competed for election as Member of Parliament for Isoka Constituency in the Muchinga Province of the Republic of Zambia. The Petitioner was sponsored by his party the United Party for National Development (UPND) and the 1st Respondent was sponsored by her party the Patriotic Front (PF).

Following the elections, the 1st Respondent was declared as the winner of the seat and the duly elected Member of Parliament for Isoka Constituency. The Petitioner polled 12,365 votes while the 1st Respondent polled 12,663 votes. There were two other contestants in the race who have not petitioned. The difference in the votes between the Petitioner and the 1st Respondent was 298 votes.

For completeness of record, the results that were announced for each candidate by the Electoral Commission of Zambia (ECZ) which are under contestation were as follows:

Name	Party	Votes Scored
i. Marjorie Nakaponda	PF	12, 663
ii. Jairo Simbeye	UPND	12, 365
iii. Juliet Nalwimba	SP	519
iv. Patricia M. Lunsonga	DP	303

PLEADINGS

The Petitioner issued his Petition on 25th August, 2021 through Messrs Japhet Zulu Advocates of Lusaka and it was supported by an affidavit of verification. The Petition is brought pursuant to **Article 73(1) of the Constitution of Zambia (Amendment) Act No. 2 of 2016, Sections 8,9,83,97 (2) (A) and (B),98 and 99 of the Electoral Process Act No. 35 of 2016 and the Electoral Code of Conduct, 2016.**

The Petitioner has made a number of allegations in the petition under paragraph 4. It is alleged that there had been noncompliance with the provisions of the **Electoral Process Act No. 35 of 2016 (the Act)** relating to the conduct of elections which affected its results; that as a result of corrupt practices, illegal practices or other misconduct in connection with the election by the 1st Respondent, or with the knowledge, consent or approval of the 1st Respondent or of the 1st Respondent's election agent or polling agent, the majority of voters

in the Isoka Parliamentary Constituency were or may have been prevented from electing the candidate in that constituency whom they preferred.

He prays that he should be granted the following reliefs and declarations:

- (1) That the election of the 1st Respondent as a Member of Parliament for the Isoka Parliamentary Constituency is null and void.***
- (2) That there has been non – compliance with the provisions of the Electoral Process Act No. 35 of 2016 and the Electoral Code of conduct, 2016 relating to the conduct of the election of Member of Parliament for the Isoka Parliamentary Constituency and that such noncompliance affected the result of the election.***
- (3) That as a result of the corrupt practices, illegal practices or other misconduct by the 1st Respondent or with the knowledge of the 1st Respondent, or of the 1st Respondents election or polling agent, the majority of the voters in the Isoka Parliamentary Constituency were or may have been prevented from electing the candidate in that Constituency whom they preferred.***
- (4) That the costs of and incidental to this Petition be borne by the Respondents.***

The 1st Respondent filed her Answer on 8th September, 2021. She has denied every allegation in the Petition and has given her reasons in paragraphs 5 to 14 of her answer.

PETITIONER'S EVIDENCE

The Petitioner testified and called nine other witnesses. I shall briefly review the evidence.

PW1 was **GIFT BROWN KANIKA**. It was his evidence in chief that he was a citizen of Malawi from Manasi Village in Chitipa District. That during the month of August, 2020 Mr. Davis Simbule also known as *Chimbunguya*, the District Commissioner (DC) for Isoka District at the time, (as he was now deceased) went

to their village to inform them that he wanted to give them **Zambian National Registration Cards (NRCs)** in order for them to vote in the soon coming elections and that in return, he would create cooperatives and distribute fertilizer to them.

Mr. Simbule also told them that the Malawian and **Zambian** governments had an agreement whereby the citizens in the border area should also cast their votes in the 2021 elections so that the current government should continue in power. So, on a day he could not recall, the DC went and got a big number of them and he took them to get **NRCs** from **Zambia**. After which they were taken back to their villages in a Land Cruiser. In December 2020, information reached their villages through various chiefs, that it was time for them to return to **Zambia**, this time to get **Voters' Cards** and some of the villagers were transported like before whilst he went to get his **Voter's Card** on foot.

He also told the Court that during the campaign period, in the first week of July, 2021, **Marjorie Nakaponda (RW1)** went to the border and met a group of them after which she gave them money, chitenges and t-shirts from the **Patriotic Front (PF)** political party. She told them that if they voted for the **PF** and helped not to change the government, they would see amazing things in return. He also testified that on 12th August, 2021 the election day, Mr. Mwanza, Kennedy Mutambo and Aaron Mutambo went to Malawi to pick them up in a 5 tonne Fuso Truck. Mr. Mwanza used a ballot paper to show them how to vote on an emblem of a boat and that they should vote for Edgar Lungu, Marjorie Nakaponda, Silwimba and Aaron Mutambo. Mr. Mwanza also told them not to leave for their home village immediately after voting because a meal had been prepared for them to eat and after they did so, they all received chitenges, mealie meal and cooking oil.

PW1 also confirmed that he was a Malawian citizen with a Malawian National Registration Card which was exhibited on page 2 of the Petitioner's Bundle of Documents (PBDs). He testified that he had acquired a **Zambian NRC** which was exhibited on page 3 of the PBDs. The voter's card was also exhibited.

When probed on whether he had proof that other Malawian villagers went in a huge number to go and vote, he agreed and indicated that the proof was clear from the voters register from where he would identify the people from his village. That pages 8 to 82 of the PBDs showed the voter register with the following names, on page 10 Aaron Sikanyika, Alick Banda, Bulambo Byata, Bulambo Gloria, Chanda William, Chanya Mastavno. Chaanya King, Chanya Kondwani, whilst page 11 indicated the names Chilongo Victor, Chiwona Kennedy, Chipeta Ronick, Chilale Fred, Chingona Lawrence, Theresa Musukwa and Gama Jonas.

Whilst page 12 showed the names, Kabaghe Charles, Kabaghe Christine, Kabaghe Dyna, Justin Sikanyika, Harawa Vincent, Halaba Bridget, Halaba Macdonald, Halaba Chimweme, Kaira Ireen, Kaira Joseph and Kabaye Blackson. Page 14, showed the names, Kalenga Yvette, Kanyika Royda, Kanyika Vincent, Kanyika Alice, Kalinga Bernard and Kaluba Vanister.

Page 15 indicated the names Kasanga James, Kasanga Mary, Katumbi Edward, Kaonga Wilton, Kawilo Titus, Kaonga Simon and Kayange Chibuka, page 16 indicated Kayange Elizabeth, Kilembe Liffke, Kita Maganizo, Kitho Smart, Kayange Nixon, Kayange Ganizani. Page 17 showed Kumwenda Timothy, Kuyokwa Alick Kuyokwa Andrew, Lukali Ketus, Lungu Philip, Lungu Simon, Lupwayi Catherine, Lungu Joshua, Lungu Martha, Lungu Emmanuel, Longwe Marthar, Lwiinga Malita and Masebo Underson. The witness positively identified the 1st Respondent, Marjorie Nakaponda before Court.

During cross examination by Mr. Kayula, PW1 stated that he did not know the requirements for one to be registered as a voter in Zambia. However, he confirmed having told the Court that Davis Simbule, the DC went to his village and requested that they acquire NRCs for purposes of participating in the 2021 elections as the Malawian and Zambian governments had agreed that Malawians participate and vote although he had just told the Court that he didn't know the requirements for voter registration.

It was his evidence that he did not lie under oath and he further confirmed that he voted in the elections of 12th August, 2021 and when he went to do so he carried a green National Registration Card, (NRC) and a Voters' Card which were analyzed in the polling station after which he was called out and given a ballot paper.

That he did not know the Zambian institution that issued NRCs or Voters' Cards but he knew that the two were government functions. Moreover, that he and about 150 other people were met by the 1st Respondent at the border and it was at this meeting that they received money which was given to a group leader who distributed it amongst them and they all received **K100.00** Malawian Kwacha. That he saw the actual distribution of this money which was the proof he brought before Court. He also confirmed that all the people that met the 1st Respondent were Malawian on the basis of the Malawian languages they spoke such as Chilambya Chingali, Chinyanja and Chichewa.

PW1 also stated that he was aware that there could be Zambians living in Malawi who had the right documents to do so and that he was also aware of the possibility of dual citizenship, although he was unaware that a candidate like the 1st Respondent was free to campaign to individuals in Malawi that were eligible to vote in Zambia.

Moreover, that the proof he had that the names he read out belonged to Malawians was the fact that they were people he lived with and that as a village secretary, he had had occasion to see their Malawian NRCs as part of the exercise they had of taking down their names in order to distribute farming inputs such as fertilizer to them. That it was a requirement that they produce these NRCs for them to be included in this program. Moreover, that this was the same group of people that had travelled to Zambia to get Zambian NRCs and Voters' Cards which made them Zambians and therefore eligible to vote in the elections as Zambian citizens.

PW1 was also cross examined by Mr. Mwala Counsel for the 2nd Respondent. He stated that he became aware of these proceedings after he was picked up by a person sent by the Petitioner who told him that he was required to come and give a testimony before Court and that he had not been paid as he had volunteered. He also confirmed his Malawian citizenship on the basis of his NRC which expired in March, 2021 whilst his Zambian NRC had been exhibited on page 3 of the PBDs. His names on the Zambian NRC were Gift Sikanyika whilst the Malawian identity document showed his names as Gift Brown Kanyika.

According to **PW1**, he did not know that what he did was illegal and he only did it because there was a promise of an incentive. That as a voter he was unaware that he had certain obligations and due to this he did not notify the Electoral Commission of Zambia (ECZ) which could not help him without a notification. It was his testimony that he did not know who the people he mentioned from his village had voted for as they could have also voted for the Petitioner. He lastly stated that he would not be in a position to count the number of people that voted.

In re-examination, he stated that he knew the people that received money were Malawian because he came from the same village as they did. He also confirmed that he did not know the requirements for obtaining NRCs and Voters' Cards.

PW2 was **MARY BANDA** from Isoka, Location compound. She testified in her capacity as the Secretary for the Kasoka Women's Group Association in Isoka. She stated in examination in chief that on 9th August, 2021 she received a call from the Ministry of Community Development which advised that she should go and collect fertilizer that would be distributed to clients.

It was her testimony that she was alarmed by this call due to its timing as it was unusual for the fertilizer to be distributed at such a time. That the next distribution was expected to be done from September to October, 2021.

Acting on the call, she and other executive members went to get the fertilizer from the shed on 10th August, 2021. When the Community Development Officers arrived, they asked them to wait for the Acting DC, Mulenga Yamishi and when he arrived, he began addressing them and told them that they would be given fertilizer which they should not sell but use at their farms and that they should be grateful to the Patriotic Front (PF) for this gesture and also vote for the PF party.

When he finished addressing them, he opened the shed and began the distribution in the following order, Chinyonga group, Chimwemwe group and then Kasoka group. She also noticed that when the fertilizer was being taken out there were a lot of people including drivers, some of whom wore PF regalia. That those that wore the regalia were the ones packing the fertilizer into the vehicles.

That when one truck was loaded, she and the Trustee went to distribute the fertilizer, while their Chairperson remained at the shed. That they carried 150 urea, 142 D compound and what remained was 8 bags.

Moreover, that they had a challenge distributing to their clients and out of fear of being attacked by cadres they spent 2 nights outside with the fertilizer. It was also her evidence that the period they were given for distribution was limited as they couldn't gather the people properly. The fertilizer was distributed on 10th, 11th and on 12th August, 2021 after casting their votes others went to collect it. It was distributed to 150 people and pages 163 to 166 of the Petitioner's Bundle of Documents showed a list of these recipients.

In cross examination by Mr. Kayula, she stated that she received a call from the Ministry of Community Development and that the Fertilizer Support Programme is a government programme and that there was nothing wrong with early receipt of farming inputs. But what scared her was the timing of this distribution since it was an election period and therefore unusual as the expectation was that government programs should have been suspended. Moreover, that farming usually began around October and November by which time they should have

received all farming inputs. **PW2** also stated that even if the election date was moved to November, she would still maintain that farming inputs should not have been given at that time due to the upcoming elections.

When cross examined by Mr. Mwala it was her evidence that the list of recipients exhibited before Court only showed their names, without a date or signatures. Further that if one wore a PF t-shirt, this would imply that they were PF due to the fact that it was an election period, whilst if one wore both PF and UPND regalia it would not be evident. She lastly confirmed having voted in the elections and that she had come to tell the Court the manner in which the fertilizer had been distributed. She lastly stated that she did not lay any complaint before the Electoral Commission of Zambia.

There was no re-examination.

PW3 was **THREZA NSOFWA** from Isoka Kalemelela Compound, the Chairlady of the Kasoka Women's Group Association. It was her evidence that on 9th August, 2021, the Community Development Officers called them and informed them that they should go and collect fertilizer for their clients. However, she and her executive wondered why they were being called when it was almost election time but also not yet time for the next fertilizer distribution which was expected in September and October of 2021.

The next morning on 10th August, 2021 around 09:00 hours they went to meet the Community Development Officers who informed them to go to the shed where they would receive the bags of fertilizer. When they arrived there, they were advised to wait for the acting DC Mr. Mulenga Yamishi so that he could flag off the distribution and when he arrived, he gave a speech and stated that the fertilizer they would receive was not meant for sale. He also asked whether they were happy and they agreed. He stated that the fertilizer was coming from a listening PF government that cared for them. He further stated that they should not make a mistake to vote for any other political party but vote for PF when the time came.

After this, the officers began offloading the bags from the Storage Shed and loaded them into the vehicles and distributed them to the Chinyonga and Chimwemwe area Women's association. The first Fuso Truck was loaded with 150 bags and the secretary, **PW2** and trustee, Ms. Judith Mbewe took the fertilizer to the place of distribution.

When her friends left, **PW3** and the Treasurer remained behind and she observed that at the time the fertilizer was being distributed, Mr. Mpembamoto and the 1st Respondent, some of the loaders and the driver of the truck all wore green PF regalia. On the same day she also saw the Petitioner there, whilst the 1st Respondent stood where the Chimwemwe group was. Mr. Mpembamoto went to greet the audience and told the people that they should vote. He also chanted PF slogans and left shortly thereafter. The 1st Respondent did not say anything.

When the Petitioner arrived at the shed, he asked why fertilizer was being distributed on that day, and not sometime back or after the elections because it appeared like they intended to sway the voters. So he advised them to close the shed, and if they failed to do so that they should call the person that opened it. After this **PW3** and the Treasurer got more bags of fertilizer and took them to their destination. **PW3** also stated that since there were too many bags and time had run out, they spent a night outside by the fertilizer and began the distribution the next morning on 11th August, 2021 until 12th August, 2021. The witness also positively identified the 1st Respondent.

When cross examined by Mr. Kayula, **PW3** stated that it was a Government Ministry that was in charge of the fertilizer distribution and she had been called by government officers. That the acting DC addressed them at the shed,

It was also her testimony that receiving fertilizer was a good thing and that during his address the acting DC told them that the fertilizer came from the PF which was the party in government at the time. That she saw some people dressed in PF regalia and feared being attacked whilst distributing fertilizer. That

her only duty as the Chairperson was to receive the fertilizer and distribute it and that She did not benefit anything from this but derived satisfaction from seeing her clients receive it as she was a subsistence farmer.

It was also her evidence that the Petitioner also went to the place of distribution in his capacity as a UPND candidate with his own interest. She lastly stated that although the 1st Respondent was present at the shed, she did not utter a word. During cross examination by Mr. Mwala, **PW3** stated that she was a registered voter in the past elections and did not register any complaint to ECZ as she did not know them. She lastly stated that she had not produced any papers before court.

There was no re-examination.

PW4 was **EDWARD HARAWA** a farmer from Manase Village, Chitipa District, Malawi. He told the court in examination in chief that their village was visited twice by the DC of Isoka, first around 19th August, 2020 when he went to their village in the company of Mr. Tiza Mukaya and requested that **PW4** and others be taken to go and acquire NRCs from Chaswata School in Zambia. The second time was in December, 2020 when he returned to help them acquire Voters' Cards. That they were first called and assembled, then transported to Chaswata Primary School. According to **PW4**, a lot of them were carried because they were coming from a big area of about 5 chiefs and **PW4** was also transported in a Land Cruiser to go and collect his Voter's Card.

The next thing he recollected was from the first week of July, 2021 when he saw a motor vehicle that brought papers which had pictures and information of the 1st Respondent and Edgar Lungu and word went round inviting them to go to the boundary of Zambia and Malawi to attend a political party meeting and he and other villagers went to attend it.

Whilst there he noticed a team of people that wore PF party regalia, and a woman addressed them. She stated that she was PF and the area councilor was Aaron

Mutambo. That they had gone to Malawi to ask them to vote in Zambia to ensure that the government of Edgar Lungu was not changed. That if they voted for the PF, the latter would open up cooperatives for them where they would receive fertilizer and have more yield the following year. At the end of the meeting, they gave them T-shirts, and chitenges with Edgar Lungu's face whilst the team leaders were given money which they distributed to them and he got **K100.00** Malawian Kwacha.

On 12th August, 2021, a Fuso Truck went to their village and it transported him and other people to Chaswata Primary School to vote and on the way there two people Mr. Mwanza and Aaron Mutambo showed them a ballot paper and how they were expected to vote at the voting center. They told them to vote on the boat, for a presidential candidate, an MP, and Councilor with a picture of a boat as this would enable them not to have difficulties in the voting booth.

After voting they ate nshima with meat and received more chitenges and T-shirts from Aaron Mutambo's place then they were taken back to Malawi. **PW4** stated that he was a Malawian citizen by virtue of the documents exhibited before Court. At page 5 of the PBDs is **PW4's** Malawi Citizenship Identification Card while page 6 of the PBDs showed his Zambian NRC and page 7 his Zambian Voter's Card.

