SCZ JUDGMENT NO. 1 OF 1996.

IN THE SUPREME COURT OF ZAMBIA SCZ NO. 99 OF 1995
HOLDEN AT LUSAKA
(Civil Jurisdiction)

JOSEPHAT MLEWA Appellant
Vs
ERIC WIGHTMAN Respondent

Coram: Ngulube, CJ., Sakala and Chaila JJS.
4th January and 24 January, .1996

Mr. S. Phiri of S.S. Phiri and Company, for the appellant
Mr. M. Sikatana of Veritas Chambers, for the respondent.

J U D M E N T

Sakala JS delivered the judgment of the court.

Cases referred to:

1. Johnson Jere Vs William Kayemba, 1983/ unreported.
2. Simwinji Vs Sibetta, 1995.unreported.
3. Sakala Vs Phiri, 1974. unreported.
4. Limbo Vs Mututwa, 1974/HP/EP/2.unreported.
5. Jere V Ngoma (1969) ZR 106.
6. Lusaka Vs Cheelo (1979) ZR 99 7. Wisamba V Makai (1979) ZR 295.

This is an appeal against a judgment of three judges of the High Court, sitting as a divisional court in an election petition, holding that the respondent, Josephat Mlewa, was not duly elected and ordering a nullification of his election and making a further order that a fresh poll be held in accordance with the provisions of the Constitution.

For convenience, we will refer to the appellant as the respondent and the respondent, in this appeal, as the petitioner which they were in the court below. The facts of the case as accepted by the High Court are that both parties were candidates in the Parliamentary General Elections held on 31st October 1991 for Mkaika Constituency.

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The petitioner stood on the ticket for the Movement for Multiparty Democracy (MMD) while the respondent stood on the ticket of the United National Independence Party (UNIP). At the close of the voting and the counting of the votes,the respondent was declared winner of the elections by the returning officer.

The petitioner petitioned the High Court for an order that the election results for Mkaika Constituency be declared null and void on account that the respondent had not been duly elected or returned. In his petition, the petitioner stated that the elections had been characterised by rampant corruption and bribery and that there had been several incidents of illegal practices. The petitioner also alleged that there had been violence, threats to life and property against voters in the constituency in general and against members of the Movement for Multiparty Democracy in particular. He further alleged that several voters in the constituency had been denied the opportunity to vote or to vote for a candidate of their own choice by members of the United National Independence Party, their agents and their supporters. The petitioner also alleged that the elections had been unfair because the UNIP candidate, the respondent, had at his disposal and use a GRZ Landrover which he used for campaign purposes. The petitioner further alleged contravention of the electoral regulations in that a UNIP polling agent at Kanjedza polling station had personally communicated with voters who were lined up to vote.

The petitioner gave oral evidence and called 15 witnesses to support his allegations. In reply to the petition the respondent filed an answer in which he denied the allegations of illegal and corrupt practices and counter alleged that the illegal and corrupt practices had been committed by the petitioner. The respondent also gave oral evidenc to rebut the petitioner's allegations and called 4 witnesses in support of his case.

After a very careful review of the evidence and the submissions, the court summarised the various allegations made by the petitioner as follows:-

Contravention of the electoral regulations;
Use of Government facilities;
Corruption and bribery;
Undue influence; and
Threats and violence to life and property.

The court found that on the evidence , the allegations of contravention of electoral regulations; the use of a government vehicle to campaign; and the giving out Jerseys to solicit for votes had not been proved. The court however, found on the evidence that the exercise books and the T-shirts were campaign materials given as free gifts by UNIP with an intention of wooing votes. The court further found that in plural politics, it is the parties which mount the campaigns for their candidates and that the consequences of any illegal dealings will inevitably affect the candidates so that a defence of not being personally involved would not be upheld if shown that the illegal acts complained of affected the results of the election. The court held that the distribution of the exercise books and the T. shirts had been done on a large scale that many voters in the constituency were bribed to vote for UNIP and that this had affected the out come of the election. On the allegations of undue influence, threats and violence to life and property during compaigns, the court found that the evidence was overwhelming and had not been challenged. The court noted that all the incidents were witnessed by a lot of people in the constituency. In the opinion of the court, the actions were capable of bringing fear into the mind of voters and that the whole atmosphere appeared to have been characterised by intimidation and actual violence against MMD supporters perpetrated by the local leadership of UNIP, Chiefs and their Headmen. The court concluded as follows:-

"Our finding is that UNIP mounted a very dirty campaign in the area and the elections were held in an atmosphere which was not free and fair because of the rampant acts of intimidation and violence. We have no doubt that this affected the result. We therefore agree with the petitioner that the respondent, Josephat Mlewa, was not duly elected. We nullify his election and order that a fresh poll be held in accordance with the provisions of the constitution."

