

**IN THE LOCAL GOVERNMENT ELECTIONS TRIBUNAL 2021/F/LGET/11  
HOLDEN AT SHIWANG'ANDU  
AT THE SHIWANG'ANDU DISTRICT**

**(Civil Jurisdiction)**

**IN THE MATTER OF LOCAL GOVERNMENT ELECTION PETITION FOR  
ICHINGO WARD OF SHIWANG'ANDU DISTRICT OF MUCHINGA PROVINCE  
OF THE REPUBLIC OF ZAMBIA HELD ON THE 12<sup>TH</sup> DAY OF AUGUST 2021**

**AND**

**IN THE MATTER OF ARTICLE 159 OF THE CONSTITUTION OF ZAMBIA AS  
AMENDED BY THE COSTITUTION (AMENDMENT) ACT NO. 2 OF 2016**

**AND**

**IN THE MATTER OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016**

**AND**

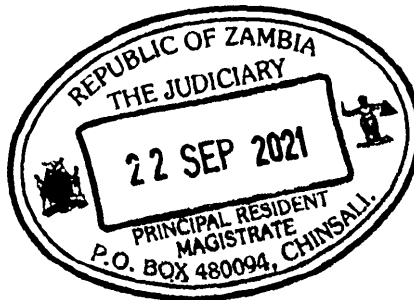
**IN THE MATTER OF THE LOCAL GOVERNMENT ELECTORAL PROCESS  
RULES S.I NO 60 OF 2016**

**BETWEEN**

**CHANDA MULENGA**

**AND**

**THOMAS CHEWE**



**PETITIONER**

**RESPONDENT**

**BEFORE: HONOURABLE C. CHILINGALA, G. CHIPULU AND M. MWENDA IN  
OPEN COURT ON THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2021**

**FOR THE PETITIONER: IN PERSON**

**FOR THE RESPONDENT: L.C LEMBA OF MULUNGUSHI CHAMBERS**

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**J U D G M E N T**

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**Chipulu delivered the judgement of the Tribunal.**

**Legislation referred to:**

1. The Constitution as amended by the Constitution (Amendment) Act No. 2 of 2016
2. Electoral Process Act No. 35 of 2016
3. Local Government Electoral Petition Rules S.I 60 of 2016

**Cases referred to:**

1. Wilson Masauso Zulu vs. Avondale Housing Project (1982) Z.R 172 (SC)
2. Hanz Winfred Lorenz vs. Zambia Revenue Authority SCZ No. 192/2010
3. Austin Liato vs. Sitwala Sitwala Selected Judgment No. 23 of 2018
4. Lewanika and Others vs. Chiluba (1998) Z.R 48
5. Nkandu Luo and the Electoral Commission of Zambia v. Doreen Sefuke Mwamba and the Attorney General, Selected Judgment No. 51 of 2018
6. Margaret Mwanakatwe vs. Charlotte Scott Selected Judgment No. 50 of 2018
7. *Kalenge vs. Munshya and Electoral Commission of Zambia and Attorney General S.C.Z No. 115 of 2012*
8. *Mubika Mubika v Poniso Njeulu, SCZ No. 114 of 2007*
9. Mubita Mwangala v Inonge Mutukwa Wina, SCZ Appeal No. 80 of 2007
10. Josephat Mlewa v. Eric Wightman (1995/1997) Z.R. 106

**Other Authorities**

Cambridge Advanced Learners Dictionary 3<sup>rd</sup> Edition

### **Oxford Advanced Learners Dictionary International Students Edition**

This petition was filed on 25<sup>th</sup> August 2021 by Chanda Mulenga (the Petitioner) who was a candidate in the Local Government Elections for Ichingo Ward of Shiwang'andu District under the United Party for National Development (UPND) ticket. The Petitioner is challenging the election of Thomas Chewa (the Respondent) of the Patriotic Front (PF) who was declared as having been duly elected Councilor for Ichingo Ward on 14<sup>th</sup> August 2021 in the elections held on 12<sup>th</sup> August, 2021.

The petition is brought pursuant to Article 159 (3) of the Constitution of Zambia as amended by the Constitution (Amendment) Act No. 2 of 2016 hereinafter referred to as "the Constitution" and the Electoral Process Act No. 35 of 2016 of the Laws of Zambia hereinafter referred to as "the Act".