During cross examination by Mr. Kayula, **PW4** stated that he was born in Malawi, Chitipa District, Manase Village although his Zambian NRC showed his place of birth as Mpangala Village, Isoka District which was not true. That the person who gave him the Zambian NRC made him lie.

That his Zambian NRC and voters card made him eligible to vote on 12th August, 2021 and when he went to vote, he produced the two documents and they were accepted, thus, he did not do anything wrong by voting. The witness also confirmed that the team leaders and not the 1st Respondent gave them money.

During cross examination by Mr. Mwala, **PW4** confirmed having voted in the past election, that he had heard about the Electoral Commission of Zambia and the possibility of lodging a complaint to them if unhappy with the manner in which the election was conducted. However, he was not aware of the procedure for submitting a complaint in Zambia. Moreover, that about 15 people were carried in the land cruiser on their way to Chaswata Primary School but it made many trips. That as they were asked to vote for PF Candidates it was not possible for him to vote for any other candidate.

However, he was able to confirm that everybody in the Fuso truck voted for PF based on what they were advised although he realized that they could have lied about the person they voted for in the same way they lied that they were Zambian nationals when they were not. Moreover, the fact that he was not with them in the voting booths or guns held to their heads as they voted meant that they could have voted for any candidate. Thus, it was possible that the Petitioner also received votes from these people.

There was no re-examination.

PW5 was **ABEL SILWENGA** the Secretary of the Community Welfare Assistance Committee, from Kampumbu village under Chief Katyetye. He stated that in the first week of August, 2021 there was a PF meeting in Kabonde village and the candidates present included the 1st Respondent, the Council Chairperson Hared Silwimba and Brian Sichinga Councillor. They talked about the Social Cash Transfer in their speeches. They emphasized that the PF government would give them Social Cash Transfer funds and if they did not vote well, they would not receive it. **PW5** found such sentiments to be a threat because he knew that the government program was not attached to the PF.

True to the indication from the meeting, the Social Cash Transfer funding was received by the Committee on 6th August, 2021. When distribution of the funds commenced ward officials in PF regalia were present and others were part of

those on the beneficiaries list such as Elisha Mutambo, Harriet Nankamba and Brian Sichinga.

When they informed the people that they were about to distribute the funds, Mr. Mutambo told them that the money came from the PF and if they did not vote for PF, they would stop receiving the Social Cash Transfer funds. One of the Committee members, Kennedy Siame told them that it was a government program and Mr. Mutambo got upset and threatened to beat him up. After this, they informed the people that this payment was for May and June since it was paid out every 2 months.

After the distribution was completed, the paypoint manager was about to go and retire the funds, when he received a call to go and get extra money for the months of July and August which was received on 9th August, 2021 whilst distribution began on 10th August, 2021.

PW5 and the Committee expressed concern on the timing of the payments and wondered if the Government had changed the timings for payment because the months had not been exhausted and the next payment was expected in September, 2021. During the second distribution, Mr. Mutambo and Ms. Nakamba aforesaid, told the recipients that if they didn't vote well they would not receive any more money. The funds were distributed on the 9th, 10th and the remainder after the 12th of August, 2021 and in total about 158 beneficiaries were paid.

It was also his evidence that during the first week of August, 2021 a truck from Isoka took mealie meal, 9 buckets of cooking oil, 3 bales of sugar, salt, PF branded t-shirts and caps and when the items arrived, the assumption on their part was that they would be for the poor, but when he went closer to the vehicle he found Mr. Hared Silwimba the Council Chair, the 1st Respondent Ms. Marjorie Nakaponda, and Max Sichamba also known as Joe Max, the campaign manager.

That when **PW5** queried Mr. Mutambo over the recipients the latter told him that they would be given to the voters and he would tell them when distribution would commence. He then observed that when Mr. Mutambo and the people he went with realized that they did not have a place to store the aforesaid items, Mr. Mutambo went to the headman - Jeremiah Mutambo and asked him to keep them and he agreed. These items were distributed on the night of 11th August, 2021 by Mr. Elisha Mutambo.

The next day on 12th August, 2021, meals were prepared at Elisha Mutambo's house for people to go and eat from there after voting so as soon as he voted, he found Mary Munthali and Elisha Mutambo giving out K20 notes and telling the recipients to vote for Edgar Chaagwa Lungu, Marjorie Nakaponda, Hared Silwimba and Brian Sichinga. **PW5** positively identified the 1st Respondent before Court. He lastly stated that the names of the beneficiaries of the Social Cash Transfer were outlined on the list on page 91 to 156 of the PBDs.

During cross examination by Mr. Kayula, **PW5** stated that the Social Cash Transfer Fund and distribution was a Government program spearheaded by the PF and it was discussed by the 1st Respondent, Hared Silwimba and others but what was wrong with this discussion according to **PW5** was their sentiments issued to the electorate that if they did not vote for the Patriotic Front Party, they would no longer receive the Social Cash Transfer Fund. The witness also stated that he was unaware that government programs came and went and that the change in programs would be affected by the change in government.

Moreover, that the Social Cash Transfer Fund was distributed monthly and the beneficiary list would stipulate the two months covered as guided by the Minister. **PW5** also recalled having testified that the PF candidates visited them in a vehicle that had cooking oil and other commodities but he had no pictures of the same to prove this assertion. He lastly stated that he had been summoned to Court by the Petitioner who had lost an election.

During cross examination by Mr. Mwala, **PW5** stated that the issue he had with the statements that had been uttered by the PF candidates was them stating that the distribution of the Social Cash Transfer Fund would cease if the electorate did not vote for PF and since the PF Government was not retained, he discovered that there was no truth in the statement and he was not influenced.

PW5 also confirmed that Social Cash Transfer Fund payments for the months of May and June, 2021 were paid on 6th August, 2021 whilst those for the months of July and August, 2021 were paid on 9th August, 2021. Prior to this he could not recall when the last payments were made as at times even a year would pass before a payment was made.

He also told the Court that although pay times would vary, two months usually passed in between payments. It was also his evidence that he voted in the election and had heard of the ECZ, however he was seeking a determination of whether a Government program would be used as a tool to threaten the electorate to vote a certain way. Secondly whether it was right for the electorate to be given food and money during the election period. He lastly stated that he did not make a report to the ECZ as they did not have offices where he resided.

PW5 was not re-examined.

PW6 was **JEREMIAH MUTAMBO** a Headman from Kankumbu Chipulula Village in Isoka District. It was his evidence in chief that on 2nd August, 2021, he saw the 1st Respondent, in the company of Joe Max and Elisha Mutambo and the trio had a truck with mealie meal and a small car. So when he enquired where the mealie meal was going, the group requested that he keep it since it was meant for distribution. So they took the mealie meal, 9 buckets of cooking oil and 3 bales of sugar and PF regalia. These items were left with Elisha Mutambo, his older brother and PF ward coordinator. **PW6** kept some of these items. The next morning, **PW6** expressed concern about the mealie meal but he kept it for them. The 1st Respondent and Joe Max asked him to keep the items until distribution at the right time and he agreed.

On 6th August, 2021 they received the Social Cash Transfer Funds and he went to get what was due to him as the fathers next of kin. During the distribution of the fund, Elisha Mutambo, Harriet Nankamba, Mary Munthali and Counsellor Brian Sichinga were all present and were dressed in PF regalia and they told the people that the PF Government was giving them money and if they voted for them this would continue. He also witnessed a bit of noise due to the distribution of the cash until he got paid and left. Moreover, that before he left, he heard the distributors of the fund, Kelvin Ngambi, Abel Silwenga, Stanley Luhanga the Chair and others maintain that this was not a political issue.

After this on the 9th of August, 2021, the 1st Respondent, Joe Max and Sibwa went to inform him that he should tell the people that more Social Cash Transfer Funds had come in and would be distributed the next day. However, when they went to receive the second payments not everyone was paid on the 10th of August, 2021 so on 11th August, 2021 Elisha Mutambo, the ward Chairperson and Harriet Nakamba began to give mealie meal to the people and on election day goats and pigs were slaughtered and food was given at the house of Elisha the ward coordinator.

During **cross examination** by Mr. Kayula, **PW6** stated that on 2nd August, 2021 he saw a truck and a small car loaded with mealie meal which was taken to his place. That although he knew that receiving it was not right, he still did so despite him lacking cogent evidence to prove this assertion before this Court. Further that he was aware that the Social Cash Transfer Fund was a Government program thus it was wrong for a person without authority to alert him that it had been received in order for him to go and collect it.

During **cross examination** by Mr. Mwala, **PW6** stated that he had voted in the last elections and as headman, his role included looking after people to ensure they lived in harmony. That he partially understood how Social Cash Transfer worked and did not react when he heard that if PF was not voted back into power there would be no continuity. That he would not know whether it was right or

on account of the fact that it was wrong to be distributing fertilizer when the next day was a polling day. The witness positively identified the 1st Respondent.

During cross examination by Mr. Kayula, **PW7** stated that he found an issue with the early distribution of fertilizer although he admitted that there was nothing wrong with early distribution of farming inputs. The fact that he saw people dressed in PF regalia made him assume that only those associated with PF would be receiving it. It was also his evidence that there was a problem with a candidate being present at the place and he reported this matter to the Petitioner although these were not the only two political parties participating in the election. **PW7** stated that it was wrong for a political party to be present at the shed.

He lastly stated that the Petitioner who was a UPND candidate went to the fertilizer shed after he was informed of what was happening by himself and when he returned there, he found him telling the people in charge to close it.

During cross examination by Mr. Mwala, **PW7** stated that he had not lodged any complaint to ECZ, nor taken any picture or video of what he witnessed but he confirmed voting in the elections. Moreover, that he witnessed the fertilizer distribution and the people at the shed who wore PF regalia from a distance of about 30m around 14:00 hours. At first, he saw the canter with fertilizer which was near the storage facility on the road then walked to the police station. Before he arrived, he noticed that there were a lot of people at the storage facility and that there was ongoing distribution of fertilizer.

Further that since he was there for only about 5minutes it meant that he would not know for a fact if other people wearing UPND regalia passed through the place. He lastly stated that he narrated the events to the Petitioner after leaving the shed 5 to 6 minutes later.

PW7 was not re-examined.

PW8 was **JIMMY SIKANYIKA** from Kalembelela Village in Isoka District, a driver and mechanic. It was his evidence in chief that on 3rd August, 2021 UPND President Hakainde Hichilema was in Isoka District and he recalled seeing him leave Prosper Lodge, at which time he got into the Toyota Vista motor vehicle and being 3rd in convoy he drove it to Isoka roundabout and parked by the side of the road.

Whilst there he found the car that belonged to the 1st Respondent, a Land Cruiser AQB 1454.

That he was certain that it belonged to her because she had been using it even before it was branded with PF Party posters of their President, their VP and herself. He also stated that he noticed that the other vehicles in convoy that belonged to HH passed and he remained behind whilst the PF cadres blocked him. That when he tried to keep following HH led convoy the PF threatened to kill him so he made a U-turn and the guys that were in the 1st Respondent's car tried to follow him in order to block him. After this he decided to get out of the car and the cadres began to break it. So he phoned the Petitioner who owned the vehicle and told him that his car had been damaged and they went to the police and reported the matter. He lastly stated that the vehicle windscreen was damaged, the mirrors shattered and tyres deflated. The vehicle was even turned upside down.

During cross examination by Mr. Kayula, **PW8** stated that he recognized the motor vehicle with Registration No. AQB 1454 and it belonged to the 1st Respondent. That he had a good memory even if he failed to recount the full number plate as he had no intentions of deceiving the Court. That his life was threatened and the vehicle he was using damaged and even if he had failed to produce a police report before this Court, he made a report to the police.

During cross examination by Mr. Mwala, **PW8** confirmed not having lodged a complaint with the ECZ. He lastly stated that he was aware that the Petitioner filed a Bundle of Documents into Court.

The witness was not re-examined.

PW9 was **RICHARD MWENYA** from Malango Village in Isoka District. During examination in chief, he stated that he came from the security wing of the UPND and on 12th August, 2021 he spent some time moving around the polling stations in order to see how people were voting. That around 14:00 hours he went to Kantensha Ward and when he reached the polling station he found people getting off a Fuso Truck that was being driven by Musyani and when he asked him who had sent him on this errand, he stated that it was the 1st Respondent. So **PW9** asked him whether he knew that, what he was doing was a crime and his response was that he was merely hired.

PW9 also saw Musyani holding K20 notes in his hands and an hour later as they left to go back to Isoka, he saw the same Fuso truck and blocked the driver on the road. When he asked him why he had returned, the driver told him that he wanted to finish what he had been sent to do.

So **PW9** went to the Fuso truck, switched it off and carried the car keys and the people he was ferrying jumped out fearing possible confusion. He then started the engine of the Fuso and turned it and they went to the police station with the driver.

When they entered, they found the dealing officer Mr. Mubiana who asked him to state his case. The officer asked him whether he knew that what he was doing was a crime after which he told him to take the vehicle and go home. The driver also thanked him for not beating him.

During cross examination by Mr. Kayula, **PW9** stated that he was a member of the UPND in the security wing and it was his duty to prevent confusion and guard their superiors according to the duty given to them by the UPND party. **PW9** also admitted knowing the role of the police although they were not working together and in that particular moment, he still decided to go to the police to make a report. That he found Musyani dropping off people at a polling station

which was wrong and he told him that he had committed an offence as he was trying to influence people which led him to block the road and this was not an offence. He confirmed having gone to the police to make a report although there was no official police report to that effect as the phone that had a video was not before court.

During cross examination by Mr. Mwala, **PW9** stated that he did not lodge any complaint with the ECZ as he did not know where they were found. After making the report the police did not just release the driver because there was no offence but because the driver was working with them.

There was no re-examination of this witness.

PW10 was **JAIROS SIMBEYE** the Petitioner in this matter. It was his evidence in chief that during the month of December 2020, he received a call from a ward next to Malawi, and the caller informed him that Zambian NRCs had been issued to Malawian citizens by the DC for Isoka, Mr. Davy Simbule.

So, on 6th January, 2021 he and two UPND party members, Emmanuel Simposya and Chipso Manchisi started off to travel to Malawi, which is about 120kms from Isoka in order to go and determine whether this report was genuine. However, about 30kms before they reached Malawi, **PW10** received a call from a police officer, Mr. Peter Nguni from Isoka Police Station who wanted to know what he was going to do in Malawi, given that it was not yet campaign time. The officer then advised him to return home and report himself to Isoka Police Station, he later sent a text stating that he should instead report on 7th January, 2021 to Chinsali Police HQ.

So the next day he went to Chinsali Police HQ and he met 4 police officers who also wanted to know what he had gone to do in Malawi and he narrated the report he had received pertaining to the alleged issuance of Zambian NRCs to Malawian citizens. In response, the police told him that he was a public figure who was not supposed to be everywhere, despite the fact that he would receive

reports and phone calls. The police stated that he should not go to the said areas until the campaign period began.

PW10 further stated that on 2nd August, 2021, the UPND President Mr. HH was in Isoka campaigning with them and he spent a night at Prosper Lodge. The next morning after he met him, it was agreed that they would conduct a road show. So **PW10** got into a Toyota Hilux that belonged to the Provincial Chairman so that he would lead the way from Prosper Lodge and he gave his vehicle Registration No. ABR 4761 to his driver Jimmy Sikanyika (**PW8**).

According to **PW10**, they formed a long convoy or entourage with the President's vehicle far behind and after driving for less than 500m from the lodge into town they were stopped by the police. The President, Mr. Hichilema got off the vehicle so he could explain the nature of their road show which was not a rally to the police officers. He also asked them to give him an hour to conduct the road show but spent 2 hours convincing them.

When they finally began moving, and were approaching the CBD they found a Prado motor vehicle, with Registration No. AQB 1454 that belonged to the 1st Respondent by the roundabout. It also had PF branding with pictures of the former President, the Vice President and the 1st Respondent. He was certain that it belonged to her because she had been using it for a long time.

This vehicle had occupants that wore PF regalia and it blocked them from proceeding with their roadshow. To avoid confrontation, they squeezed through between the pavement and the Prado, and turned to the left to go to town. He also noticed the third vehicle in the procession which belonged to him. It was later parked by the side of the road whilst the road show carried on and as they moved slowly the President's entourage was behind and his vehicle went out of sight.

After they moved for a few more meters, he received a call from **PW8** who reported that the vehicle had been damaged by PF cadres who had tried to block them by the roundabout.

So he told him that he would escort the UPND President who was proceeding to Nakonde to the junction then return to see the extent of the damage to the vehicle. When he finally returned, he found that it was completely damaged; 3 windows and the front and rear windscreens were shattered. All the tail lights and seats were damaged. From what he observed, the car had also been turned upside down for easy access to the fuel tank that had been damaged, and it was emptied of all fuel.

In order to push the car to the police station, they borrowed 2 tyres to replace the 2 that had been punctured, where he took the pictures he had exhibited before Court with his note 10 plus phone. He also reported the case to the police station and it was currently in Court and two people that had been named in the police report had been apprehended in connection with the subject offence. From that moment onwards he had difficulties with transport, and could not campaign effectively as it was his last vehicle and he was relying upon it entirely.

PW10 testified that on 6th August, 2021 he received a call from UPND officials known as Mr. Kankumbu, Mr. Mpandwa and Mr. Musukwa. They told him that the distributors of the Social Cash Transfer Fund included people that were dressed in PF Party regalia and the electorate were being told that it was a PF government programme. So he advised them to go and speak to them.

PW10 also testified that on 10th August, 2021, whilst at Isoka Central Police Station in the company of about 6 or 7 other people, a person he came to know as Ishmael (**PW7**) approached him to inform them that he had seen fertilizer being distributed by people, some of whom were dressed in PF regalia. That he had been able to identify some people at the said distribution point and he recalled seeing the 1st Respondent who was the PF aspiring candidate and another one he could not recall.