These are the findings the respondent has appealed against. Although the respondent filed a memorandum of appeal containing three grounds, Mr. Phiri, counsel for the respondent informed the court that there was only one major ground of appeal which hinged on the interpretation of the whole of section 18(2) of the Electoral Act No. 2 of 1991. Mr. Phiri indicated that his main quarrel with the judgment was the court's finding that the respondent was responsible for the acts not committed by him personally or committed by his agent or polling agents without his knowledge and approval. He submitted that this finding which raises a novel point of law, was in total contrast with a further finding that the respondent was not guilty of any of the acts complained of in the petition and that the acts complained of had been committed by the general membership of UNIP. Mr. Phiri contended that there was no finding that the acts complained of had been committed with the knowledge or consent and approval of the respondent. He argued that the court having found that the acts complained of had not been committed by the respondent and that the respondent had no knowledge or consent and did not approve of them, it came to him with a sense of shock that the court proceeded to find against the respondent. Mr. Phiri pointed out that paragraph (a) of Section 18 (2) of the Electoral Act does not state as to who should commit the corrupt or illegal practice and that while paragraph (c) of the same section does particularise as to who should commit the corrupt or illegal practices, on the finding of the court the respondent was not caught by the provisions of paragraph (c)

Mr. Sikatana cited the unreported decision of the High Court in the case of **Limbo Vs Mututwa** (4) in which the court found nothing against the candidate but still nullified the election for illegal practices committed by persons who were not agents of the respondent. Mr. Sikatana submitted that although the court found nothing against the respondent, the issue before the court was to determine the effects of the acts complained of on the whole election once proved. He urged the court to dismiss the appeal with costs.

We have very carefully examined the evidence on record and the judgment of the High Court as well as the submissions by both learned counsel. Before resolving the legal issues raised by the appeal we wish to express, with regret, our deep concern for the long delay it has taken to bring this particular election petition to its final determination. We share the concern of all the affected parties.

The appeal arises from a petition, challenging the election of the respondent during the Parliamentary General Elections held on 31st October, 1991 for Mkaika Constituency. The petition was filed in the High Court on 29th November 1991 while the answer was filed in the High Court on 10th July, 1992. The hearing of the petition only commenced on 26th January 1993 at Chipata. The petitioner concluded his case on the 6th of April, 1993 while the respondent closed his case on the 14th of June 1993. On the 4th of August 1993 the respondent filed his final submissions. We take note that before the parties closed their respective cases there were several adjournments and that the hearing of the petition took place at Chipata before three judges, two from Lusaka High Court while one came from Kabwe. Both counsel came from Lusaka.

The record of appeal was filed in the Supreme Court Registry on the 23rd of October, 1995.

We have deliberately set out the history of this appeal to acknowledge the fact that there was inordinate delay in finalising this petition. We are now in 1996. We take judicial notice that this is supposed to be an election year. The delay however cannot be attributed to any individual party to the proceedings nor to the court. They were delays generally described as an avoidable.

Turning to the appeal itself, Article 72(1) of the Constitution empowers the High Court to hear and determine questions as to membership of the National Assembly. Article 72 (2) reads as follows:-

> "The determination by the High Court on any question under this article shall not be subject to appeal:
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> provided that an appeal shall lie to the Supreme Court from any determination of the High Court on any question of law including the interpretation of this constitution."