The detailed allegations made by the Petitioner are contained in paragraph 3 of the petition and are summarized as follows:

- I. That the Respondent and his party, namely PF were ferrying voters to the polling station on the poll day;
- II. That the Respondent and his party members were giving K 20.00 notes to voters;
- III. That the Respondent's party used the Social Cash Transfer (SCT) funds as a campaign tool threatening beneficiaries with removal from the list if they did not vote for PF candidates;
- IV. The Respondents and other PF officials were collecting information from peoples voters cards for unknown reasons; and
- V. That the Respondent's party prepared food to be eaten by voters after voting for the PF candidates on the poll day.

To this effect, there is an Affidavit verifying the petition sworn by the Petitioner and the Petitioner accordingly prays that it be determined that the Respondent's election be declared void.

The Respondent filed an answer on the 30<sup>th</sup> August 2021. The Respondent denied the contents of paragraph 3 (i) of the petition and averred that he had no knowledge of PF officials ferrying voters to polling stations on the poll day. Further the Respondent denied the contents of paragraph 3 (ii) and (iii) of the petition and averred that at no time did he and other PF members give out K20.00 notes or use the SCT funds as a tool for canvassing votes.

Additionally the Respondents denied both paragraph( iv) and (v) of the petition asserting that at no point did he and other PF members collect information from voters cards or prepare food for the voters to eat after voting.

When the matter came up for hearing on 12<sup>th</sup> September 2021, the Tribunal made an observation that the Petitioner did not state the grounds upon which his petition was premised. Accordingly the Tribunal guided the unrepresented Petitioner on the three grounds upon which an election petition can be premised as provided by Section 97 (2) of the Act and asked him to state the ground/s on which his petition was premised. This was done in accordance with Rule 9 (3) which permits the Tribunal to order the parties to furnish such particulars which may be necessary to ensure a fair hearing of the matter.

The Petitioner stated that he was relying on the ground which alleges illegal practices, corrupt practices and misconduct and the hearing proceeded on that premise.

At the hearing of the petition, the Petitioner testified and called three witnesses in support of his case.

The Petitioner (PW1) stated in his testimony that he and the Respondent were contenders in a local government election seat for Councilor under Ichingo Ward where the Respondent emerged and was declared winner on 14<sup>th</sup> August 2021.

He testified that on 12<sup>th</sup> August 2021 after the Respondent cast his vote at Kabangwe Polling Station, he together with Mr. Chileshe, who is a teacher and also a person designated as SCT pay point manager and other Community Welfare Assistant Committee (CWAC) members, started disbursing SCT funds. He stated that those that benefitted included banakulu Chanda Boyd whose funds were collected by Chanda Boyd. He further testified that whilst paying out SCT funds, the Respondent and Mr. Chileshe were warning that if anyone made a mistake of voting for the UPND, they will be removed from the list of SCT beneficiaries. The Petitioner stated he was informed of these happenings by PW 4 who was present at the time.

The Petitioner further testified that on the same day, the Respondent went to Esau Village with a motor vehicle driven by Giland Sume to ferry voters from Kalonge. The Petitioner stated that he asked the Respondent why he was doing so and he stated that he had the right to do so and that the Petitioner had no right to ask.

It was the Petitioner's further testimony that thereafter, the Respondent went to the PF branch chairlady's house where he followed and found them cooking food. The Petitioner stated that he found the Respondent with the Branch chairlady and Josephine Mulenga. He further testified that when he inquired from Josephine Mulenga what was going on, she informed him that the Respondent had taken some chicken and cabbage to cook for the voters and that whoever voted for the PF was to go and partake in the eating. He stated that later when she inquired from Josephine if they had eaten she responded that they had eaten and been they had been given K20.00 notes.

In addition, the Petitioner testified that on the same day, the Respondent went to pick voters from Bwalya Longwe Community taking them to Malikani Polling Station. This according to the Petitioner, he learnt from PW 2 who had informed him that he had met the Respondent whilst doing patrols as an election monitor.