After receiving this report, **PW10** did not follow it up immediately until 15 to 20 minutes later as he wanted to speak to the Officer-in-Charge at Central Police. When he reached the shelter, he spoke to the officers that were distributing the fertilizer and asked why distribution was being done during the election period as only a day was remaining to the polling day.

PW10 told the Court that he had a challenge with what was happening because the people that were loading trucks and vans with fertilizer were wearing PF regalia which was sending out a wrong impression. So he asked Emmanuel Simposya to take pictures and a video of the incident so he could have evidence of what was transpiring.

The distributors of the fertilizer told him that they were merely following instructions from their leaders, so **PW10** called Judith Mambo the District Elections Officer for the ECZ and informed her what was happening, he also stated that he wondered why the Fertilizer Storage Shed was open and why the distribution was being done by people dressed in PF regalia. In response, she admitted that it was wrong and advised him to speak to the District Commissioner since he was the one that gave the directive.

That when he was about to call the DC, one of the people he was with had already phoned him to explain the situation. So he told the Community Development Officers that since the DC had ordered the opening of the distribution he should also come and close it. After this he decided to return to the police station to see the Officer-in-Charge (OIC) to make an official report and when he did so, the OIC told him that the police could not do anything since the distribution was a government programme.

After this he continued preparing to go and cast his vote from Chaswata which is over 120 km from Isoka town and the road was very bad. **PW10** left Isoka on the evening of 10th August, 2021 and travelled the whole night until he arrived at Nzoche. The next morning the Ward Chairman, a Mr. Siame, went to greet

them and he informed them that Social Cash Transfer was being given at a school.

PW10 went to the school where he found the ECZ team that was going to facilitate the voting and when he asked them if it was right for the Social Cash Transfer Funds to be given out on that date they explained that it was not right and stated that they had actually told the distributors not to distribute it from the school where the ECZ were but to use another school.

He proceeded to the said school, about 300m away and when he arrived, he found a man that was wearing a PF T-shirt inside his jumper and he could see it clearly because it was protruding. **PW10** spoke to the man that was distributing the funds and he asked Emmanuel Simposya to record a video of their conversation after which the man left on a motor bike. He also met a teacher who was one of the people responsible for the Social Cash Transfer Fund and when he asked him why it was being distributed, he told him that they were working under orders.

After this **PW10** and his team proceeded to Chaswata Primary School and they arrived just after 17:00 hours on 11th August, 2021 and prepared to go and vote the next morning. He stated that it was his intention to go and vote early in the morning to enable the 2 men who had accompanied him return to Isoka in time to also cast their votes. So they waited from 05:00 hours until the polling stations were opened at 06:00 hours. That they hung around since he was allowed to do so in order to assess the voting pattern as a candidate. It was also his evidence that Chaswata was a main polling station with 3 streams under it. So he stayed there until just before 08:00 hours and all of a sudden he noticed a group of PF supporters arrive all at once in a strange way from the Malawi direction. The strange thing is that these people about 50 in number came at the same time and from the direction of Malawi. When he asked one of them where they were coming from, he was informed that they were coming from Malawi.

PW10 went and spoke to the ECZ representatives at the school and he was told that there was nothing he could do as they had NRCs and Voters' Cards. 20 minutes later, he saw another group of people arrive in a similar fashion and to his dismay, after they voted instead of going back to Malawi they all went in a different route and he decided to follow them to see where they were headed. As he was moving along behind them, he met the 2 witnesses, Kanyika Gift (**PW1**) and Edward Harawa (**PW4**).

PW10 told the Court he engaged them in a conversation and they narrated how they came from Malawi where NRCs had been given to them by the DC Davy Simbule and that they later returned to Zambia to collect their Voters' Cards. They told him that the two governments had arranged that when this was done the Malawians would receive fertilizers through cooperatives that would be formed.

That **PW1** also mentioned that the PF candidate Majorie Nakaponda also went to the Malawi boundary to inform them that their help was required so that the PF government would stay in power. They also left money for them. When he asked them if there was any other political party present at the meeting, he refused and stated that only the 1st Respondent and the DC had gone to tell them about *pabwato*, Edgar Lungu and the PF aspiring candidate Marjorie Nakaponda, the PF Council Chairman and Aaron Mutambo, the Councilor.

At that point the Petitioner told **PW1** that he was also a candidate, the latter apologized and told him that he had already cast his vote and that there had been a promise for him to go and get a meal and more party regalia from the place where he was now headed.

As they were about to reach their destination, **PW10** noticed food being prepared and when they arrived the Petitioner was recognized and they were asked what they were doing there and yet they were from another party. To avoid misunderstanding, he decided to leave quickly for Isoka and he also got the contact details of the two Malawians, **PW1** and **PW4**. The people he was with

cast their votes and the results of the Parliamentary election were announced on 13th or 14th August, and the difference between the 1st Respondent and himself was 298. After this he decided to petition the results and when he did so some other witnesses came through. Some brought the list of the social cash transfer recipients as well as a list of the fertilizer recipients. They volunteered to testify and that was why he was before the Court. Moreover, that he had a number of documents before Court such as page 1 which showed the declaration of results of the MP elections which showed the difference in their results.

In terms of the manner in which the Petitioner's Bundle of Documents was outlined; Page 2, shows Gift Kanyika's Malawian ID, page 3 shows his Zambian NRC, Page 4 Gift Sikanyika's Voter's Card No. 3708037, Page 5 the Malawian ID for Harawa, Page 6 shows the Zambian NRC for Harawa, Page 7 Harawa's voter's card 37080216, Page 8 to 82 is the voters' registration list of names for Chaswata polling station which had 3 polling streams. Page 83 is the whitebook for the vehicle that was damaged with his full names. Pages 84 to 89 shows pictures of his campaign vehicle that was damaged (ABR 7461) page 90 shows a police report of the damaged vehicle with a crime register number: 10/08/21.

Page 91 to 156 shows a Social Cash Transfer Register from the Ministry of Community Development and Social Welfare which he got from Abcl Silwenga (PW5). Whilst page 68 has a report that was not used by any witness. Page 159 to 161 has pictures showing the warehouse where fertilizer was being distributed from with the people that were loading trucks wearing PF regalia. Pages 163 to 166 a list that came from 1 of the witnesses regarding fertilizer distribution in Isoka. Pages 167 had a picture that showed the recipients of mealie meal and cooking oil. Page 168 shows a report from Kapililonga that was not used by any witness and lastly page 169 has a picture of 1st Respondent and the ECZ officer at one of the polling stations that was taken from his page. He also took 2 videos before court that were part of the bundle. These videos were taken with his phone and they were offloaded onto his laptop and onto the compact discs which he

submitted as part of his Bundle of Documents which were admitted into evidence.

When cross examined by Mr. Kayula, **PW10** stated that the Isoka DC was issuing NRCs and Voters' Cards and yet their issuance was a function of the government under the Ministry of Home Affairs, whilst that of voters' cards was a function of the ECZ and the 1st Respondent played no role in the two processes. Moreover, that Paragraph 9 of the affidavit verifying petition and the statement he gave before court were one and the same thing. That the actual issuance of NRCs and Voters cards was the same as facilitating their issuance.

It was also his testimony that he learnt about the alleged issuance of NRCs and Voters' Cards which happened around mid-December of 2020. Moreover, that there was a time when he attempted to go to the Malawian border town and was told to turn back by the police who asked him to wait until the campaigns began before going there. He also told the Court that the alleged issuance of NRCs by the DC bothered him extremely but he did not report this activity to the police because he did not have enough facts, only suspicions.

Moreover, that the campaign period only opened on 14th May, 2021 and he confirmed that from the time it commenced, the police did not stop him from going to campaign or from going to conclude his fact-finding mission of the alleged irregular issuance of NRCs and Voters' Cards. **PW10** admitted the possibility of Zambians who lived in Malawi and were eligible to register and later participate in the past elections.

PW10 also stated that when he saw the Malawians coming from a particular direction in a very strange way, he had an opportunity to speak to the Electoral Commission of Zambia but they told him that they could not do anything because these people had Voters' Cards and NRCs. Further that he knew the ECZ voter eligibility guidelines which appeared on the left side of page 34 of the PBDs. He also said that he knew that the Social Cash Transfer program belonged

to the government and it fell under the Ministry of Community Development and Social Services.

Further, that the 1st Respondent did not hold any position in this Ministry and that if a government official wished to participate in the election they were expected to resign from their position. He also admitted that the evidence given before this Court linked the 1st Respondent to the Social Cash Transfer program. That the person he found giving out this Social Cash Transfer and later took off on a motor bike was not the 1st Respondent. That he later met a teacher that was also responsible for this program and when he queried him about what was happening, he told him that they were merely following the instructions issued from the top and he did not probe further to enquire what he referred to when he said top and neither did he expect this Court to assume the meaning of the word.

PW10 also testified that the Fertilizer Farmer Input program was a government program and at the time of this alleged distribution of fertilizer, the 1st Respondent did not hold any Government position. Moreover, that whilst at the police station a man he came to know as Ishmael told him that he saw some people clad in PF regalia distributing fertilizer on 10th August, 2021.

He also confirmed that according to this report the 1st Respondent was also present there although there was no pictorial or video evidence of this before Court. That after he was informed about the fertilizer distribution, he decided to go to the shed and when he arrived, he did not find the 1st Respondent there.

Regarding the 3rd day of August, 2021, **PW10** testified that on this day, his car Registration No. 7461 was damaged by alleged PF cadres. That as he headed towards the roundabout, he found a vehicle that belonged to the 1st Respondent and he did not take any pictures or videos of it.

PW10 also told the Court that his damaged vehicle was being driven by Jimmy Sikanyika (**PW8**) who did not tell him that he received death threats on this day.

That the only report that was made to the police, was that of the malicious damage to the vehicle and not threats made to his life as clearly indicated in the police report. However, he could not confirm that the testimony of the driver was not true since **PW8** informed this Court that the damage to the car and the threats to his life were both reported to the police. That after his vehicle was damaged, it could not move on its own and it was merely pushed to the police station on 3rd August 2021, the day he took pictures of the damaged car and proceeded to report the matter. He lastly stated that the document he referred to as a police report was in fact a letter on page 90 and is dated 20th August, 2021.

During cross examination by Mr. Mwala, **PW10** was guided through the documents and pictures he had exhibited in his Bundle of Documents. He stated that page 1 was a declaration of the results of the election for Member of Parliament and it shows that 26, 568 people voted, which was a huge unprecedented turn out. Pages 2 to page 7 exhibited the Zambian NRCs for **PW1** and **PW4**. The witness also stated that it was not true that he had failed to exhibit their Malawian NRCs nor that he had only exhibited 1 since the other one was expired.

That Pages 83 to 89 show pictures of the damaged motor vehicle without a date which could not confirm who damaged the motor vehicle as there were no PF cadres or pictures there. Page 90 shows the letter which was not a police report which letter had the word 'suspected' which meant that it was inconclusive that the perpetrators were PF cadres.

Whilst Pages 91 to 156 show the Social Cash Transfer documents and **PW10** stated that the distribution of this fund was a government program with no prescribed date upon which it could be tendered and the government could not be sued if it was distributed earlier than was expected. Moreover, that he would only be unhappy about such distribution under certain circumstances. **PW10** confirmed not having relied on the documents exhibited on pages 157 and page 168.

PW10 admitted that the pictures exhibited on pages 159 to 161, had no dates which invited the possibility that they could have been taken during the campaign period and not just before elections. Similarly, that the document on page 165 was neither dated nor signed and could have been prepared at any time, whilst the undated pictures on page 167 had a lady with a bag of mealie meal, and two 5 litre containers next to her. Whilst page 169 showed the man wearing a cap who was the Presiding Officer and the lady who was the 1st Respondent herein.

PW10 also confirmed having called Ms. Judith Maambo, the District Electoral Officer for the ECZ to find out if it was right for fertilizer to be distributed by individuals wearing PF regalia and she told him that it was not and she asked him to contact the DC who had authorized this. **PW10** then told the Court that the reason why he called the District ECZ officer was because there was no time to follow the procedure since they were rushing to go and cast their votes.

In addition, he stated that he did not get the names of the ECZ officials as they did not show him their accreditations but he saw their ECZ badges. **PW10** also confirmed that all the witnesses he called, cast their votes and none of them complained to ECZ using the established channels. **PW10** admitted that without any complaint submitted before it, the ECZ could not assist him in any way because it would remain unaware of such complaint. He went on to state that there were about 72 polling stations and with the streams they increased to 85 and he was present at all those stations.

PW10 was not re-examined.

This marked the close of the Petitioner's case.

RESPONDENT'S EVIDENCE

The 1st Respondent also testified and called no other witnesses, whilst the 2nd Respondent called two witnesses. I shall again endeavor to summarize their evidence.

RW1 was Marjorie Nakaponda (the 1st Respondent). The 1st Respondent's evidence in chief is that she is the current Member of Parliament (MP) for Isoka Constituency. That she was before Court to state that she applied to contest on the PF ticket as MP and she was later interviewed and finally adopted as the party candidate. So she flagged off her campaign on 14th May, 2021 and according to her, the campaigns were free and fair. That on 12th August, 2021 the polling day, she cast her vote at the Council Hall polling station then returned home to await the results which were announced on 14th August, 2021 and she was declared the winner. She was called to Parliament in Lusaka for orientation and whilst there, she received a call informing her that the results of the election had been petitioned and she was shocked.

Moreover, that the said petition had allegations regarding the issuance of NRCs and Voters' Cards to alleged Malawian citizens; the distribution of the Social Cash Transfer issue and the allegation of the damage to the Petitioner's motor vehicle by suspected PF cadres. There were also allegations of fertilizer distribution and the slaughtering of a cow.

RW1 testified that as a common citizen without a position in government, she had no power to facilitate the issuance of NRCs and Voters' Cards to alleged Malawian citizens. To her knowledge the former was a function of government under the Ministry of Home Affairs, Registration Department, while the latter was carried out by the Electoral Commission of Zambia (ECZ). Similarly, the distribution of Social Cash Transfer Funds and fertilizer were government programs.

RW1 also testified that on the 3rd day of August, 2021 she had a funeral, as Mr. Davy Sichone a party member lost a parent and she asked the drivers to go and attend the funeral, while she remained behind as she was unwell. That she had no idea that a car had been damaged due to her absence where it happened. Further that on the day of the fertilizer distribution, she was at Katenshya Ward

and had no idea who was distributing it or where it was being done from as she was not there.

Moreover, that the Petitioner also told the Court that he did not find her at the place of distribution when cross examined. She lastly stated in examination in chief that she was surprised that a cow had even been slaughtered when they had run out of relish at their camp, also that she had never heard of Elvis Mulenga, or seen him or her since her electoral agent was Webster Makanta, who had even signed on the papers, she had filed in support of her nomination to the ECZ, which was exhibited on page 1 of the Respondents Bundle of Documents.

During cross examination **RW1** stated that she was aware that non Zambians were not permitted to vote in the elections but that she was unaware that the only Zambians that were allowed to hold dual citizenship were those that had previously been Zambian. She knew that in order to acquire dual citizenship one had to apply to the citizenship board in the prescribed manner. That she did not recall that **PW1** and **PW4** stated that they were Malawian citizens or that they exhibited their Malawian registration cards. **RW1** only recalled when they showed their Zambian NRCs. She admitted that the documents exhibited from pages 2 to 5 of the PBDs were purported to be Malawian identity documents for **PW1** and **PW4** aforesaid. She also recalled that the 2 witnesses testified that they were not the only ones that came to Zambia as they came to vote in a large group from Malawi.

RW1 also admitted having gone to the border of Malawi and Zambia to campaign, however, she did not recall **PW1** and **PW4** in cross examination being asked whether there was anything wrong with her going to do so. That during cross examination of **PW1** and **PW4** they were not challenged about **RW1** having promised the Malawian electorate during the campaign that if they voted for PF candidates, she would give them cooperatives and fertilizers.

RW1 admitted having heard **PW1** and **PW4** claim that she had given them money and she did not recall the lawyers asking that question as the only question they asked was if the funds were taken from **RW1** directly or through their team leaders. **RW1** went on to state that it was not her testimony that giving money to voters amounted to electoral malpractice. **RW1** said that the man who wore the blue shirt in the court gallery was not her driver and was not part of her campaign team. However, she was able to recognize him. She also denied having given him and others her motor vehicle on 3rd August, 2021.

RW1 however admitted that he had been arrested by the police for damaging the Petitioner's vehicle and was currently out of police custody on bond. That, she did not recall the testimony of **PW8** who stated that the people in her vehicle partially blocked the roundabout. **RW1** also stated that as a candidate she was not aware that blocking an opponent's road show amounted to electoral malpractice and she did not recall the testimony of **PW8** who claimed that the occupants of the 1st Respondent's vehicle on 3rd August, 2021 were the ones that had damaged the vehicle of the Petitioner. Neither did she recall the question whether her vehicle was at the scene or that it blocked the Petitioner's road show. She however admitted that damaging an opponents' vehicle would amount to an electoral malpractice.

Regarding the Social Cash Transfer payments, **RW1** admitted being aware of such payments occurring but unaware that these were paid out in amounts of **K300.00** monthly or that payments were done every two months. Neither did it come to her attention during her campaign time that the Social Cash Transfer payments were paid out on 6th August, 2021 or that barely 3 or 4 days later another payment was made.

It was also **RW1**'s evidence that she was aware that farmers were expected to receive fertilizer from September to October, 2021 but she was not aware that this time around it was distributed a day or two before the elections. She however admitted that these payments and distributions were not Patriotic Front party programs and as such it would be wrong for the distributors to wear PF regalia

whilst making Social Cash Transfer payments and whilst loading and offloading the fertilizer.