We agree with the submissions by both learned counsel that the determination of the issues in this appeal centres on the interpretation of Section 18 (2) of the Electoral Act No. 2 of 1991 in particular paragraphs (a) and (c). The appeal therefore raises a question of law and is properly before this court. On account of the position taken by Mr. Phiri in his submissions on paragraphs (a) and (c) of Section 18 (2) that paragraph (a) as a ground cannot stand on its own but that it is dependent and qualified by paragraph (c), it becomes necessary to set out the whole Section 18 (2) in order to ascertain whether the four paragraphs are dependent on each other and in particular whether Mr. Phiri is correct in his submission that paragraph (a) is dependent and qualified by paragraph (c). Section 18 (2) reads as follows:-

> "(2) The election of a candidate as a member of the National Assembly shall be void on any of the following grounds which is proved to the satisfaction of the High Court upon the trial of an election petition, that is to say -

(a) that by reason of any corrupt practice or illegal practice committed in connection with the election or by reason of other misconduct, the majority of the voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred; or

(b) subject to the provisions of subsection (4), that there has been a non-compliance with the provisions of this Act relating to the conduct of elctions, and it appears to the High Court that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election;

(c) that any corrupt practice or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or of his election agent or of his polling agents;

(d) that the candidate was at the time of his election a person not qualified or a person disqualified for election.

It is common cause that the court did not find the respondent guilty of any corrupt or illegal practices committed in connection with the election in the Mkaika constituency or that such practices were with his knowledge and consent or approval. There was also no finding of corrupt or illegal practices made against the respondent's agent or polling agents. On the facts of the petitioner's case as pleaded the issue of non-compliance with the provisions of the Electoral Act did not apply. Paragraph (b) was therefore not in issue. Furthermore paragraph (d) was also not an issue because the question of whether the respondent was not qualified or a person disqualified for election did not arise. On the other hand the court found that the distribution of the exercise books and the T. shirts in the Constituency done on a large scale amounted to bribery by UNIP and this affected the outcome of the election. The court also

found that the evidence of undue influence, threats and violence to life and property during the campaigns was overwhelming and was perpetrated against MMD supporters by the local leadership of UNIP, Chiefs and their Headmen. The court concluded that the elections were held in an atmosphere which was not free and fair because of the rampant acts of intimidation and violence. Mr. Sikatana contended that the court fell short of saying that under Section 18 (2) (a) of the Electoral Act No. 2 of 1991 "we hold that the election was null and void."

The gist of Mr. Phiri's submissions and arguments is that the court having exenorated the respondent on all the allegations of corrupt and illegal practices committed by the general membership of UNIP, it misconstrued the provisions of Section 18 (2) (a) and (c) of the Electoral Act No. 2 of 1991 by nullifying the whole election because the provisions of paragraph (a) are qualified by paragraph (c). Mr. Sikatana on the other hand contended that the two paragraphs are independent of each other and each one of them forms an independent and separate ground upon which once proved an election can be nullified.

After a very careful examination of the whole Section 18 (2) and in particular paragraphs (a) and (c) we have no hesitation in agreeing with the submissions by Mr. Sikatana. Subsection (2) of Section 18 in our view sets out four clear grounds upon which an election of a candidate as a member of the National Assembly shall be held void once each is independently proved to the satisfaction of the High Court. Proof of one of the grounds is enough for a court to nullify an election. We are satisfied that Subsection 2 of Section 18 sets out four independent and separate grounds which if any of them is proved to the satisfaction of the High Court then the election of a candidate as a member of the National Assembly shall be nullified. We are fortified

in our interpretation of Section 18 (2) by a number of decided cases both unreported and reported. In the case of Limbo V Mututwa (4), the only unreported High Court decision made available to us, Cullinan J considered Section 17 (2) of the Electoral Act, 1973 with similar provisions as Section 18 (2) of the Electoral Act No. 2 of 1991. To make the comparison crystal clearer it is imperative to set out in full section 17 (2) of the 1973 Act. Section 17 (2) of the Electoral Act of 1973 reads as follows:

> (2) The election of a candidate as a member shall be void on any of the following grounds which is proved to the satisfaction of the High Court upon the trial of an election petition that is to say:
>
> (a) that by reason of any corrupt practice or illegal practice committed in connection with the election or by reason of other misconduct, the majority of voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred; or
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> (b) subject to the provisions of subsection (4), that there has been a non-compliance with the provisions of this Act relating to the conduct of election and it appears to the High Court that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election;
>
> (c) that any corrupt practice or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or of his election agent or of his polling agents;
>
> (d) that the candidate was at the time of his election a person not qualified or a person disqualified for election as a member."