Furthermore, it was the Petitioner's testimony that on 8<sup>th</sup> August 2021, the Respondent went to Esau village with Seba, Andrew Kamyongo, Sikopiko and Kel where they found the Petitioners and others whom they attacked. He stated that the Respondent and his group started beating Simon Chilufya saying their advice to him not to join the UPND seemed to have fallen on deaf ears. The Petitioner ran into Cephas Mwika Zamgwa's house where he sought refuge. The Respondent took their campaign materials made out of wood carvings which have not been returned to date.

Under cross examination the Petitioner stated that he had received orientation from Electoral Commission of Zambia (ECZ) on the procedure to follow if one observed an electoral malpractice and that amongst the recommended course of action was reporting to police or ECZ. He further stated that he did not report the Respondent.

The Petitioner was further asked what SCT is to which he responded that it was money meant for the vulnerable. Asked if he knew that a political party was different from government he responded in the affirmative and when further asked to confirm that distribution of the SCT funds was a preserve of the government, he said he did not agree and maintained that it was a preserve of a party and that prior to the elections, disbursement of SCT funds was a preserve of the PF. Despite confirming that SCT program was a government program, the Respondent retaliated that the disbursement of the funds under the SCT program was done by government employees working hand in hand with the PF officials.

When asked which vehicle was being used to ferry voters from Kalonge to Esau Polling Station, he stated that it was a Toyota Hilux and that from what he saw seven (7) people were picked from Kalonge. He said he knew that they were going to vote because they had voters' cards and national registration cards and that they told him they could not vote for someone who had not provided them with transport.

As for the food that was being cooked he said, personally he had no proof that the same was bought by the Respondent but that Josephine is the one who told him so.

When asked whether he had reported the attack of the 8<sup>th</sup> August to the police, he said he had but the policeman did not do anything stating that he too was a victim of PF attacks. He further stated that the complaint was recorded but he had not brought any document to so confirm. Asked whether he had reported Mr. Chileshe to the authorities, he responded in the negative.

Under re-examination he stated that the disbursement of the SCT funds was being done by PF officials.

Cephas Mwika Zanga (PW 2) stated that on 8<sup>th</sup> August 2021, whilst in Matumbo Village, he received a call from his children who informed him they had been attacked by PF cadres who had managed to get away with campaign materials made out of wood carvings.

Further, PW 2 testified that on poll day, as he was doing patrols as a local monitor for the UPND at Ichingo and Mwiche Polling Stations, he found that people had convened at Malikani in Ichingo Ward. They asked him why he had gone with a motor bike when they needed transport. He further testified that he was informed by those people that they had been advised to convene at a Central place by the Respondent, Gilland Chanda and Bernard Mukuta so they could be ferried to the Polling Station. He further stated that he later met the Respondent with Gilland Chanda and Bernard Mukuta and asked them why they were ferrying voters and they told him that if he did not have the means to do so he must allow them who had the means to do so. PW 2 proceeded to Mwiche ward and on his return to Ichingo ward, he met the Respondent, Gilland and Bernard who had yet again picked voters. When he returned he informed PW 1.

Under cross examination he stated that the Respondent and his colleagues were using a Toyota Hilux to ferry voters and that he met them twice. He further stated that there were seven people in the van. In addition, he stated that he did not see the Respondent drop the occupants of the motor vehicle at a polling station and that he had no evidence to show that the Respondent told the people that he carried to vote for him and neither did he see them vote for the Respondent.

PW 3 was Josephine Mulenga she stated in her testimony that on the poll day she met the Respondent who told her to vote for the PF and gave her a K20,00 note saying that if she does not do so there was a camera in the polling booth which will capture the details of whom she will vote for. She further stated that she was also told by the Respondent that after voting, she should go to the chairlady's house for a meal.

She further testified that after voting she went to the chairlady's house and the Petitioner arrived before the Respondent left. The Petitioner asked her what was going on and she informed him that the Respondent had brought chickens for cooking.

Under cross examination she stated that the Respondent gave her a K20.00 note on her way to the polling station. Further she informed Court that she did not see the camera when voting and that she voted in the manner she wanted though she did it with the fear of cameras.

As for the incident at the chairlady's place she stated there were many people present among them Grace Katongo, Bana Kangwa Chewe, Bana Mutale Kapiya, Banakulu Angela and Bana Mwenya. She also stated that she witnessed the delivery of the chickens by the Respondent.