When asked about the pictures exhibited on pages 159 to 161 of the PBDs, **RW1** stated that there were loaders in the picture and that Theresa Nsofwa, **PW3** and Ishmael Mukuka, **PW7** testified that they saw her at the place where the fertilizer was being distributed. That she recalled that under cross examination **PW3** and **PW7** having been asked whether there was anything wrong with a candidate being found at that place, but she did not know whether their evidence was challenged. Moreover, that the issue of her being at Katenshya Ward was not verified with the witnesses.

RW1 that she recalled the evidence of headman Jeremiah Mutambo, **PW6** who told the Court that the 1st Respondent and his brother (Elisha Mutambo) took mealie meal, cooking oil and sugar to Kampumbu Ward which were distributed by the 1st Respondent and her colleagues to voters. She stated that any such distribution amounted to electoral malpractice.

RW1 told the Court that the difference in the votes between her and the Petitioner was only 298. Regarding the person she knew to be on police bond for having damaged the Petitioner's vehicle that wore the blue shirt she said that he was not her driver and she only met him that very day. **RW1** lastly stated that at the time of filing the nominations and during campaigns she had been residing in Isoka and her vehicle AQB 1454 was the one she drove to date and it was the motor vehicle she had rode on to get to court on the day this evidence was received.

When cross examined by Mr. Mwala, **RW1** stated that she was duly elected as an MP for Isoka and that the elections were free and fair and without violence. That she did not instruct the purported PF cadres because the fertilizer distribution, and the Social Cash Transfer fund were government programs. That she was unaware of any complaint that was made to the ECZ on these allegations. That she was unable to confirm that there was a possibility that the

alleged Malawian voters could have voted for different candidates because each of them voted alone. Thus, if there was any irregularity, she was unable to state for a fact that it only affected the Petitioner and neither was she able to confirm if the allegations raised by the Petitioner substantially affected the voting pattern and the final results.

There was no re-examination of this witness.

This marks the close of the 1st Respondents case.

RW2 was **GINO MALAMA SICHILIMA** the Returning officer for the Isoka Constituency elections. He stated that his duty was to oversee the electoral processes in the constituency and this included sensitization of the stakeholders. The stakeholders included the poll staff, the uniformed staff and to receive and distribute material from the ECZ. He also added that he would also conduct sensitization on various topics including the electoral process at the polling station, the Conflict Management Committee and its role of receiving electoral complaints and the duties of the poll staff, the media, local and international observers and monitors.

RW2 also stated that he and the other staff were monitoring the polling stations and were giving feedback to the District Electoral Officer (DEO) on the situation on the ground pertaining to the results of the polling station and tallying them in the totaling center as results would come in. After the election, they conducted results verification, announcing and declaring the councilor and mayoral results.

Moreover, that a person needed to produce a Voter's Card and a green NRC to be eligible to vote and the ECZ played no role in the issuance of NRCs as its main role was to handle the issuance of Voters Cards. However, he confirmed that for one to be issued with a voters' card they were required to produce a green NRC.

RW2 told the Court that he had no response to the allegations that non-Zambians voted, that fertilizer was distributed or that there was alleged violence. However, he was able to confirm that the Petitioner called him before the polls

to lodge a complaint on the distribution of fertilizer and he told him that there was need to escalate the issue to the Conflict Management Committee which would look into such complaints.

Further that as a Returning Officer, his office had not received any official communication on violence and he had only heard about such a report from the radio. However, he was able to confirm that if the Electoral Commission of Zambia was not informed about any alleged malpractice it would not take any step without official communication.

When cross examined by Mr. Zulu, **RW2** stated that non-Zambians were not eligible to vote and it would amount to non-compliance if they did so. He agreed that giving money, mealie meal, cooking oil and sugar to voters whilst soliciting for their votes would amount to an electoral malpractice. The witness also stated that such giving advantaged the giver and disadvantaged the opponents whilst blocking an opponent's road show by one candidate would equally amount to a malpractice.

RW2 told the Court, that if the distribution of the Social Cash Transfer, and fertilizer was being done by persons wearing the regalia of a particular political party there was a possibility that some voters would assume that it was the same political party that was giving them the funds and the fertilizer. Therefore, an election with some of the malpractices exhibited would not be considered to be free and fair. **RW2** also confirmed receiving a phone call from the Petitioner who was trying to lodge a complaint. Lastly the witness stated that he did not know whether a malpractice could be discovered after the results were announced.

When cross examined by Mr. Kayula, **RW2** stated that the Electoral Commission of Zambia played no role in the issuance of NRCs and this duty was carried out by the Ministry responsible. Regarding eligibility for one to vote, one was expected to have both the Voter's Card and a green NRC and that everyone that voted in the Isoka parliamentary election had the two. He also confirmed having not received official communication of electoral violence as the returning officer.

RW2 also stated that he did not know whether not receiving complaints relating to electoral violence was indicative of the fact that the environment was free and fair for political participants. Moreover, that the Social Cash Transfer and the fertilizer distribution were government programs and no political party would claim to own them.

He lastly stated that he was unable to recall the total number of registered voters or the percentage of voter turnout in Isoka Constituency and to state unequivocally whether the voters freely expressed their will in choosing their MP.

During re-examination, he stated that if the Petitioner wanted guidance on what step to take after lodging in his complaint, he told him to seek redress with the Conflict Management Committee.

RW3 was **JUDITH MUKWITA MAAMBO** the Isoka District Electoral Officer. She told the Court that the Petitioner called her 2 or 3 days before the poll day to complain about the distribution of fertilizer and in response she asked him to escalate the issue to the office of the DC to ascertain who was authorizing this distribution of the fertilizer. She asked him to escalate the Complaint to the said office because she was aware that all issues of farm inputs and fertilizer distribution were usually administered under the departments that operated under the office of the DC.

When cross examined, by Mr. Zulu, she stated that as the District Electoral Officer for Isoka District; she was the highest ranking ECZ official in Isoka and she confirmed that the Petitioner called her and made a complaint.

When cross examined by Mr. Kayula, she stated that the complaint she received from the Petitioner was not presented to her in a formal and written manner as was procedurally required.

There was no re-examination of **RW3**.

This was the close of the 2nd Respondent's case.

SUBMISSIONS

Counsel for the Petitioner and both Counsel for the 1st and 2nd Respondents filed written submissions into Court which I have considered together with the evidence on record.

The summary of the Petitioners submissions is as follows. On the basis of the case of **MARGARET MWANAKATWE V CHARLOTTE SCOTT AND ATTORNEY GENERAL**⁶ Counsel for the Petitioner stated that the election of the Isoka MP, Marjorie Nakaponda (the 1st Respondent) be nullified pursuant to **Section 97 (2) (a) of the Electoral Process Act of 2016**. This is because the Petitioner had proved to the requisite satisfaction of this Court that the Candidate personally committed corrupt or illegal practices or other misconduct in relation to the election or that the acts in issue were committed with the candidate's knowledge and consent or approval or that of the candidate's election or polling agents.

In line with this law, it was alleged that the 1st Respondent committed those malpractices when she went to campaign to Malawians, which fact was proved by **PW1** and **PW4** who were Malawian citizens and eye witnesses to what the 1st Respondent did. The other allegations were that the 1st Respondent or her election or polling agents allegedly committed corrupt or illegal or other malpractices by damaging the Petitioner's motor vehicle on 3rd August, 2021; by the distribution of the Social Cash Transfer funds; the distribution of mealie meal; cooking oil and sugar; by distributing fertilizer to the electorate a few days to the elections; and when the purported voters from Malawi were transported to vote and fed afterwards by the 1st Respondent and her agents.

A summary of the 1st Respondent's case is that the allegations made by the Petitioner against the 1st Respondent and her election or polling agents have not been proved with cogent evidence to the requisite standard or proof namely a fairly high degree of convincing clarity. That the Social Cash Transfer Funds and the Farmer Input Support Programme under which Fertilizer is distributed were government programs over which the 1st Respondent had no control, whilst the

purported issuance of NRCs and Voters' Cards are also a function of the Zambian government and the ECZ respectively. Thus the 1st Respondent had no power to use such programmes to her advantage or influence in the 2021 elections. That the alleged campaigns and distribution of campaign materials to Malawian citizens, the damage caused to the Petitioners motor vehicle a few days to the elections as well as the distribution of mealie meal, cooking oil, sugar and PF regalia to members of Katenshya Ward had not been proven to the required standard of proof.

The 2nd Respondent in sum, submitted that the allegations levelled against it were that the 2021 elections in Isoka Constituency were marred with irregularities and malpractices to the effect that non-Zambians, particularly Malawian citizens were allowed to vote by the 2nd Respondent contrary to the law; that the 2nd Respondent failed to take action over the alleged distribution of the Social Cash Transfer Funds and fertilizer distribution by people clad in Patriotic Front Party regalia a few days prior to the elections. However, in response the 2nd Respondent stated that it was unequivocal from the evidence of all the witnesses on the record that they did not complain to the ECZ and that the Petitioner and his electoral agents failed to utilize the complaints procedure despite having been sensitized according to the 2nd Respondent's witness Ginno Malama Sichilima (RW2). Further that all the witnesses confirmed that the 2nd Respondent could not act if it was not made aware of any alleged malpractices or breaches of the Electoral Process Act, 2016.

THE LAW

Section 97 (2) of the Electoral Process Act No. 35 of 2016 deals with the grounds upon which the election of a Member of Parliament shall be void if proved to the satisfaction of the trial court. It states that:

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

- (a) *a corrupt practice, illegal practice or other misconduct has been committed in connection with the election—*
 - (i) *by a candidate; or*
 - (ii) *with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;*
- (b) *subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election; or*
- (c) *the candidate was at the time of the election a person not qualified or a person disqualified for election.*
- (3) *Despite the provisions of subsection (2), where, upon the trial of an election petition, the High Court or a tribunal finds that a corrupt practice or illegal practice has been committed by, or with the knowledge and consent or approval of, any agent of the candidate whose election is the subject of such election petition, and the High Court or a tribunal further finds that such candidate has proved that—*
 - (a) *a corrupt practice or illegal practice was not committed by the candidate personally or by that candidate's election agent, or with the knowledge and consent or approval of such candidate or that candidate's election agent;*
 - (b) *such candidate and that candidate's election agent took all reasonable means to prevent the commission of a corrupt practice or illegal practice at the election; and*

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

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

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

The above provision sets out the grounds for the nullification of an election under **Section 97 (2) (a) and (b) of the Act**. The current position is that a malpractice must be such that it is capable of influencing the outcome in an election in that the majority of voters either in a constituency as it is in this case, district or ward will be prevented from voting for a candidate of their choice.

The Constitutional Court interpreted this provision in the case of **STEPHEN MASUMBA V ELLIOT KAMONDO**⁸ when they held that the grounds for nullifying an election petition were as follows:-

“(i) That a corrupt practice or an illegal act or other misconduct was committed in connection with the election;

(ii) The illegal act or misconduct complained of was committed by the respondent or by his election agent or polling agent or with the respondent's knowledge, consent or approval;

(iii) As a result of the corrupt or illegal act or misconduct committed, the majority of the voters in the constituency were or

may have been prevented from electing a candidate whom they preferred.

(iv) Where it appears to the High Court or the Tribunal that the election was not conducted in accordance with the Act or the Law and that as a result of the non-compliance, the results were affected; and;

(v) The candidate was at the time of the election a person not qualified to stand for elections.”

The law on Undue Influence that relates to election malpractice is taken from Section 83 (1) (c) of the Electoral Process Act No. 35 of 2016. It states that:

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

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

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

(ii) to vote or not to vote;

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

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

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

BURDEN AND STANDARD OF PROOF

It is trite law that the burden of proof in an election petition lies with the petitioner. In **LEWANIKA AND OTHERS V CHILUBA**¹ the Supreme Court stated that “parliamentary election petitions are required to be proven to a standard higher than a mere balance of probabilities”. In **MABENGA V WINA AND OTHERS**² the Supreme Court said that:

“An election petition is like any other civil claim that depends on the pleadings and that the burden of proof is on the challenger to that election to prove “to a standard higher than on a mere balance of probability; issues raised are required to be established to a fairly high degree of convincing clarity”.

Further in **MAZOKA AND OTHERS V MWANAWASA AND OTHERS**³ the Supreme Court stated:

“...that for the petitioners to succeed..., it is not enough to say that the respondents have completely failed to provide a defence or to call witnesses, but that the evidence adduced establishes the issues raised to a fairly high degree of convincing clarity in that the proven defects and the electoral flaws were such that the majority of voters were prevented from electing the candidate whom they preferred; or that the election was so flawed that the defects seriously affected the result which could no longer reasonably be said to represent the true free choice and free will of the majority of voters.”

The same principle has been followed in other commonwealth jurisdictions such as Kenya where the Supreme Court of Kenya in **RAILA ODINGA AND OTHERS V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND OTHERS**⁴ states thus at page 75:

“But at the same time, a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden. The threshold of proof should in principle, be above the balance of probability, though not as high as beyond reasonable doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question”.

In the Indian presidential election case of **SHRI KIRPAL SINGH V SHRI V. V. GIRI**⁵ the Supreme Court of India stated that:

“There can be no doubt that a charge of undue influence is in the nature of a criminal charge and must be proved by cogent and reliable evidence, not on the mere ground of balance of probability but on reasonable certainty that the persons charged therewith have committed the offence which leaves no scope for doubt as to whether they have done so. Although there are inherent differences between the trial of an election petition and that of a criminal charge in the matter of investigation, the vital point of identity for the two trials is that the Court must be able to come to the conclusion beyond any reasonable doubt as to the commission of the corrupt practice”.

In my view the standard of proof is generally higher than the ordinary balance of probabilities because the subject matter of the petition is of critical importance to the welfare of the people and their democratic governance. The duty is therefore on the petitioner to bring cogent evidence before court to prove his allegations on the required standard of proof. Moreover, the allegations made in the petition once proved must substantially affect the election results otherwise the election ought not to be declared void.

A Petitioner has a duty to adduce credible or cogent evidence to prove his allegations on the requisite standard of proof; and that the evidence must be free from contradictions and truthful, so as to convince a reasonable tribunal to give judgment in the party's favour. On both principle and on authority, I am convinced that the allegations made in the Petition if proved must affect the results of the election in a substantial manner. Without a bearing on the result, the election cannot be avoided.

In the Ugandan case of **NABUKEERA HUSSEIN HANIFA V KIBULE RONALD AND ANOTHER**⁷ it was said that:

“In an election Petition, just like in the election itself, each party is set out to win. Therefore, the Court must cautiously and carefully evaluate all the evidence adduced by the parties. To this effect evidence of partisans must be viewed with great care and caution, scrutiny and circumspection”.

It was also stated that:

“...it would be difficult indeed for a Court to believe that supporters of one candidate behaved in a saintly manner, while those of the other candidate were all servants of the devil; further that; “in election contests of this nature, witnesses most of them motivated by the desire to score victory against their opponents deliberately resort to peddling falsehoods. What was a hill is magnified into a mountain “and that “... the evidence of both parties is, in its entirety subjective and cannot be relied upon without testing its authenticity from a neutral and independent source.”

I cannot agree more with these observations.

THE ISSUES

From the pleadings and evidence, it seems that seven (7) main questions arise for decision:

Whether there were any corrupt or illegal practices or other misconduct which would be sufficient ground to nullify the election on the basis of the following allegations;

- a) Whether the 1st Respondent and or her election or polling agents solicited the help of Malawian citizens by giving them Zambian NRCs and Voters' Cards to enable them to vote as Zambian citizens in the elections by promising to reward them with cooperatives, fertilizer and money.***

- b) Whether the 1st Respondent hired people to campaign for her and distributed campaign materials to Malawian Citizens who were not qualified to vote.*
- c) Whether the 1st Respondent and or her election or polling agents distributed the Social Cash Transfer funds a few days to the elections.*
- d) Whether the 1st Respondent and or her election or polling agents distributed fertilizer just before the elections.*
- e) Whether the 1st Respondent and or her election or polling agents distributed mealie meal, cooking oil and sugar just before the elections.*
- f) Whether the 1st Respondent and or her election or polling agents damaged the motor vehicle of the Petitioner.*
- g) Whether on the polling day the 1st Respondent hired people to transport Malawians into Zambia to vote and cook for the Malawians.*

I will deal with each issue seriatim in the light of the evidence adduced before Court:

The overall or main legal issue is whether there were any corrupt or illegal practices which would be sufficient ground to nullify the election on the basis of the following allegations.

A. WHETHER THE HELP OF MALAWIAN CITIZENS WAS SOLICITED

The first issue I will resolve is whether or not the 1st Respondent and her election or polling agents solicited the help of Malawian citizens by giving them Zambian NRCs and Voters' Cards to enable them to vote as Zambian citizens in the elections by promising to reward them with co-operatives, fertilizer and money.

In determining this issue and every other issue hereunder, I will endeavor to show whether or not the allegation has been proved to the requisite standard of proof as stated in the case law referred to above.

According to the Petitioner, the 1st Respondent committed an electoral offence under **Section 83 (4) of the Electoral Process Act No. 35 of 2016** which provides that:-

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

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

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

According to Counsel for the Petitioner, the evidence of **PW1** and **PW4** Malawian citizens was that in the first week of July 2021, the 1st Respondent and her team who included Hared Silwimba (PF candidate for the Council Chairperson position in Isoka) and Aaron Mutambo (PF Councilor candidate for a ward within Isoka Constituency) went to Malawi to campaign to Malawian citizens near the boundary with Zambia and **PW1** and **PW4** attended the said meeting. That these witnesses corroborated each other and both confirmed the presence of the 1st Respondent at the gathering and the fact that the 1st Respondent in fact addressed the gathering.