PW 4 was Mukonko Joyce. She stated that on 11<sup>th</sup> August 2021, she went to collect SCT funds. She stated that at the pay point, she found the Respondent, and CWAC members namely, Felix Mukonko, Kangwa and Mr. Chileshe



disbursing money. She said that after getting the money, the PF officials present told her that since she had been paid, she must vote for PF, if not the camera at the polling station will capture her and her grandchild will forfeit her entitlement to those funds. She in turn responded that those were mere threats they were making and they told her to return the money. She assured them there was no problem and went home.

She further stated that on 12<sup>th</sup> August 2021, the poll day, she found the Respondent and same group disbursing funds to other people who were being told that if they do not vote for the PF they will forfeit their SCT entitlement and when she reminded them that they had continued threatening people she was told to leave by the Respondent.

Under cross examination the witness informed the Tribunal that she was given K600.00 under SCT and she signed for it, she further stated that the proof that she got that money will be found on the documents she signed. She also told the Tribunal that she was not personally registered as a beneficiary under SCT.

Under re-examination she stated that she was merely collecting the same for Diana Kangwa, her grandchild.

The Respondent called three witnesses in support of his case who adduced their evidence by way of Affidavits. The said Affidavits were read and translated to the Petitioner before the Respondent and his witnesses were subjected to cross examination.

The first witness was the Respondent himself who for convenience we shall refer to as RW 1.

RW 1 stated in his testimony that Morgan Machina is not a member of the Patriotic Front and the Branch Chairlady for Esau Village is Lenny Chilufya. He stated that Bernard Mukutu was not his election agent and that there was no incident of electoral malpractice recorded in Ichingo Ward. He denied ever

participating in the disbursement of SCT funds or providing voters with food or money before, during and after the 12<sup>th</sup> August 2021 elections saying he had no capacity to do so as a peasant farmer.

Under cross examination when asked why he worked hand in hand with Bernard Mukuta if he was not election agent, he denied having worked with the latter. When asked if PW 2 was a leader under PF or UPND he said he did not know.

RW 1 denied ever ferrying voters during the 12<sup>th</sup> August 2021 general elections or visiting PW 2's shop during the campaign period. He stated in his testimony that that PW 2 is an uncle to the Petitioner while PW 4 is the Petitioner's aunt. He stated that he believed that he was duly elected Councilor for Ichingo Ward.

RW 2 was Innocent Saviour Chileshe who is a teacher at Kabangwe Secondary School in Shiwang'andu District and pay point manager appointed under the Social Welfare Office for Kabangwe, Sele and Mwenge pay points. He testified that on 11<sup>th</sup> August 2021, he disbursed the SCT funds to the beneficiaries for the period July – August 2021 whilst in the company of Mr. William Mutale and Joyce Bwalya and that Joyce Makonko did not receive any SCT payment from him on 11<sup>th</sup> August 2021 and that on 12<sup>th</sup> August 2021, he voted at 10:31hrs at Kabangwe Primary School Polling Station and never went anywhere. In addition he stated that he did not receive any instructions from the Respondent herein regarding the discharge of his duties as a pay point manager for SCT funds.

Under cross examination when asked if Foster was a beneficiary under SCT he answered in the affirmative, when asked whether she collected money on the 11<sup>th</sup> or 12<sup>th</sup> August 2021, he stated that she collected on the 12<sup>th</sup> of August 2021.

RW 3 Lemmy Bwalya who stated that she was the Branch Chairlady for the Patriotic Front at Esau Village. She stated that she is married to Charles

Chanda and that she did not witness the Respondent or his election agent providing food or money to voters before, during or after elections and that she did not witness any electoral malpractices in Ichingo Ward during the 12<sup>th</sup> August 2021 elections.

Under cross examination when asked how she was elected as Chairlady she said she was merely appointed. When asked if the ward officials were present when she was appointed she said they were not present. When asked who was responsible for appointing her since the officials were not present she said she did not know their names. Asked if the PF Official Party Register was officially endorsed, she said it wasn't.

This marked the close of the case and the Respondent's Counsel filed written submissions whilst the Petitioner relied on the evidence on record.

In his submissions the Learned Counsel argued that other than the allegations of the Petitioner and his witnesses, no tangible evidence was adduced before the Tribunal to buttress the facts alleged.

Regarding the events of 12<sup>th</sup> August 2021 concerning the preparation of food, Learned Counsel submitted that the allegation made by the Petitioner (in his pleadings) was that the food was prepared at Morgan Machina's house however, the evidence adduced suggest that the food was prepared at the PF chairlady's house named Ireen.

They further argue that RW2's evidence will show that she was the Branch Chairlady of the PF at Esau Village and not Ireen.

Regarding the allegation on the disbursement of the social cash transfer, Learned Counsel argued that RW1 testified that he was not in the company of the Respondent when he disbursed the SCT funds and that he also told this Tribunal that he never disbursed SCT funds on poll day.

Concerning the burden of proof, it was submitted the same lies with the one who alleges and cited the case of Wilson **Masauso Zulu vs. Avondale Housing Project** which was cited with approval in by the Supreme Court in the Case of **Hanz Winfred Lorenz vs. Zambia Revenue Authority** where the Supreme Court held:

*“Where a Plaintiff who alleges that he has been unfairly or unfairly dismissed, as indeed any other case where he makes any allegations, it is generally for him to prove these allegations. A plaintiff who has failed to prove his case cannot be entitled to judgement, whatever may be said of his opponent’s case.”*

Additionally Counsel argued that in election petitions, the standard of proof is higher than that required in an ordinary civil matters and it is a condition precedent that before an election can be nullified, it must be shown that the evidence adduced in support of the allegations establishes the issues raised to a *fairly high degree of convincing clarity* and in this respect relied on the case of **Austin Liato vs. Sitwala Sitwala** which the Constitutional Court cited with approval the sentiments of the Supreme Court in the case of **Lewanika and Others vs. Chiluba** wherein the Court stated that:

*“it could not be seriously disputed that parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probabilities and that it followed that the issues raised were required to be established to a fairly high degree of convincing clarity.”*

Counsel further submitted that the grounds upon which the election of a councillor may be nullified by this Tribunal are provided for under Section 97 (2) of the Electoral Process Act and are espoused in the case of **Nkandu Luo and the Electoral Commission of Zambia vs. Doreen Sefuke Mwamba and the Attorney General**.

Furthermore Counsel argued that the evidence adduced by the Petitioner and his witnesses falls way too short of the threshold required to annul an election relying on the case of **Margaret Mwanakatwe vs. Charlotte Scott**, where the Constitutional Court stated:

*“the 1st Respondent did not adduce any evidence to prove that the prohibited act was widespread and affected the result of the election by preventing the majority of the electorate from electing their preferred candidate and so rendered the election a nullity.”*

In conclusion Learned Counsel argued that the evidential threshold to surmount in an election petition as espoused in a plethora of cases has not been met by the Petitioner.

We have carefully considered the pleadings and evidence before this Tribunal in its entirety, and the submissions made by Counsel. By this petition, the Petitioner seeks to nullify the election of the Respondent as Councilor for Ichingo Ward. The nullification is sought on the ground that the illegal and corrupt practices and other misconduct alleged swayed the voters to vote in a particular way.

We shall now espouse the law that governs the nullification of a candidate as a Councilor. Article 159 (3) of the Constitution provides that a person may file an election petition with a local government elections Tribunal to challenge the election of a Councilor.

Section 98 of the Electoral Process Act provides:

*An election petition may be presented to the High Court or a Tribunal by one or more of the following persons:*

*(c) a person claiming to have been a candidate at the election to which the election petition relates;*

The grounds upon which the election of a candidate as a Mayor, Council Chairperson or Councilor may be declared void by a Tribunal are set out in Section 97 (2) of the Electoral Process Act. Section 97 (2) provides inter alia as follows:

*97 (2) 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.*

In the case of **Nkandu Luo and the Electoral Commission of Zambia v. Doreen Sefuke Mwamba and the Attorney General**, the Constitutional Court stated that:

*“In order for a Petitioner to successfully have an election annulled pursuant to Section 97 (2) (a) there is a threshold to surmount. The first requirement is for the Petitioner to prove to the satisfaction of the Court, that the person whose election is challenged personally or through his duly appointed election or polling agents, committed a corrupt practice or illegal practice or other misconduct in connection with the election, or that such malpractice was committed with the*

*knowledge and consent or approval of the candidate or his or her election or polling agent.”*

The Court further stated that:

*“in addition to proving the electoral malpractice or misconduct alleged, the Petitioner has the further task of adducing cogent evidence that the electoral malpractice or misconduct was so widespread that it swayed or may have swayed the majority of the electorate from electing the candidate of their choice.”*

We agree with the submission by learned Counsel that It is trite law that the burden of proof in an election petition lies upon the Petitioner and the standard of proof required is higher than a mere balance of probabilities.