That **PW4** testified that in her address to the gathering the 1st Respondent told the Malawian citizens that she had come to Malawi in order to get the Malawians to vote for the Government in Zambia so that Edgar Lungu is not removed from power. She further told the gathering that if the Malawians voted for her and other PF candidates, the Zambian Government would open co-operatives in Malawi just like they had done in Zambia and they would commence fertilizer distribution just like they had done in Zambia.

The Petitioner's Counsel contended that in the cross examination of **PW1** and **PW4** Counsel for the 1st Respondent did not challenge or deny the 1st Respondent's presence. The issue that was raised was that there was nothing wrong with the 1st Respondent campaign at the boundary area. Further that in

cross examination Counsel for the 1st Respondent equally did not challenge promises and utterances made by the 1st Respondent to the Malawian Citizens.

It is contended that from the 1st Respondent's utterances to the gathering, it is clear that she knew that they were Malawian Citizens and that explains why she was promising to take co-operatives to them and start distributing fertilizer to them as was the case in Zambia.

The Petitioner also contends that the 1st Respondent committed an electoral offence under **Section 81 (1) (a) of the Electoral Process Act, No. 35 of 2016** which provides that:

"1. A person shall not, neither directly or indirectly be oneself or with any other person corruptly

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

Further that **paragraph 15 (h) (iii) of the Code of Conduct of the Electoral Process Act** provides that:

"A person shall not –

(h) offer any inducement, reward or bribe to any person in consideration of such person.

(iii) voting or not voting"

It is stated that **PW1** and **PW4** testified that while at the said gathering, the 1st Respondent released money which she gave to leaders of the Malawian attendees for onward distribution to the attendees. **PW1** and **PW4** each received **K100.00** (Malawian Kwacha) from the said distribution of money.

That when Counsel for the 1st Respondent cross examined **PW1** and **PW4** he did not challenge the fact of giving money to Malawian citizens. The only questions he raised on that issue was that money was not directly given to the witnesses by the 1st Respondent but that the 1st Respondent gave the money to leaders who then distributed to attendees.

Furthermore, when the 1st Respondent testified, she did not call as witnesses, the people she was allegedly with, namely Hared Silwimba and Aaron Mutambo to testify as to what transpired at the campaign gathering in question.

It is submitted that since the 1st Respondent did not challenge the evidence of **PW1** and **PW4** either during cross examination or during her defence, the evidence of **PW1** and **PW4** as to what transpired in the first week of July 2021 should be accepted as a fact.

It is contended that the action by the 1st Respondent of giving money to leaders of the Malawian attendees for onward distribution to the attendees is an act of bribery as defined and is a violation of **Section 31 (1) (a) of the Electoral Process Act** and **Rule 15 (h) (iii) of the Code of Conduct of the Act**.

As regards whether the said corrupt, illegal or other malpractice was committed by the 1st Respondent or with her knowledge, consent or approval or by her election agent or polling agent it is argued that the 1st Respondent was personally present at the campaign events. That she personally made the promises about co-operatives and fertilizer and she personally gave money to leaders of the attendees for onward distribution.

It is submitted that there is no doubt that the corrupt, illegal or other malpractice was personally done by the 1st Respondent or with her knowledge.

With regard to whether as a result of the corrupt, illegal and other malpractice on the part of the 1st Respondent, the majority of voters in the Isoka Parliamentary election were or may have been prevented from electing the

candidate whom they preferred it is sated that the difference in votes between the 1st Respondent and the Petitioner was only 298 votes.

It is stated that as shown through the testimony of **PW1**, **PW4** and **PW10** the boundary area in question is near Chaswata Polling Station where Malawian citizens were registered to vote and actually voted. That despite Chaswata being remote and sparsely populated, as testified by **PW10**, it is strange that it had 3 voting streams with a total of 2,058 voters of which at least 537 were said to be Malawians which is more than the 298 vote difference between the 1st Respondent and the Petitioner. That of note was the fact that Chaswata Polling Station that ended up with 2,058 voters is not a Ward but merely a Polling Station under Kasoba Ward.

It is submitted that as a result of the corrupt, illegal or other malpractices committed by the 1st Respondent, the majority of voters may have been prevented from choosing the candidate whom they preferred because of the malpractices in question alone involved people in excess of 298 vote difference between the 1st Respondent and the Petitioner. That therefore the allegation under paragraph 4 (ii) as read with paragraph 4 (xi) of the Petition has been proven to the required standard and on this score alone the election should be nullified.

The 1st Respondent in response to the allegations under paragraph 4 (ii) as read with paragraph 4 (xi) contended that the issuance of NRC's is an exclusive act of the Government of the Republic of Zambia and same is governed by the **National Registration Act, Chapter 126 of the Laws of Zambia**.

That the issuance of NRCs is conducted by the Ministry of Home Affairs and not either the 1st Respondent or the 2nd Respondent. It is submitted that the alleged act of issuance of NRCs to Malawians cannot be the basis for nullifying an election as it cannot fit in **Section 97 (2) (b) of the Electoral Process Act, 2016**.

It is further submitted that during cross examination, the Petitioner admitted that the issuance of NRCs is a function of government under the Ministry of

Home Affairs and that the 1st Respondent played no role in the process of issuance of NRCs.

That it is not in dispute that the NRCs exhibited by the Petitioner were obtained before the voter registration process. Therefore at the time the 2nd Respondent commenced its voter registration process, the alleged Malawians had green National Registration Cards and were as such eligible to register as voters.

It is submitted that **Article 229 of the Constitution of Zambia (Amendment) Act No. 2 of 2016** mandates the Electoral Commission of Zambia (the 2nd Respondent) to register voters. That **Section 8 of the Electoral Process Act, 2016** sets out the qualifications for one to register as a voter. **Section 8 (1)** provides as follows:

“a person qualifies for registration as a voter if that person –

(a) Is a citizen of Zambia;

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

(c) Is in possession of a national registration card.”

It is submitted that ECZ is mandated to register any person as a voter who has presented to them a green NRC at the time of voter registration process. That the 2nd Respondent is not expected to do a background check as to the citizenship of each and every individual that presents a green NRC at the voter registration process as there is a presumption that only Zambian citizens are issued with a green NRC. The Court's attention was drawn to the Guidelines of ECZ at page 34 of the Petitioner's Bundle of Documents which state that only a person with a green NRC and a Voters' Card could be issued with the ballot paper. It is stated that the Petitioner in cross examination testified that he was not asked whether he was a Zambian or not when casting his vote on the poll day. All he did was to produce his green NRC and a Voter's Card.

It is submitted that everyone who voted, produced the two documents that are required before one is issued with a ballot paper, a clear and unequivocal

indication that everyone who cast their vote in the Isoka Parliamentary Constituency was eligible to vote.

It is argued that only two identity cards of the alleged Malawians have been brought before the Court as no such evidence has been brought before the Court with respect to the other alleged Malawians. That the absence of the identity cards for the rest of the alleged Malawians constitutes an invitation to the Court to assume that other Malawians could have voted. The Court was urged to decline the invitation.

It is stated that as the Petitioner testified that he became aware of the alleged issuance of NRCs and Voters' Cards to Malawians in December 2020 he ought to have reported the matter to relevant authorities, such as lodging a complaint to the Ministry of Home Affairs, reporting to the police or indeed lodging a complaint with the Conflict Management Committee under ECZ. That these were avenues through which the Petitioner's concerns could have been addressed if they had any truth or merit in them. The Petitioner is only raising these allegations after losing an election. That the allegations are therefore products of an afterthought and as such lack merit. The Court was urged to dismiss the allegations.

As regards the allegation that the 1st Respondent campaigned to Malawian citizens and released or paid money to leaders of the Malawian attendees for onward distribution to the attendees, the 1st Respondent takes issue with PW1's and PW4's testimony which includes payment of money. It is contended that the allegation as contained in the pleading was that the 1st Respondent went to campaign among people who did not qualify to vote and later on distributed campaign materials to these ineligible voters. The pleadings do not allege that the 1st Respondent distribute money at this gathering. Campaign materials and money are two different things and it cannot be said that money is a campaign material.

Reference was made to the case of **CHRISTOPHER LUBASI MUNDIA V SENTOR MOTORS LIMITED**⁹ which was cited with approval by the Constitutional court in the case of **NKANDU LUO V DOREEN SEFUKE MWAMBA**¹⁰ when it held that:

“Though only of a persuasive value to this Court, we find the case of CHRISTOPHER LUBASI MUNDIA V SENTOR MOTORS LIMITED⁹ instructive where it was held that where the pleadings are at variance with the evidence adduced in Court, the case fails since the case is completely recast without actual amendment of the action.”

It is submitted that the Court should therefore not consider evidence relating to the 1st Respondent giving money at the gathering as this is not anywhere pleaded in the petition. That this evidence does not support any particular claim in the pleadings.

Regarding the issue of the 1st Respondent campaigning and distributing campaign materials to Malawians who were not qualified to vote the 1st Respondent submits as follows:

That nowhere in the evidence before Court has it been alleged or stated that the 1st Respondent went to campaign in Malawi, it has only been stated that the 1st Respondent went to campaign at the border of Zambia and Malawi. That by its nature, at the border, one expects to find people or person who are from both neighbouring countries. Further, by its nature a rally is a public meeting at which the person holding the rally does not have control of who attends such event. In some cases, even children who are not even eligible to vote attend these rallies. Being a border, even citizens of a neighbouring country can attend. The 1st Respondent cannot be expected to pin point who the Malawians or Zambians are at a public meeting like a rally. That therefore this allegation is baseless and lacks merit.

That the allegation that these Malawians did not qualify to vote is baseless because at a public meeting, the attendees are not asked to come with their

NRCs and Voters' Cards in order to ascertain whether such an attendee is Zambian and qualifies to vote as a pre-condition for attendance of that event. That any person within the vicinity of the political rally could attend. The target for any candidate are the people or persons who are eligible to vote and this eligibility to vote is determined by the law and in this case, one is eligible to vote upon production of green NRC and a Voter's Card. It is submitted that there is no aorta of allegation in this Petition that persons who did not hold or produce these two sine qua non documents were allowed to vote. Counsel for the 1st Respondent urged the Court to hold that the allegations in paragraph 4 (ii) of the Petition are baseless and the evidence brought in respect of it is at variance with what is actually contained in the pleading.

The 2nd Respondent in response to the Petitioner's allegation that the 2nd Respondent allowed non-Zambian citizens to vote in the elections submitted as follows:

That although **PW1** and **PW4** testified that they are Malawian Citizens who obtained Zambian National Registration Cards, Voters' Cards and eventually voted in the election in exchange for money, during cross examination they both confirmed that they possessed the Zambian NRCs that were procured by deceit. They further admitted that, they were not aware of the legal requirements for procuring the same. The 2 witnesses also confirmed that they did not report the allegation to any authority and confirmed that the 2nd Respondent cannot act where it is not notified of any alleged malpractice. Further the witnesses confirmed that they did not produce any evidence, such as Zambian NRCs to prove that the names they had stated before the Court were indeed names of Malawians who were allowed to vote in the contested election.

That the Petitioner confirmed in cross examination that he only provided two NRCs for the alleged Malawians, one whom had an expired National Registration Card for Malawi. The Petitioner agreed that the 2nd Respondent does not issue National Registration Cards but Voters' Cards.

That the 2nd Respondent witness, Mr. Ginno Sichilima rebutted this allegation in his categorical evidence wherein he testified that it is the Ministry of Home Affairs that issues NRCs and not the 2nd Respondent. The 2nd Respondent merely confirms whether a person is a holder of the NRC. Therefore, any allegation relating to the issuance of NRCs is unfounded.

It is contended that the Petitioner's attempts to argue that the 2nd Respondent should have done more is not tenable because the 2nd Respondent is not under any obligation, legal or otherwise to verify a person's nationality. This notwithstanding, ECZ confirmed the nationality of the voters upon the production of the NRCs. It is submitted that the production of an NRC is conclusive of a person's right to be registered as a voter. That this position is reinforced by the provisions of the law in Zambia.

Section 8 (1) – (3) of the Electoral Process Act, 2016 provides that:

“(1) A person qualifies for registration as a voter if that person –

(a) Is a citizen of Zambia;

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

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

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

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

It is submitted that it is clear from the above that a person who possess a valid NRC and is 18 years and above is capable of being registered as a voter. Citizenship is determined by someone's possession of an NRC. This presumption stands unless challenged. In this case, the 2nd Respondent dispenses with the requirement in **Section 18 (1) (a) of the Act** upon proof of an NRC by a prospective voter.

Regarding the Petitioner's submission that the 2nd Respondent was required to ascertain whether the person seeking registration as a voter is a citizen by either

birth, descent, registration or adoption as defined by **Article 35, 36, 37 and 38 of the Constitution of Zambia as Amended by Act No. 2 of 2016**, it is submitted that the Petitioner totally misconstrued the combined reading of **Sections 8 and 9 of the Act** which provide that where a person is a citizen of Zambia, that person is still required to be in possession of an NRC before he could be registered as a voter. It is not the intention of Parliament or indeed the effect of the Sections that the mandate to determine citizenship be usurped by the 2nd Respondent from the Ministry of Home Affairs. That even on grounds of public policy to give perspective of who has the mandate to establish citizenship, the 2nd Respondent cannot be enquiring from all the voters in the Country about their citizenship during the limited timeframes they have to register voters. If this were to be the case, we would never have elections as the process would be inordinately delayed by these alleged investigations which are within the mandate of the Ministry of Home Affairs. This was never the intention of Parliament.

That the provisions of the Constitution were complied with because all the voters possessed NRCs. This means that the alleged Malawians were Zambian citizens by registration. It is submitted that an NRC is conclusive evidence of one's nationality unless challenged. In *casu*, at the point at which the voters were voting, there was no challenge whatsoever to the voters' nationalities. The 2nd Respondent could therefore not be faulted for allowing persons with valid NRCs to vote.

It is argued that if there was any issue, the same should have been raised by the Petitioner prior to the announcement of results which he chose not to do. If the Petitioner was aggrieved about this issue, he would have lodged a complaint in the prescribed form as by law mandated. The Petitioner was aware of how to lodge a complaint before the Conflict Management Committee following his training at the instance of the 2nd Respondent. Furthermore, the Petitioner did not confirm which officers of the 2nd Respondent that he allegedly approached.

It is submitted that the Petitioner failed to demonstrate whether the said alleged breach of **Sections 8 and 9 of the Act** affected the results. That to the contrary the Petitioner and his witnesses confirmed in cross examination that they had the right and privilege to vote for whichever candidate they opted for despite them being allegedly influenced by promises of financial incentive. Even the argument that a total of 238 Malawians voted is not justifiable as the Petitioner failed to adduce evidence to show that these were indeed Malawians. All these people had Zambian NRCs and no Malawian NRCs were presented before Court to show a different position.

It is finally submitted that the Petitioner or any person acting under him did not object to any alleged inaccuracy in the counting of the votes or the announcement of the result in terms of **Section 70 of the Electoral Process Act, 2016**. **Section 70 of the Act** provides that:

- “(1) An election or polling agent may object to an alleged inaccuracy in the counting of the votes or the announcement of a result under Section seventy-one.***
- (2) An objection under subsection (1) shall be made to a presiding officer, ...on any stage before the presiding officer has announced the result.***
- (3) A presiding officer shall determine the objection and decide whether to order a recount...”***

That the Petitioner or any person acting under him admitted that they did not write any letter to the Presiding Officer or any office complaining about anything as mandated by the law.

Section 70 of the Act provides for objections concerning counting of votes and announcement of provisional results and does not deal with issues relating to the eligibility of voters to vote or qualifications for voting. It does not apply to the Petitioner's concerns that Malawian citizens were issued with Zambian NRCs and Voters' Cards and subsequently allowed to vote. Mr. Mwala's submission

that the Petitioner ought to have complained to the Presiding Officer under **Section 70 of the Act** is misconceived.

The first allegation of malpractice or illegality contained in paragraph 4 of the Petition relates to issuance of NRCs and Voters' Cards to alleged Malawian Citizens.

I have carefully considered the Petitioner's evidence and the evidence of his witnesses on the allegation of issuance of NRCs to alleged Malawian citizens. It is clear from the evidence that this allegation does not relate to the 1st Respondent nor her election agent or Polling agent. They are not mentioned at all.

From the evidence on record and the submissions of the Petitioner and the Respondents, I find that the issuance of NRCs is a function of the Government of the Republic of Zambia conducted under the Ministry of Home Affairs and not either the 1st Respondent or the 2nd Respondent. This being the case the alleged act of issuance of NRCs to Malawians cannot be the basis for nullifying the election herein pursuant to **Section 97 (2) (a) and (b) of the Electoral Process Act, 2016**. I find and hold that this allegation fails and it is dismissed.

As regards the allegation that the issuance of Voters' Cards to Malawian citizens by the 2nd Respondent amounted to non-compliance with **Sections 8 and 9 of the Electoral Process Act, 2016** the Petitioner argues that the 2nd Respondent is required to ascertain whether the person who seeks registration as a voter is a citizen of Zambia by birth, descent, registration or adoption as defined by **Articles 35, 36, 37 and 38 of the Constitution of Zambia**.

I have read **Sections 8 and 9 of the Act** and note that **Section 8** provides for qualifications for registration as a voter while **Section 9** provides for disqualification from registration as a voter. **Section 8** provides that a person qualifies for registration if that person *(a) Is a citizen of Zambia; (b) has*

attained the age of eighteen years and (c) is in possession of a national registration card.