In ***Mabenga v Wina and Others***, the Supreme Court held 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*** the Supreme Court stated:

*“ for the Petitioner 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.”*

As earlier stated, this petition is hinged on allegations of illegal practices, corrupt practices and other misconduct which the Respondent in his pleadings specifically denies.

Evidence before this Tribunal which is not in dispute is that the Petitioner and Respondents were contenders in the Local Government elections for the position of Councilor under Ichingo Ward of Shiwang’andu District held on the 12<sup>th</sup> August 2021. It is also not in dispute that the Petitioner stood under the UPND ticket whilst the Respondent stood under the PF ticket. Further, it is not in dispute that the Respondent having emerged victorious in the said election was declared as having been duly elected as Councilor for Ichongo Ward.

What appears to be in dispute and beg the determination of this Tribunal appears to be:

1. whether the Respondent committed corrupt practices or illegal practices or other misconduct in connection with the election as alleged.
2. Or if not personally committed by the Petitioner, whether such corrupt illegal practice of misconduct were committed with the knowledge and consent or approval of the Respondent or his duly appointed election or poll agents; and
3. whether the alleged electoral malpractice or misconduct if proved was so widespread that it swayed or may have swayed the majority of the electorate from electing the candidate of their choice.

The particulars of the alleged misconduct, illegal and corrupt practices are as follows:

- i. That the Respondent and his party officials were ferrying voters to the polling station on the poll day;



- ii. That the Respondent and his party members were giving K 20.00 notes to voters;
- iii. That the Respondent's party used the social cash transfer funds as a campaign tool threatening voters with removal from the list of beneficiaries if they did not vote for PF candidates;
- iv. The Respondents and other PF officials were collecting information from peoples voters cards for unknown reasons; and
- v. That the Respondent's party prepared food to be eaten by voters after voting for the PF candidates on the poll day.

We shall analyse the particulars in the order in which they are presented.

In relation to the allegations regarding the ferrying of voters, the Petitioner's evidence was that on 12<sup>th</sup> August 2021, the Respondent went to Esau Village with a motor vehicle driven by Gilland Sume to ferry voters from Kalonge to Esau polling station.

Further, PW 2 testified that on 12<sup>th</sup> August 2021 whilst doing patrols as an election monitor for UPND, he went to Malikani and whilst there he met the Respondent with Gilland Chanda and Bernard Mukutu ferrying voters. He stated that he asked them why they were ferrying voters and they told him to mind his own business.

The Respondent in his evidence gave a bare denial denying ever having ferried voters during the 12<sup>th</sup> August 2021 elections.

This notwithstanding, we hold the view that the ferrying of voters using private transportation on poll day does not constitute an illegal or corrupt practice or other misconduct under part VII of the Act or the Code of Conduct. Our position is fortified by the fact that the Code of Conduct does forbid the ferrying of voters using government transport but says nothing about ferrying of voters using private transport. By implication therefore, the act is not forbidden.

Our view is further fortified by the Supreme Court decision in the case of ***Kalenge vs. Munshya and Electoral Commission of Zambia and Attorney General*** where the Supreme Court held as follows:

*“The argument by learned Counsel for the appellant while relying on the **Mabenga case** is that the use of government transport is an illegal practice. We agree. However, in this case the transport used was private transport and it is settled that the use of private transport to ferry voters is not an offence under our Electoral Laws.”*

As to whether it constitutes a corrupt practice, the Supreme Court stated:

*“We do not agree that because the trucks in question had a message to vote on the clock this amounted to a corrupt practice or bribery. This, in our view, would be overstretching the definition of corrupt practice, bribery or treating”*

Consequently, we find that the conduct complained of is not proscribed under our laws.

As for the allegation that the Respondent was giving out K20.00 notes to the voters on poll day there was evidence from PW 3 that on 12<sup>th</sup> August 2021 as she was going to vote she met the Respondent who gave her a K 20.00 note and told her to vote for him. The Respondent in his testimony stated that PW 3 was an aunt to the Petitioner, however we note that he did not raise the issue in cross examination when both PW 1 and PW 2 took the stand. Further in the Respondent’s submissions, it is alleged that PW 3 was UPND official and thus her evidence falls in the category of partisan witnesses and requires corroboration. We find no evidence on record to support the said claim. To the contrary the evidence on record reveals that PW 3 stated that she is PF and campaigned with the Respondent and this was not disputed in cross examination, as such, we find that she had no motive to tell lies against her own party nor were any such motives suggested in cross examination. Further

when cross examining the witness, the Respondent merely skirted around the bribery issue and gave a bare denial in his defence. Accordingly, we find the evidence of the Petitioner on his issue to be more credible than that of the Respondent and find that the Respondent did engage in bribery contrary to Section 81 of the Act.

With regard to the allegation that the Respondent and his party were using the SCT funds as a campaign tool there was evidence from PW4 that on 12<sup>th</sup> August 2021 when she went to collect SCT funds for and on behalf of her grandchild, Diana Kangwa, she found the Respondent who was in the company of other PF members and Mr. Chileshe, a teacher and pay point manager and other CWAC members. She stated in her evidence that after she was paid the PF officials who were there told her that since she had been paid she must vote for the Respondent or risk her grandchild losing her entitlement to SCT funds. PW 4 further testified that on 12<sup>th</sup> August 2021 after casting her vote as she was coming out of the Polling Station she found the same group paying out SCT funds and when she asked the Respondent why they were threatening people, he was told to leave. She stated that the beneficiaries being paid were being threatened with removal from the list of beneficiaries if they did not vote for the PF.

The Respondent in his defence denied ever participating in the disbursement of SCT funds. RW2, the pay point manager alleged to have been with the Respondent stated in support of the Respondents case that on 11<sup>th</sup> August he disbursed social cash transfer funds for the period July to August 2021 and that he was in the company William Mutale and Joyce Bwalya. He further stated that that PW4 did not receive any social cash transfer from him on 11<sup>th</sup> August 2021.

We find the evidence of the Petitioner to be more credible on this issue for the reasons that follow hereafter. PW 4's evidence remained unshaken under cross examination. Whilst the RW 2 denied having paid PW 4 on the material date,

he did not deny the assertion that PW 2 got money on behalf of the grandchild. Further whilst RW 2 stated in his evidence that he was in the company of William and Joyce when disbursing funds he did specifically state that these are the only people he was with nor did he specifically deny the assertion that he was in the company of the Respondent. We thus find that this allegation has been proved and that Section 81 of the Act was contravened.

Regarding the allegation that the Respondent was getting information from voter's cards, no evidence was led to support the claim. In the case of ***Mabenga vs. Wina and others*** the Supreme Court stated that an election petition is like any other civil claim that depends on the pleadings and the burden of proof is on the challenger to that election to prove to a standard higher than on a mere balance of probability on the issues raised. There was no evidence to support the pleading and accordingly, we dismiss it.

Regarding the allegation concerning the feeding of voters, PW 1 testified that he was informed by PW 3 that the Respondent had bought food to feed the voters on election day and that on 12<sup>th</sup> August 2021, when he asked PW 3 if they had eaten the food she responded in the affirmative. PW 3 in her testimony however only testified about the bringing of the food by the Respondent but did not state that she or any other person had eaten the food. The evidence of feeding of the voters was based on what PW 1 was told by PW 3 and PW 3 when called to testify did not confirm this position in her own testimony. We thus find that the allegation is based on inadmissible hearsay and accordingly, we find that the allegation has not been proved.

Regarding the allegations of violence and intimidation alleged to have taken place on the 8<sup>th</sup> August 2021, we note from our perusal of the pleadings that this issue was not pleaded in the Petition. However we also note that the Respondent did not object to evidence being led on the same. In ***Anderson Mazoka and Others vs, Levy Patrick Mwanawasa*** it was held that where a matter not pleaded is let in evidence and no objection is raised by the other

side, the Court is not precluded from considering it. This Tribunal will thus consider the evidence led on this issue.