It is clear that where a person is a citizen of Zambia, that person is still required to be in possession of an NRC before he can be registered as a voter. As the mandate to issue NRCs is that of the Ministry of Home Affairs it follows that the 2nd Respondent is mandated to register any person as a voter who has presented to it a green NRC at the time of voter registration. Although Section 9 of the Act provides that the 2nd Respondent shall not register a person as a voter if that person is not a citizen, I find that the 2nd Respondent is not expected to do a background check as to the citizenship of each and every individual that presents a green NRC and requests to be registered as a voter. This is so because there is a presumption that only Zambian citizens are issued with a green NRC under **Regulation 3 of the National Registration Regulations, Statutory Instrument No. 257 of 1963.**

I accept the 2nd Respondent's submission that it is not the intention of Parliament or indeed the effect of **Sections 8 and 9 of the Electoral Process Act, 2016** that the mandate to determine citizenship be usurped by the 2nd Respondent from the Ministry of Home Affairs. I also agree that from a public policy perspective it would be impractical for the 2nd Respondent to be enquiring from all the voters in the Country to the bona fides of their citizenship during the limited timeframes they have to register voters. Investigations of every voter's citizenship status by ECZ would inordinately delay the elections and these investigations are in any event within the mandate of the Ministry of Home Affairs and not that of ECZ.

I find that a green NRC is conclusive evidence of one's Zambian citizenship unless challenged. In *casu*, there is no evidence that at the point that the alleged Malawian citizens (who possessed Zambian green NRCs and Voters' Cards) were voting there was challenge to their Zambian citizenship. The 2nd Respondent cannot therefore be faulted for allowing persons with valid green NRCs and Voters' Cards to vote.

The Petitioner testified that he became aware of the alleged irregular issuance of NRCs and Voters' Cards sometime in December 2020 but he failed to report the matter to any relevant authorities or to lodge a complaint with the Conflict Management Committee. Although the Petitioner told the Court that on 6th January, 2021 he attempted to go to the border of Zambia and Malawi to investigate whether Zambian NRCs and Voters' Cards were issued to Malawians he was stopped from doing so by the Police who said that it was not campaign time yet – he took no further action thereafter. As the Petitioner was aware of the complaints procedure following training provided by ECZ to all candidates he ought to have lodged a complaint in the prescribed manner rather than wait until after the announcement of the results.

The Petitioner further testified that on voting day when he saw many people coming from the Malawian direction to vote in the Zambian elections he approached some officers of the 2nd Respondent to address the issue, but the said officers merely said there was nothing they could do since the said people had NRCs and Voters' Cards. The Petitioner did not obtain details of the officers involved and his testimony could not be verified. The Petitioner again failed to escalate the issue to the Conflict Management Committee.

I find that the Petitioner's concerns could have been addressed had he reported the same to relevant authorities such as the Police or the Ministry of Home Affairs or lodged a formal complaint with the Conflict Management Committee.

The Petitioner contends that a total of 537 Malawians voted at Chaswata Polling Station and these are as follows; 238 under Stream 1 shown at page 32 of the Petitioner's Bundle of Documents, 134 under Stream 2 shown at page 54 of Petitioner's Bundle of Documents and 165 under Stream 3 shown at page 80 of the Petitioner's Bundle of Documents. During his evidence **PW1** even identified 62 people that he said he personally knew from the many Malawians that allegedly voted in the Zambian elections. However, a perusal of the pages of the Petitioner's Bundle of Documents referred to above shows that everyone who

voted produced a green NRC and a Voter's Card, the two documents that are required before one is issued with a ballot paper.

I note that the Petitioner only brought two Malawian National Identity Cards of the alleged 537 Malawians. Only the Malawi Identity Cards of **PW1** and **PW4** were adduced in evidence. For the rest of the alleged Malawians there is no evidence before the Court that they are Malawians. The Petitioner failed to adduce any evidence to show that these were indeed Malawians. All these people have Zambian NRCs and as no Malawian NRCs were presented before Court the Petitioner has not proved the allegation that the 2nd Respondent issued Voters' Cards to Malawian citizens who do not qualify to vote in Zambian elections.

I find that **PW1** and **PW2** on their own admission and on documentary evidence adduced by the Petitioner are Malawian citizens who obtained Zambian citizenship by deceit.

The Petitioner has not established this allegation to a fairly high degree of clarity. The allegation fails and it is dismissed.

The Petitioner at Paragraph 4 (ii) as read with Paragraph 4 (xi) of the Petition alleges that the 1st Respondent hired people to campaign for her and distribute campaign materials to Malawian citizens who did not qualify to vote in Zambian elections.

The 1st Respondent contends that **PW1** and **PW4** who testified to this allegation gave evidence which went beyond the pleadings when they testified that the 1st Respondent while at the meeting gave money to leaders of Malawian attendees for distribution to the attendees. That the pleadings allege that campaign materials were distributed but not money. Campaign materials and money are two different things and as such the pleadings are at variance with the evidence adduced and as such the evidence relating to the 1st Respondent giving money at the campaign gathering should not be considered. The case of

CHRISTOPHER LUBASI MUNDIA V SENTOR MOTORS LIMITED⁹ was relied on for this submission.

In **MAZOKA AND OTHERS V MWANAWASA AND OTHERS³** the Supreme Court guided as follows:

“The function of pleadings is very well known, it is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matter in dispute between the parties. Once the pleadings have been closed, the parties thereto are bound by the pleadings and the Court has to take them as such.”

The object of pleadings is to bring the parties to an issue, to prevent the issue being enlarged, which would prevent either party from knowing what the real point to be discussed and decided is.

There is no evidence on the record that the pleading in paragraph 4 (ii) of the Petition was amended with leave of Court to reflect that the 1st Respondent gave money to leaders of the Malawian attendees at the campaign meeting for distribution to the attendees. I cannot therefore accept evidence pertaining to the 1st Respondent paying money at the campaign meeting because these matters were not pleaded.

Although the Petitioner ought to have done more to have the alleged issuance of NRCs and Voters' Cards to Malawians investigated by relevant authorities, I am of the view that the police were guilty of dereliction of their duty to the nation when in January 2021 after the Petitioner informed them of his suspicions they failed to investigate the alleged issuance of NRCs and Voters' Cards to Malawians.

B. 1ST RESPONDENT CAMPAIGNING AND DISTRIBUTING CAMPAIGN MATERIALS TO MALAWIANS WHO WERE NOT QUALIFIED TO VOTE

The evidence on this allegation comes from **PW1** (Gift Brown Kanyika) and **PW4** (Edward Harawa) who are Malawian citizens. They told the Court that in the first week of July 2021 the 1st Respondent and her team who included Hared Silwimba (PF Chairperson Candidate) and Aaron Mtamba (PF Councillor Candidate) went to campaign to Malawian citizens at the border between Zambia and Malawi and they both attended the meeting or gathering. They confirmed the presence of the 1st Respondent and testified that she addressed the meeting.

PW4 testified that during the campaign meeting, the 1st Respondent addressed the said meeting or gathering and told the Malawian citizens that she had come to Malawi in order to get Malawians to vote for the Government in Zambia so that Edgar Lungu is not removed from power. **PW4** further told the Court that the 1st Respondent further told the gathering that if the Malawians voted for her and other PF party candidates, the Zambian Government would open co-operatives in Malawi just like they had done in Zambia and they would commence fertilizer distribution just like they had done in Zambia.

Both **PW1** and **PW4** testified that the 1st Respondent and her team gave them and other attendees of the campaign meeting, PF campaign challenge materials and T-shirts.

Counsel for the 1st Respondent submitted that nowhere in the evidence before the Court has it been alleged or stated that the 1st Respondent went to campaign in Malawi, it has only been stated that the 1st Respondent went to campaign at the border between Zambia and Malawi. Further that by the nature of a rally which is a public meeting the person holding the rally does not have control of who attends such an event. In some cases, even children who are not even eligible to vote attend these rallies. That being a border, even citizens of a neighbouring country can attend. The 1st Respondent cannot be expected to pin point who the Malawians or Zambians are at a public meeting like a rally. That therefore, this allegation by the Petitioner is baseless and lacks merit.

The Petitioner's allegation is that the 1st Respondent went to the border area and campaigned to Malawian citizens. He does not allege that the campaign meeting was held in Malawi and as such the Petitioner is not required to prove that the campaign meeting or gathering took place in Malawi as contended by the 1st Respondent's Counsel.

I accept the submission by Mr. Kayula that at the border one expects to find people from both neighbouring countries and that the 1st Respondent and her team cannot be expected to control who attends a rally which is a public meeting or to pin point who are Malawians or Zambians. The Petitioner has not taken issue with the fact that the 1st Respondent was campaigning at the boundary or border area. What the Petitioner takes issue with are the promises that the 1st Respondent made to Malawian citizens if they voted for her and other PF candidates. It is the promise that the Zambian Government would open co-operatives in Malawi and commence fertilizer distribution to Malawians if they voted for her and other PF candidates which the Petitioner alleges is a malpractice.

It is submitted by Mr. Zulu that the 1st Respondent knew that the attendees were Malawian citizens and that explains why she was promising to take co-operatives to them and start distributing fertilizer to them as was the case in Zambia.

I have taken note that during cross examination of **PW1** and **PW4**, Counsel for the 1st Respondent did not deny or challenge the 1st Respondent's presence at the campaign meeting at the border or the promises and utterances made by the 1st Respondent to the Malawian citizens. When the 1st Respondent testified in her defence she did not rebut the testimony on what she said at the Campaign Meeting to Malawian Citizens. The evidence of **PW1** and **PW4** which conforms with the pleadings as to what transpired at the campaign gathering or meeting in the first week of July 2021 should be accepted as fact.

The 2nd Respondent submitted that **PW1** and **PW4** stated that they obtained Zambian NRCs and voted in exchange for money and that they further conceded to being men of dishonest character. That from the demeanour of these witnesses and in light of the foregoing admissions, the Court should take reasonable caution in evaluating their evidence. Reference was made to the case of **NABUKEERA HUSSEIN HANIFA V KIBULE RONALD AND ANOTHER⁷** which I have already referred to above.

In light of the above authority and the witnesses' admission of dishonesty, Counsel submitted that their respective testimonies should be viewed with care and caution. That their admission of dishonesty is indicative of the possibility that they could have been paid and/or bribed to falsely testify in these proceedings.

I agree with the sentiments expressed in **NABUKEERA HUSSEIN HANIFA V KIBULE RONALD AND ANOTHER⁷** and find it instructive. I therefore warn myself of the need to cautiously and carefully evaluate all the evidence adduced by the parties.

PW1's and **PW4's** demeanour when they were testifying and the kind of evidence they gave shows that it is highly likely that they were telling the truth and I treat their evidence as such.

Whilst **PW1** and **PW4** admitted being dishonest by obtaining Zambian NRCs and Voters' Cards and voting in exchange for money and possibly agricultural incentives, I find their evidence credible and cogent as they were PF supporters or sympathizers from August 2020 until after casting their votes on 12th August, 2021 when the Petitioner spoke to them about the campaign carried out by the 1st Respondent and the PF Party. They were therefore not likely to have fabricated lies against the 1st Respondent and the PF party. Apart from corroborating each other's evidence, their evidence is corroborated by the evidence of **PW10**.

The **Electoral Process Act, 2016** defines a corrupt practice to be:

“Any conduct which is declared to be a corrupt practice in accordance with Section eighty-one;”

Section 81 states inter alia that:

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

...

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

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

...

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

Section 83 (4) of the Act states that:

“A person, knowing that another person is not entitled to vote shall not -

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

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

Section 83 (5) of the Act provides that a person who contravenes any of the provisions of subsections (1) to (4) commits an offence.

Further Paragraph 15 (1) (h) (iii) of the Code of Conduct of the Electoral Process Act provides that:

“A person shall not -

*(h) offer any inducement, reward or bribe to any person in consideration of such person -
(iii) voting or not voting;"*

In my judgment there is evidence to substantiate the allegations in paragraph 4 (ii) that during the campaign period the 1st Respondent hired people to campaign for her and distribute campaign materials to Malawian citizens who did not qualify to vote in Zambian elections.

I find and hold that the 1st Respondent committed an electoral offence under Section 83 (4) of the Act by campaigning to and seeking to persuade Malawian citizens to vote for her and other PF Party candidates knowing fully well that these people were Malawians. Even assuming that the majority of the 537 alleged Malawians were Zambian Citizens, I have found that **PW1** and **PW4** were and are Malawian Citizens and as such the 1st Respondent committed the said electoral offence.

It is trite law that in order for the candidate to be liable for the corrupt practice or illegal practice or misconduct, it must be shown to be perpetrated by the candidate or with the candidate's knowledge and approval or consent or that of his election agent or polling agent.

From the evidence of **PW1** and **PW4** the 1st Respondent was personally present at the campaign meeting. She personally made the promises about establishing co-operatives and distribution of fertilizer to the Malawians. I find that the corrupt, illegal or other malpractice was personally done by the 1st Respondent. It is clear that the promise to form co-operatives and to start distributing fertilizer was meant to lure these alleged Malawian voters.

In order for a Petitioner to successfully have an election annulled pursuant to **Section 97 (2) (a) of the Act**, evidence must be led to prove that the majority of voters were or may have been prevented from electing their preferred candidate.

The Petitioner made reference to the fact that the difference in votes between the 1st Respondent and the Petitioner was only 298 votes. The evidence led also shows that the boundary area in question is near Chaswata Polling Station where Malawian citizens were registered to vote and actually voted. The Petitioner further testified that despite Chaswata being remote and sparsely populated, it had 3 voting streams with a total of 2,058 voters of which at least 537 were said to be Malawians which is more than the 298 vote difference between the 1st Respondent and the Petitioner.

The 1st Respondent submitted that the narrow margin by which the 1st Respondent won the election is not a factor which the Court is required to take into account in arriving at a decision whether to uphold an election or nullify it. It is contended that the narrow win by the 1st Respondent is testament that the electoral process was reasonably smooth and allowed for effective campaigns for all candidates. The 2nd Respondent submitted that the argument that a total of 537 Malawians voted is not justifiable as the Petitioner failed to adduce any evidence to show that these were indeed Malawians.

The record shows that a total of 26,538 votes were cast by eligible voters in the Isoka Parliamentary Constituency election held on 12th August, 2021. It follows that the inducement made by the 1st Respondent to the 537 Malawians only related to 2.02% of the electorate in the Constituency and does not therefore meet the threshold required i.e. the majority of the electorate or voters being prevented from electing their preferred candidate.

I find that apart from **PW1** and **PW4** there were no witnesses called by the Petitioner to testify that they did not vote for their preferred candidate on account of the inducement made by the 1st Respondent.

I find that the Petitioner failed to show that the 1st Respondent's campaign to Malawian Citizens and the distribution of PF campaign materials to them affected the final election result. These allegations on campaigning and distribution of campaign materials also fail and are dismissed.

C. DISTRIBUTION OF SOCIAL CASH TRANSFER FUNDS

It is alleged that the 1st Respondent and her election and/or polling agents distributed the Social Cash Transfer Funds a few days to the elections.

The Petitioner alleged that the Social Cash Transfer Fund was normally distributed every two months in arrears however, prior to this years' election this fund was actually distributed twice. According to **PW5**, prior to the distribution in the first week of August, 2021, the electorate or recipients of the fund in Kampumbu area were addressed by PF candidates at MP, Council Chairperson and Councilor levels.

That these people all stated that if the electorate did not vote well, they would stop receiving this fund and **PW5** the witness who brought this evidence to the fore stated that hearing such sentiments disturbed him as the distribution of this fund was a government program and not a PF party program.

PW5 further testified that on 6th August, 2021 the funds for May and June 2021 were received and he and his colleagues distributed the funds but PF Party Ward Officials kept telling beneficiaries that the money was coming from the PF.

PW5 told the Court that on 9th August, 2021 more funds were received for the months of July and August, 2021. That he was concerned because these funds were not due for payment but he and his colleagues distributed the funds on 10th August, 2021. That Elisha Mutambo and Harriet Nakomba again told the beneficiaries to vote wisely.

PW5's testimony was corroborated by **PW6** who told the Court that the PF Kampumbu Ward Officials who addressed the beneficiaries were all wearing PF Party Regalia.

The 1st Respondent in response stated that she was not involved with the Social Cash Transfer Fund which is a Government Program, aimed at assisting the vulnerable in communities and is implemented under the Ministry of Community Development and Social Services. That the 1st Respondent as a common citizen

had no influence on the timing of the distribution of this fund and no evidence was adduced to show that she used the distribution of this fund to her advantage because although the pleadings of the Petition show that the distribution of this fund was being distributed by people clad in PF Party regalia the evidence on record showed that the Social Cash Transfer Funds was in fact distributed by the representatives of the Ministry of Community Development and Social Services including **PW5** the witness of the Petitioner.

The Petitioner's Counsel submitted that because the testimony of **PW5** was not challenged during cross examination it follows that the 1st Respondent was present and gave the impression that this was a PF program. That the 1st Respondent's conduct of hijacking a Government Program amounted to undue influence on the voters.

The 1st Respondent's Counsel submitted that the allegation as pleaded at paragraph 4 (iv) of the Petition does not allege that either the 1st Respondent and or her election agent or polling agent involved themselves in the distribution of this Social Cash Transfer Fund or used it to their benefit. The allegation is that it was paid earlier than usual.

I find that no cogent evidence to the requisite standard of proof has been adduced on this aspect of the 1st Respondent using the distribution of this fund to her advantage and to influence the elections herein. This is because I find that the distribution of this fund was a Government Program which effectively meant that it was not under the control of the 1st Respondent. Moreover, while I accept the fact that the 1st Respondent was in fact present the first time these funds were being distributed on 6th August 2021, I find that no evidence was adduced to show that the 1st Respondent or her electoral agents were involved in distributing the funds or the number of people that were or may have been influenced to vote in her favor as there is no unequivocal guarantee that the recipients of the social cash transfer fund voted in her favor.

In my judgment there was no evidence to substantiate the allegations in paragraph 4 (iv) of the Petition that Social Cash Transfer Funds were distributed by people clad in PF Party Regalia. The record shows that it is representatives of the Ministry of Community Development and Social Services who were distributing the funds. The decision to pay early was made by the government and not by the 1st Respondent.

The testimony by the Petitioner that on 11th August while in Nzonche area he saw a man wearing a PF T-shirt under his outer shirt or jersey giving out Social Cash Transfer money is inadmissible because it is at variance with the Pleading of paragraph 4 (iv) of the Petition which relates to payments made in Kampumbu Ward.

The testimony by the Petitioner that he complained to some ECZ officers about distribution of these funds on the election date is also inadmissible because it is at variance with the Pleading at paragraph 4 (iv) of the Petition which relates to payments made at Kampumbu Ward and not Nzonche and **PW10** could not identify the alleged ECZ officers and he never lodged a complaint with either **RW2** (the Returning Officer) or **RW3** (the District Electoral Officer) or the Conflict Management Committee.

In any case, even if the Petitioners testimony aforesaid was admissible and the Petitioners allegation that the 2nd Respondent was in breach of its duty because it failed to deal with a complaint he made to some ECZ Officers on the 11th August, 2021 at Nzonche regarding Social Cash Transfer Funds being distributed a day before the voting day stood, I find that such distribution of funds did not substantially affect the results of the election in Isoka Constituency.

I also find that the election herein was so conducted as to be substantially in accordance with the provisions of the Act and therefore in terms of **Section 97 (4) of the Act** the election cannot be declared void.

The allegation against the 2nd Respondent therefore fails and it is dismissed.

The allegations against the 1st Respondent pertaining to distribution of Social Cash Transfer Funds also fail and are accordingly dismissed.

D. DISTRIBUTION OF FERTILIZER

The Petitioner's evidence on this issue begins with **PW2**, Mary Banda the secretary for the Kasoka Women Association who on 9th August, 2021 received a call unexpectedly to go and receive fertilizer for distribution to members of her Association. She and their Chairperson, **PW3** went and collected on 10th August, 2021 and distributed until the day before the election on 11th August, 2021.

PW3 testified that people clad in PF regalia were at the fertilizer distribution shed loading it. That she collected 150 bags of fertilizer and left the Chairperson to collect the rest. Whilst there waiting for the fertilizer, the 1st Respondent and Mr. Pembamoto arrived at the shed dressed in PF regalia but the 1st Respondent did not say anything as the person that addressed the people gathered was Mr. Pembamoto who urged the recipients of the fertilizer to vote for PF.

The fact that people clad in PF Party Regalia were the ones loading fertilizer on the trucks was corroborated by **PW7** and **PW10**. I also took note of the photos at pages 159 to 161 of the PBD's and a Video Recording submitted and admitted into evidencce depicting people clad in PF Party Regalia being in charge of loading fertilizer on to trucks.

In her defence the 1st Respondent told the Court that on 10th August, 2021 she was in Katenshya and was nowhere near the Fertilizer Storage Shed where fertilizer was being distributed.

The Petitioner's Counsel submitted that in the cross examination of **PW2**, **PW3** and **PW7** Counsel for the 1st Respondent did not deny or challenge the presence of the 1st Respondent at the Fertilizer Storage Shed but merely asked the witnesses whether there was anything wrong with the 1st Respondent being present during the fertilizer distribution.

It was also submitted that the alibi testimony ought to have been raised during the cross examination of **PW2**, **PW3** and **PW7** and that the 1st Respondent should have called a witness to support her alibi. That the alibi was an afterthought without substance.

That it is clear from the evidence that the 1st Respondent and Mr. Pembamoto whilst both were clad in PF Party Regalia went to the Fertilizer Distribution Centre and Mr. Pembamoto openly campaigned for the PF Party and the 1st Respondent neither stopped him nor condemned him. That therefore there was an illegality or malpractice committed during the fertilizer distribution exercise.

Mr. Kayula submitted that the evidence before the Court does not in any way point to the fact that the 1st Respondent or her electoral agents were the ones distributing the fertilizer. That therefore the Petitioner ought to prove that though this act was not done by the 1st Respondent and/or her electoral agent, she actually knew and consented to the alleged illegal act of distributing fertilizer. The Court's attention was drawn to the video exhibited by the Petitioner in which the Petitioner tells recipients of the fertilizer that the fertilizer distribution is not a PF Party project and a gentleman wearing a blue shirt and dark blue pair of trousers standing by the door of the shed says that he is a civil servant and he is just working according to instructions.

It is further submitted that the Farmer Input Support Program is a government program as admitted by the Petitioner in cross examination. That the 1st Respondent being an ordinary citizen could not influence how government programs were implemented.

That the law places the burden of proving each and every allegation in the Petition on the Petitioner and as such it is not incumbent on the 1st Respondent to prove that she was not at the shed and never knew or consented to the distribution of fertilizer.

It is finally submitted that if the Court holds that the 1st Respondent was at the shed and was involved in the distribution of fertilizer – then it is submitted that the Petitioner has not adduced any evidence to show how the distribution of fertilizer affected the people of Isoka Constituency and also to show that the fertilizer distribution was widespread within the Isoka Constituency.

I have carefully considered the evidence of the Petitioner and the evidence of his witnesses as well as the 1st Respondent's evidence on the allegation of distribution of fertilizer. I find that the 1st Respondent lied when she testified that on 10th August, 2021 during the fertilizer distribution she was at Kantensha Ward and had no idea who was distributing it or where it was being done from as she was not there. **PW2**, **PW3** and **PW5** all told the Court that the 1st Respondent in the Company of Mr. Robby Pembamoto was at the fertilizer storage shed on 10th August, 2021 but left after the distribution was flagged off by Mr. Mulenga Yamishi the Acting District Commissioner for Isoka.

I accept Mr. Kayula's submission that the law places the burden of proving each and every allegation on the Petitioner and that the Constitutional Court has in a number of election petition appeals frowned upon shifting the burden of proof from the Petitioner to the Respondents. However, when a Respondent sets up a defence of alibi this must be supported by other evidence such as calling a witness to confirm the alibi.

I find that the 1st Respondent was present at the Fertilizer Storage Shed on 10th August, 2021 when Mr. Robby Pembamoto, PF Councilor Candidate for Kasoka Ward addressed the recipients who included **PW2** and **PW3** to vote for the PF Party. I find that both the 1st Respondent and Mr. Pembamoto and the loaders and drivers of the trucks were dressed in PF Party Regalia.

I also find that apart from Mr. Mulenga Amishi the then Acting District Commissioner for Isoka who told the people gathered that the fertilizer was not for sale but from the caring PF Government which they must vote for, there were Community Development Officers who are civil servants and actually released

the fertilizer to the beneficiary Women's Associations and others. The civil servants such as the man dressed in blue captured in the Petitioner's video were not wearing PF Party Regalia.

From the Evidence on the record it is clear that the fertilizer distribution was not a PF Party program but a government program under the Farmer Input Support Program. Although the people loading fertilizer on the trucks wore PF Party Regalia, the people who released and issued the fertilizer were civil servants from the Ministry of Community Development and Social Services. I find that although the 1st Respondent was present at the Fertilizer Storage Shed in the morning on 10th August, 2021 she left after the fertilizer distribution was flagged off by the then Acting District Commissioner for Isoka and she was not involved in the distribution of fertilizer. I accept Mr. Kayula's submission that the 1st Respondent had no capacity to influence the execution of a government program which had been running even before she decided to contest the Isoka Parliamentary Constituency.

The Petitioner and his witnesses did not lead any evidence to show that the majority of voters in Isoka Constituency were prevented from voting for a candidate of their choice on account of the alleged distribution of fertilizer by persons clad in PF Party regalia. No agent duly appointed by the 1st Respondent was shown to have illegally distributed fertilizer.

Whilst it was improper for the 1st Respondent to have been personally present at the commencement of the distribution of fertilizer, there was nothing to suggest or prove that the improper act prevented the majority of the electorate from voting for a candidate of their choice.

For these reasons I find that the Petitioner has not proved this allegation of distribution of fertilizer to the requisite standard of proof and the allegation therefore fails. The allegation against the 1st Respondent is dismissed.

The matter does not however end there. The Petitioner also alleges that on 10th August, 2021 he received a report from **PW7** concerning the distribution of fertilizer by people wearing PF Party regalia. That following the said information, he called Mrs. Judith Maambo (**RW3**) to lodge a complaint and that the said 2nd Respondent Officer did not take any action despite being notified.

In rebuttal, the 2nd Respondent called **RW3** who testified that when she received the call from the Petitioner regarding the distribution of fertilizer, she advised the Petitioner to refer the matter to the relevant office being the District Commissioner. This was according to her, based on the fact that fertilizer distribution was a government program which does not fall within the mandate of the 2nd Respondent.

The 2nd Respondent's Counsel submitted that not every complaint can be escalated to the ECZ especially where such alleged complaint on the face of it, is bereft of merit. That the complaint must relate to an alleged breach of the Electoral Process Act. It is contended that the distribution of fertilizer was a government program and the 2nd Respondent does not have the mandate to address any concerns and/or complaints regarding the said program. It was therefore in order to refer the Petitioner to the office he was referred to by **RW3**.

Mr. Mwala further submitted that it cannot be said that the Petitioner lodged any complaint by merely informally calling **RW3**. That the parties and stakeholders were advised on the manner they were to lodge a complaint. That while acknowledging that a complaint could be made to an officer of ECZ, the said complaint cannot be said to be lodged by merely informally calling any officer.

Reference was made to **Rule 12 and 13 of the Code of Conduct of the Act** which provides that:

"12. (1) The following persons may lodge a complaint to the Commission in relation to an election:

(a) A voter or candidate in a constituency where a breach of this Code has been committed; or

(b) From a political party participating in an election.

(2) Complaints arising during election campaigns and elections may be made to an election officer or to a conflict management committee at the place where the conduct complained against occurred.

...

13. (1) Conflict management committees established by the Commission pursuant to Section one hundred and eight may resolve electoral disputes.

(2) The conflict management committees shall take into account the provisions of this Code in resolving electoral disputes.

...”

It is submitted that despite the establishment of the said Conflict Management Committee, no such complaint was ever raised by the Petitioner, his agents and or personnel before, during or after the elections.

That based on the above, the Petitioner has failed to show that the allegations affected the election results and that the same did not affect him alone if at all it is true that such irregularities ever happened. That the Petitioner's witnesses **PW5** and **PW6** confirmed that they were among voters who could not be influenced by the alleged promises of payments of money and would still have voted for their preferred candidates. That therefore the Petitioner cannot claim that the alleged irregularities affected the result of the election.

It is submitted that the Petitioner failed to call witnesses to adduce compelling evidence to prove that the fertilizer was ever distributed. That **PW2** adduced a list of people that allegedly received the fertilizer but the document was not dated or signed by the relevant authorities. She also told the Court that there were no minutes of a meeting detailing instructions to collect and distribute fertilizer.

That **PW2**'s denial contradicts the testimony of **PW3** who was called upon to corroborate **PW2**'s testimony. Although **PW3** stated that government officials had instructed **PW2** to collect and distribute fertilizer, she admitted that there were minutes. That there are blatant inconsistencies/and/or contradictions in the testimonies. It is submitted that the testimonies should not be accepted by the Court as the same appear to have been fabricated by the witnesses.

It is submitted that **Section 97 (4)** of the Act shows that an election can be annulled for non-compliance with the law only where it is shown that the non-compliance affected the results of the election. That it is not enough for the Petitioner to allege non-compliance with the provisions of the Act. He was required to go further and show that such non-compliance affected the result of the election. That in *casu* the Petitioner did not adduce evidenced demonstrating how the results were actually affected.

I do not accept Mr. Mwala's submission that as the distribution of fertilizer was a government program the 2nd Respondent does not have the mandate to address any concerns and/or complaints regarding the said program. That it was therefore in order to refer the Petitioner to the office of the District Commissioner.

I am of the view that if a government program such as the Farmer Input Support Program under which agricultural inputs such as fertilizer are distributed to deserving members of the public, is used by a candidate during election campaigns to show that such distribution will only continue if the electorate vote for him, that amounts to undue influence or an inducement which is an electoral malpractice or misconduct in respect of which the ECZ has mandate to deal with.

In this case the allegation was that people wearing PF Party regalia were distributing fertilizer just 2 days before the election and that Mr. Mulenga Yamishi the Acting District Commissioner for Isoka was involved. Although matters pertaining to distribution of fertilizer are usually dealt with by the office of the District Commissioner it was inappropriate for **RW3** to refer the Petitioner to the Acting District Commissioner. Given the proximity to election day and

because it is the Acting District Commissioner who is alleged to have committed the malpractice, **RW3** as District Electoral Officer ought to have dealt with the complaint pursuant to **Rule 12 (2) of the Code of Conduct of the Act**.

Although the failure by **RW3** to act on the Petitioner's complaint amounted to non-compliance with **Rule 12 (3) of the Code of Conduct** as rightly submitted by Mr. Zulu, I find that the Petitioner failed to demonstrate through evidence that the misfeasance affected the outcome of the election. I also find that the election was conducted as to be substantially in accordance with the provisions of the Act. The election of the 1st Respondent cannot therefore be annulled on account of this allegation.

I do not accept the submission by the 2nd Respondent's Counsel that there are blatant inconsistencies and/or contradictions in the testimonies of **PW2** and **PW3**. This submission is based on the fact that **PW3** purportedly testified that there were minutes of a meeting detailing the instructions to collect and distribute fertilizer which were prepared by **PW2** given to **PW3** for perusal and then given back to **PW2** but which were not before the Court. In contradiction to this **PW2** told the Court that there were no minutes.

I have perused the record and note that neither **PW2** nor **PW3** spoke about minutes relating to instructions to collect and distribute fertilizer. The Community Development Officers asked both **PW2** and **PW3** to go and collect fertilizer by telephone. The only document prepared by **PW2** in relation to the fertilizer collected on 10th August, 2021 was a list of purported recipients of fertilizer found at page 168 of the Petitioner's Bundle of Documents. It is clear that when **PW3** spoke about a document prepared by **PW2** she was referring to the list and not minutes.

From the demeanour of both **PW2** and **PW3** when they were testifying and the kind of evidence they gave shows that it is highly likely that they were telling the truth and I treat their evidence as such.

E. DISTRIBUTION OF MEALIE MEAL, COOKING OIL AND SUGAR

The Petitioner alleges that the 1st Respondent committed an electoral offence under **Section 83 (1) (c) of the Act and Rule 15 (1) (h) (iii) of the Code of Conduct of the Act** in that on 10th August, 2021 two days before the election was due to be held, persons clad in PF Party attire distributed mealie meal, cooking oil and Sugar to members of Katenshya Ward in the Isoka Parliamentary Constituency thereby unduly influencing members of the Constituency to vote for the PF Party and its Parliamentary Candidate the 1st Respondent.

The evidence on this allegation comes from **PW6** (Jeremiah Mutambo) who told the Court that on 2nd August, 2021 the 1st Respondent, Joe Max and Elisha Mutambo went to Katenshya Ward with a truck loaded with mealie meal. The said truck could not reach its destination and its load was offloaded into a small vehicle and the items taken to his home. The items left at **PW6**'s house were bags of mealie meal, 9 buckets of 20 litre cooking oil, 3 bales of sugar and PF Party regalia. When **PW6** enquired what the items were for he was told that they were for distribution to the people.

PW6 further testified that on 10th August, 2021 while people in the ward were receiving Social Cash Transfer funds, Elisha Mutambo, Mary Munthali and Harriet Nankamba started distributing the items they had kept with **PW6** to the people. That the distribution continued until 11th August, 2021.

In cross-examination **PW6** told the Court that although he disapproved of the distribution of the items by the PF Party he agreed to accept the items for safekeeping because he is also a headman.

PW5 (Abel Silwamba) Secretary of the Community Welfare Association Committee in Katenshya Ward testified that he saw the 1st Respondent, Max Sichamba (popularly known as Joe Max) and Hared Silwamba when they took and delivered mealie meal, cooking oil and sugar to Elisha Mutambo's house. That because there was not enough space at Elisha Mutambo's house they took some of the items to **PW6**'s house for safe keeping. **PW5** told the Court that

when he asked Elisha Mutambo what the items were for, Elisha Mutambo answered that the items were for distribution to voters.

The 1st Respondent in her defence did not say anything regarding the allegations relating to distribution of mealie meal, cooking oil and sugar.

The Petitioner's Counsel submitted that during cross examination of **PW6** and **PW5** Mr. Kayula never denied or challenged the presence of the 1st Respondent when on 2nd August, 2021 bags of mealie meal, cooking oil and sugar were taken to Katenshya Ward.

Mr. Kayula submitted that the evidence from **PW6** should be treated with extreme caution because he is not an honest witness. This is because he testified that he was not in support of distribution of mealie meal, cooking and sugar but he involved himself in safe keeping these items. He did not report the suspicious activities to the Police or ECZ or distance himself from illicit activities since as Headman he is a custodian of national values and moral conduct.

It is also submitted by the 1st Respondents Counsel that should the Court find and hold that the 1st Respondent was part of the people who distributed the items, then it is submitted that the Petitioner has not brought cogent evidence to show how such distribution affected the electorates in choosing a leader of their choice. That there is no evidence to show that such distribution was widespread in Isoka Constituency.

I do not accept Mr. Kayula's submission that **PW6** had an interest to serve when he agreed to keep the items and could have an interest to serve by testifying in these proceedings.

I have carefully considered the evidence of **PW6** and **PW5** on the allegation of distribution of food items. I find the evidence of **PW6** to be credible and cogent as he is the young brother to Elisha Mutambo the PF Katenshya Ward Coordinator and not likely to lie and implicate his own elder brother. He is a

headman in the village who gave a firsthand account of what transpired. **PW6's** testimony was in fact corroborated by **PW5**.