The Petitioner testified that on the 8<sup>th</sup> August 2021 himself and Simon Chilufya were attacked by the Respondent and PF cadres who included Sikopipo, Andrew Kampyongo, Seba and Kel at PW 2's shop at Esau Village. He stated that whereas he managed to run and sought refuge in PW 2's house, Simon Chilufya was not so lucky and was beaten by the Respondent and his group. He further stated that the Respondent and his group left with their campaign materials made out of wood carvings. The Respondent denied ever going to PW 2's shop during the campaign period. However PW 2's evidence remained unshaken during cross examination. We thus find that violence and intimidation did take place as alleged and this is in contravention of Paragraph 15 (1) (a) of the Code of Conduct.

Having found that the allegations of ferrying voters, giving out K20.00 notes, using the SCT funds as a tool for canvassing more votes and violence and intimidation have been proved the next issue to consider is whether it has been proved that as result of the said acts the majority of the voters were or might have been prevented from electing a candidate of their choice.

In the case of **Mubika Mubika v Poniso Njeulu, SCZ Appeal No. 114 of 2007** which the Constitutional Court cited with approval in **Jonathan Kapaipi v Newton Samakayi, CCZ Appeal No. 13/2017**, the Supreme Court stated that:

*"The provision for declaring an election of a Member of Parliament void is only where, whatever activity is complained of, it is proved satisfactorily that as a result of that wrongful conduct, **the majority of voters in a constituency were, or might have been prevented from electing a candidate of their choice**, it is clear that when facts alleging misconduct are proved and fall into the prohibited category of conduct, **it must be shown that the prohibited conduct was widespread in the***

**constituency** to the level where registered voters in **greater numbers** were influenced so as to change their selection of a candidate for that particular election in that constituency; only then can it be said that a greater number of registered voters were prevented or might have been prevented from electing their preferred candidate” (emphasis ours).

Further, in **Mubita Mwangala v Inonge Mutukwa Wina, SCZ Appeal No. 80 of 2007**, the Supreme Court held:

“In order to declare an election void by reason of corrupt practice or illegal practice or any other misconduct, it must be shown that the **majority of voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred.**” (emphasis added)

In the case of **Josephat Mlewa v. Eric Wightman** the Supreme Court held that:

“The Court must be satisfied about the scale or type of wrong doing. By scale, it is meant widespread as to influence the majority of voters in the constituency not to vote for their preferred candidate.”

The term majority is defined by the Oxford International Students Dictionary Edition as “*the largest part of a group of people or things*”

Cambridge Students Dictionary defines majority as the “*larger number or part of something*”.

Notwithstanding that allegations of ferrying voters, giving out K20.00 note, using the SCT funds as a tool for canvassing more votes and violence and intimidation have been proved, we agree with the Learned Counsels

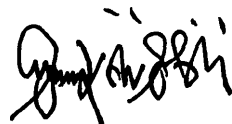
submission and find that no cogent evidence was adduced to prove that the actions complained of were widespread to the level where registered voters in greater numbers were swayed so as not to vote for their preferred candidate.

The upshot of our decision therefore is we find that the Petitioner has failed to prove to the requisite standard his petition. Consequently, we find no ground on which to declare the election of the Respondent as Councilor for Ichingo Ward void. In effect, we dismiss the petition and declare that the Respondent was duly elected as Councilor for Ichingo Ward.

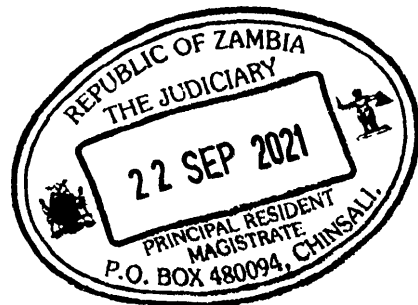
Each party to bear own costs.

Parities informed of right of appeal within 14 days of the Decision.

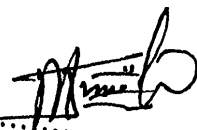
Dated this 22<sup>nd</sup> day of September 2021



C. CHILINGALI  
CHAIRPERSON




G. CHIPULU  
MEMBER



M. MWENDA  
MEMBER