I find that the 1st Respondent together with Max Sichamba, Hared Silwimba and Elisha Mutambo on 2nd August, 2021 took bags of mealie meal, 9 buckets of 20 litre cooking oil, 3 bales of sugar and PF Party regalia to Katenshya Ward which were to be distributed to voters. The items were stored at Elisha Mutambo's house and **PW6's** house. On 10th and 11th August, 2021 these items were distributed to voters by Elisha Mutambo, Mary Munthali and Harriet Nankamba.

I find that although the 1st Respondent was not present when actual distribution took place on 10th and 11th August 2021, the 1st Respondent was part of the PF Party members who distributed mealie meal, cooking oil and sugar to the electorates in Katenshya Ward.

By distributing mealie meal, cooking oil and sugar to the electorate in Katenshya Ward so that they could vote for the 1st Respondent and other PF Party candidates, the 1st Respondent committed an electoral offence under **Section 83 (1) (c) of the Act and Rule 15 (1) (h) (iii) of the Code of Conduct of the Act**.

The evidence brought by the Petitioner shows that distribution of mealie meal, cooking oil and sugar was only in Katenshya Ward. Evidence adduced did not show that such distribution was widespread in Isoka Constituency. I find therefore that the Petitioner failed to adduce cogent evidence to show that the majority of voters in Isoka Constituency were prevented from voting for a candidate of their choice on account of the distribution of mealie meal, cooking oil and sugar in Katenshya Ward.

For the foregoing reasons, I find and hold that this allegation has not been proved to the requisite standard in an election petition of a fairly high degree of clarity and cannot therefore be the basis for nullifying the parliamentary election in Isoka Constituency. The allegation fails and is dismissed.

F. DAMAGE TO THE PETITIONER'S CAMPAIGN MOTOR VEHICLE

The Petitioner alleges that the 1st Respondent committed an electoral offence under **Section 83 (1) (c) (v) of the Act and Rule 15 (1) (a) and (e) of the Code of Conduct of the Act** in that on 3rd August, 2021 at around 11:00 hours the Petitioner's branded campaign vehicle, namely Toyota Vista, Registration No. ABR 7641 was severely damaged by members of the 1st Respondent's political party the PF or supporters of the 1st Respondent and the matter was reported to the Police and arrests were made and the perpetrators are on police bond. Members of the Isoka Parliamentary Constituency were thereby disadvantaged from attending or participating in political meetings, marches or other political events organized by the Petitioner.

The evidence on this allegation was from **PW8** (Jimmy Sikanyika) who told the Court that on 3rd August, 2021 the convoy of vehicles in the UPND Road Show led by UPND President Hakainde Hichilema was partially blocked at the Roundabout near Prosper Lodge by the 1st Respondent's campaign motor vehicle, Land Cruiser Registration No. AQB 1454. That the Petitioner's motor vehicle was damaged by persons who were in the 1st Respondent's motor vehicle. **PW8** called the Petitioner and they later went and reported the matter to the Police.

The damages to the Petitioner's vehicle included – all windows except for one back window and both front and rear windscreens broken, all lights at the back shattered, seats snapped off, fuel tank damaged and tyres punctured. At pages 84 to 89 of the Petitioner's Bundle of Documents are photos showing damage to the Petitioner's vehicle.

The Petitioner (**PW10**) confirmed receiving a report on how his vehicle was damaged. He testified that the vehicle was pushed to the Police Station where the incident was reported and a Police Report issued. At page 90 of the Petitioner's Bundle of Documents is a letter from Zambia Police confirming that

a report of malicious damage to the Petitioner's motor vehicle was made on 3rd August, 2021. The letter is dated 20th August, 2021.

In her defence the 1st Respondent testified that she was unwell on the material day and she gave her vehicle to her driver to go and attend a funeral for the parent of one of the PF members.

The Petitioner's Counsel submitted that the people who blocked the UPND roadshow and later damaged the Petitioner's vehicle came from the 1st Respondent's campaign vehicle. That during the trial of the Petition the 1st Respondent came with a group of people among who was a person wearing a blue shirt whom the 1st Respondent admitted she was aware was on police bond for damaging the Petitioner's vehicle. But the 1st Respondent later claimed she did not know the person wearing the blue shirt and was seeing him for the first time.

It is finally submitted that the 1st Respondent lacks credibility because during cross examination the 1st Respondent and her Counsel were openly and contemptuously cheating by gesturing to each other on how to respond to questions.

The 1st Respondent's Counsel stated that the allegation in paragraph 4 (iii) of the Petition are against the PF Party or the 1st Respondent's supporters, who are persons she is not answerable for and therefore will not answer on their behalf.

That the 1st Respondent who was unwell on 3rd August, 2021 was not aware of what transpired after the driver of her car took the vehicle and drove to the funeral house. That there is no evidence before the Court suggesting that the 1st Respondent knew and consented to what happened at the scene where her vehicle is alleged to have been.

Mr. Kayula also submitted that the Petitioner is the one with the burden of proof and not the 1st Respondent. That no evidence has been brought to show how

the damage to the Petitioner's vehicle affected the people of Isoka Constituency to vote for the leader of their choice.

It was also submitted that there are inconsistencies in the Petitioner's evidence. Firstly, the Petitioner testified that a Police Report was before Court but in cross examination he changed his evidence regarding the nature of the document from the Police which is a letter and not a Police Report. Secondly, **PW8** testified that the death threats he received at the time the Petitioner's car was damaged was reported to the Police at the same time malicious damage to the car of the Petitioner was reported. However, in cross examination, the Petitioner denied that the death threats issued against **PW8** were reported to the Police. That because of these inconsistencies to the events of 3rd August, 2021 it is unsafe for the Court to place any weight on this testimony. That because of the time lag between 3rd August, 2021 and 20th August, 2021 the date of the Police letter, the testimony relating to the alleged events of 3rd August, 2021 is an afterthought. It is contended that the letter of 20th August, 2021 must have been obtained in anticipation of the Petition.

I have carefully considered the evidence of **PW8** and **PW10** and that of the 1st Respondent and the parties' submissions. I do not accept Mr. Kayula's submission that the testimony relating to the events of 3rd August, 2021 is an afterthought and was obtained in anticipation of the Petition because of the time lag between 3rd August, 2021 and 20th August, 2021.

The letter written by the Zambia Police at Isoka Police Station dated 20th August, 2021 as exhibited at page 90 of the Petitioner's Bundle of Documents reads as follows:

"20th August, 2021

TO WHOM IT MAY CONCERN

Dear Sir,

RE: MALICIOUS DAMAGE TO PROPERTY

Refer to the above captioned matter.

Be informed that this formation is in receipt of a case of malicious damage to property Contrary to Section 335 Chapter 87 of the Penal Code of the Laws of Zambia, in which M/Jairos Simbeye aged 43 of Kampumbu Village, Chief Katyetye District Isoka who was also an aspiring Member of Parliament for Isoka Constituency under United Party for National Development (UPND), reported that his motor vehicle namely Toyota Vista Registration Number ABR 7461 painted in UPND Party colours was maliciously damaged by some suspected Patriotic Front (PF) Party Cadres. This occurred on Tuesday 03/8/21 around about 11:00 hours near Roundabout, Isoka Town Centre in Isoka District.

.....

The Police have since arrested two (2) suspects who will appear in Courts of Law.

Meanwhile, the Police have no objection to any assistance that may be rendered to the Complainant. Our Crime Register No. 10/08/21 refers.

Regards.

MUSHIMBEI MUSHIMBEI

c.c. Docket

c.c. File"

It is clear from the above letter that the Petitioner's campaign vehicle was damaged on 3rd August, 2021 by suspected PF Party Cadres and that 2 suspects had been arrested. It is also evident that this letter which is not a Police Report only dealt with the issue of Malicious Damage to the Motor Vehicle and not any other issue which may have been reported to the Police by **PW8** pertaining to the incident.

I do not consider that the contents of the above letter from the Police justify the 1st Respondent's submission that **PW8**'s testimony that the death threats that he received at the time the Petitioner's car was damaged was reported to the

police at the same time malicious damage to the car was reported is false. As already stated the letter is not a Police Report and does not therefore cover everything that **PW8** and **PW10** reported to the Police on 3rd August, 2021. The letter does not for example state that the incident happened when the UPND were having a campaign road show. On the basis of the holding in the case of **NAKBUKEERA HUSSEIN HANIFA V KIBULE RONALD AND ANOTHER**⁷ I have cautiously and carefully evaluate all the evidence adduced by the parties.

I find that although the pictures of the damaged car at pages 83 to 89 of the PBDs do not have a date or pictures of PF Party Cadres, it is PF Party Cadres who damaged the Petitioner's car on 3rd August, 2021. The evidence of **PW8** and **PW10** is confirmed by the oral evidence that there are 2 PF Party Cadres appearing in the Magistrates' Court for malicious damage to property. During cross examination the 1st Respondent admitted that a PF member who was wearing a blue shirt in the gallery had been arrested by the police for damaging the Petitioner's vehicle and was out of police custody on bond.

After evaluating the evidence of the parties, I find that the Petitioner's campaign vehicle was damaged by PF Cadres who came from the 1st Respondent's campaign vehicle on 3rd August, 2021.

I find that the Petitioner has not adduced evidence before this Court showing that the 1st Respondent or her election agent or polling agent were involved in damaging the Petitioner's campaign vehicle. As stated by the Supreme Court in the case of **LEWANIKA AND OTHERS V CHILUBA AND OTHERS**¹ a candidate is only answerable for those things which he has done or which are done by his election agent or with his consent. In this case there is no evidence to suggest that the 1st Respondent knew and consented to the PF Cadres blocking the UPND roadshow which resulted in the Petitioner's vehicle being damaged.

For the foregoing reasons I find and hold that although there is evidence that PF Cadres damaged the Petitioner's campaign vehicle, the 1st Respondent is not answerable for things which are done or purported to be done by PF Party Cadres

or other members of the PF Party who are not her election agents or polling agents. The allegation in paragraph 4 (iii) of the Petition has not been proved to the requisite standard with cogent evidence and therefore fails.

G. SLAUGHTER OF A COW IN KAPILILONGA AREA

The Petitioner alleges that on 11th August, 2021 a PF Party member called Elvis Mulenga slaughtered a cow and distributed to people in Kapililonga Area of Isoka and requested them to vote for the PF Candidates, including the 1st Respondent thereby unduly influencing the said members of the Isoka Parliamentary Constituency to vote for PF and its Parliamentary Candidate the 1st Respondent.

This allegation was abandoned because the witness was not available. This allegation therefore fails.

H. TRANSPORTATION AND FEEDING OF VOTERS

The Petitioner at paragraph 4 (viii) of the Petition alleges that on the polling day the 1st Respondent hired people who organized trucks that went into Malawi and transported Malawian Citizens into Zambia to vote in the Isoka Parliamentary elections.

At paragraph 4 (ix) of the Petition the allegation is that the 1st Respondent hired people to cook for the Malawian citizens who came to vote in the Isoka Parliamentary elections.

These two allegations are related and were argued together.

The evidence on these allegations come from **PW1**, **PW4** and **PW10**. All three testified that Malawian voters were transported on election day to go and vote and after voting, the voters were taken to Aaron Mutambo's house and were given food.

PW1 and **PW4** testified that a Mr. Mwanza, Kennedy Mutambo and Aaron Mutambo are the ones who organized transport (FUSO Truck) to move the Malawian citizens to go and vote. That the trio reminded people that as promised

during the campaign period the time for them to vote for PF had come. **PW1** told the Court that Mr. Mwanza who had a ballot paper showed them how to mark for PF Party Candidates.

The 1st Respondent did not say anything regarding these allegations in her defence.

Mr. Zulu drew the Court's attention to the fact that Aaron Mutambo was in the entourage of the 1st Respondent when she went to campaign to Malawians at the border area in the first week of July 2021 and hence the reminder to them that they are to vote for PF Party Candidates. He submitted that as the 1st Respondent did not distance herself from the July 2021 campaign visit, the only reasonable inference is that she had the knowledge and consented or approved the operation by her team to go and fulfil the promise of transporting Malawians to vote.

It is further submitted that transporting Malawian Citizens to vote and feeding them after voting is an electoral malpractice and contravenes the provisions of **Section 83 (4) of the Act and Rule 15 (1) (h) (iii) of the Code of Conduct of the Act.**

Mr. Kayula submitted that the Petitioner has not brought evidence before the Court to show that the 1st Respondent hired trucks or organized people to hire trucks to transport Malawians to come and vote. There is no documentary evidence of these. That the Petitioner has failed to describe the purported hired trucks by number plates or colour and the drivers have not been named.

It is further submitted that there is no cogent evidence that the 1st Respondent knew and consented to transporting any Malawians from Malawi to Zambia. Lastly that the Petitioner has not proved how this alleged transportation of Malawians affected the people of Isoka in choosing the leader of their choice and how widespread such activity was in Isoka Constituency.

Regarding cooking of food for voters the 1st Respondent's Counsel submitted that no cogent evidence has been adduced to show that indeed the voters went to have a meal after voting. That even assuming that Malawian voters went to eat after voting, the Petitioner has not brought evidence to show that the 1st Respondent orchestrated such cooking.

It is also submitted that no evidence has been adduced to show that the feeding of voters was widespread within Isoka Constituency. The Petitioner has not shown how this feeding affected the people of Isoka in voting for a candidate of their choice.

I have already found that **PW1** and **PW4** are credible witnesses and they are not likely to have fabricated lies against the 1st Respondent. I believe the evidence of **PW1** and **PW4**. I find that Mr. Mwanza, Kennedy Mutambo and Aaron Mutambo are the ones who organized Fuso Trucks to transport 537 voters including **PW1** and **PW4** from the border of Malawi and Zambia to Chaswata Polling Station to go and vote and back to the border area.

I also find that after voting, these voters were taken to Aaron Mutambo's house and given food that is nshima and meat.

I agree with the submissions by Counsel for the 1st Respondent that the Petitioner has not proved by way of cogent evidence that the 1st Respondent knew and consented to the transporting of any Malawians from Malawi to Zambia to vote. The Petitioner did not adduce evidence showing that the cooking was orchestrated by the 1st Respondent or her election agent or polling agent.

I further find that the transportation of voters was not widespread within Isoka Constituency but limited to Chaswata Polling Station. The feeding of voters was also not widespread in Isoka Constituency.

As the allegations in paragraph 4 (viii) and 4 (ix) of the Petition were not against the 1st Respondent or her election agent or polling agent they cannot be the basis

of nullifying the Isoka Constituency Parliamentary election. The allegations fail and are dismissed.

Civil Servants are generally independent and non-partisan, in this case however I find that the District Commissioner for Isoka, Mr. Davy Simbule (now deceased) and the Acting District Commissioner for Isoka Mr. Mulenga Amishi were partisan and openly campaigned for the PF Party. This is most unfortunate.

The Petitioner made 9 allegations against the 1st Respondent. Under **Section 97 (2) (a) of the Act** an election of a candidate as a Member of Parliament, shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court that a corrupt practice, illegal practice or other misconduct has been committed in connection with the election by a candidate; or 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.

The 1st Respondent has been proved to have committed an electoral offence by campaigning to and seeking to persuade Malawian citizens to vote for her and other PF Party candidates as alleged at paragraph 4 (ii) of the Petition. The 1st Respondent has also been proved to have committed an electoral offence by being part of a team of PF Party members who distributed mealie meal, cooking oil and sugar to the electorate in Katenshya Ward on 10th and 11th August, 2021.

The 1st Respondent has not been proved to have committed any illegal practice or corrupt practice or any other electoral misconduct in respect of the 7 other allegations contained in the Petition. No single agent duly appointed by the 1st Respondent was shown to have committed any illegal practice or corrupt practice or any other electoral misconduct. No single witness testified before Court that he or she was prevented from voting for the candidate he or she preferred save for **PW1** and **PW4** whose testimonies on this aspect was not categorical. Each

witness stated that he or she voted freely at the Polling Station to which they registered.

As regards the two allegations in respect of which the Petitioner adduced cogent evidence that the 1st Respondent personally participated in the illegality of campaigning to Malawian citizens and distributing mealie meal, cooking oil and sugar to the electorate of Katenshya Ward, the Petitioner failed to show that these electoral offences were widespread within Isoka constituency and that they prevented the majority of the voters from voting for the candidate of their choice.

Under **Section 97 (2) of the Act** two corrupt or illegal practices are not sufficient to nullify an election unless they prevented the majority of the voters from electing a candidate of their choice. Although the 1st Respondent campaigned to Malawians and she was part of the PF Party members who distributed mealie meal, cooking oil and sugar to the electorate in Katenshya Ward, the allegations would still have to have affected the majority of the electorate in Isoka Constituency to lead to the nullification of the election.

I have come to the inescapable conclusion that the Petitioner has failed to prove to the requisite standard 7 of the allegations in the Petition. As regards the 2 allegations in respect of which the 1st Respondent committed an electoral offence, the Petitioner failed to prove that the electoral offence was widespread and prevented or may have prevented the majority of voters from electing a candidate of their choice. Therefore, I find no ground on which to declare the election of the 1st Respondent as Member of Parliament for Isoka Constituency as null and void.


The Petitioner made 3 allegations against the 2nd Respondent, that the elections in issue were marred with irregularities and malpractices. I have found that the Petitioner failed to prove to the requisite standard any of the allegations against the 2nd Respondent in the Petition. In my view the election in Isoka Constituency was so conducted as to be substantially in accordance with the provisions of the **Electoral Process Act, 2016**.

In totality of the above, this Petition should be dismissed. I declare that the 1st Respondent (Marjorie Nakaponda) was duly elected as Member of Parliament for Isoka Constituency. Accordingly, I dismiss the Petition.

I make no order as to Costs. Each party is to meet their own costs.

Leave to appeal is granted.

**DELIVERED IN OPEN COURT AT CHINSALI THIS 22ND DAY OF NOVEMBER,
2021.**


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WILLIAM S. MWEEMBA
HIGH COURT JUDGE