The petitioner's case as pleaded in Limbo case was based on paragraph (a) and (b) which as can be seen are word for word as in 18 (2) (a) and (b) of the 1991 Act. In the Limbo case the petitioner's main allegation concerned the delay at Kalongola Ferry caused by the pontoon operator and others resulting in the petitioner being unable to file his nomination papers whereby the respondent was returned as un opposed. It was found and accepted that the petitioner never caused the delay and that the pontoon operator and others were not his agents. But the court having found that an illegal practice had been committed in connection with an election held that the majority of voters in the constituency may have been prevented from electing in the constituency a candidate whom they preferred. The election was held void on the basis of only paragraph (a) of Section 17 (2). The question of whether paragraph (a) was qualified or dependent on any of the other three paragraphs was never considered and was never an issue.

In the case of Jere V Ngoma (5) the evidence established a "tense war like" situation between the ANC and UNIP supporters in which the ANC candidate was prevented from filing his nomination papers on the nomination day.

Briefly the facts were that the petitioner intended to put himself forward as a candidate for the ANC Party for the Chipata West Constituency. He petitioned for a declaration that the election be declared void on the ground that he, the petitioner, was prevented by the supporters of his opposing candidate, the respondent, from duly lodging his nomination papers on Nomination Day. The evidence adduced by the petitioner showed that on Nomination day and the period immediately preceeding it, there was trouble in the area. The court found that on the Nomination Day there were crowds of the opponent of the petitioner stationed at the entrance to the returning officer's office in order to prevent the petitioner access to the office and that the petitioner was put in reasonable

fear so as to prevent him approaching the returning officer to lodge his nomination papers. Magnus J had this to say

> "I therefore find that this behaviour of the crowd at the education offices on that day constituted misconduct as a result of which the majority of voters in the constituency of Chipata West were or may have been prevented from electing the candidate whom they preferred, contrary to Section 16 (2) (a) of the Electoral Act, 1968. In the circumstances I, therefore, decide that the respondent John Chiponda Chisamba Peterson Ngoma was not duly elected as Member of Parliament for the Chipata West constituency, and declare that this election void."

The head note to the report is more illustrative and aptly put and reads:

> "Where evidence shows that a candidate for election to Parliament was prevented by the misconduct of other persons, from lodging his nomination papers with the returning officer, such misconduct essentially makes the election in the particular constituency void."

The election was nullified under paragraph (a) because the petitioner had been prevented, by "a crowd of people," nothing to do with the respondent, from lodging his nomination papers. Suffice it also to mention that the provisions of section 16(2) of the Electoral Act of 1968 are also word for word as those of the present section 18(2) of the 1991 Act.

In the case of Lusaka Vs Cheelo the petitioner based his case on Section 17 (2) (a) and (c) of the Electoral Act, Cap 19; whose provisions are also word for word as the 1991 Act. The Lusaka case is a good illustration of nullification of an election under paragraph (c) where a candidate or agent is held blame worthy personnaly. Cullinan J nullified the election under paragraph (c) for the corrupt practice of bribery committed by the respondent while Paragraph (a) was held inapplicable. In the case of Wisamba V Makai (7) the grounds for the petition were based on the provisions of Section 17 (2) (b) and (c) of Cap 19. Although the petitioner did not succeed on both paragraphs as the determination of the petition finally centred on the recount, Cullinan J. in the course of reviewing the evidence acknowledged that proof of each of the four

paragraphs in Section 17 (2) can be a basis for nullifying an election.

We are in full agreement with all the High Court decisions on the interpretation of the previous Section 17 (2) and now 18 (2) of the present Electoral Act. It therefore follows that the position taken by Mr. Phiri in his submissions that courts have made paragraph (a) dependent on paragraph (c) is not correct. The four paragraphs in Section 18 (2) are independent and separate grounds.

On a consideration of the whole section we are satisfied that the respondent missed the point of difference between the two distinct and separate situations as at paragraphs (a) and (c). The question of personal knowledge is quite irrelevant and inapplicable under paragraph (a) where it does not matter who the wrong doer is and the scheme of the law appears designed to protect the electorate and the system itself by providing for nullification whenever there is wrong doing which the court feels satisfied, perhaps because of the scale or type of wrong doing, has adversely affected and probably affected the election. In other words the conduct complained of has to affect the election.

In contrast paragraph (c) penalizes the candidate. Even one or two proven instances are enough and even if they could not conceivably have prevented the electorate from choosing their preferred candidate.

In the present case we find no departure from the previous decisions. We do not accept that plural politics affected the courts interpretation of Section 18 (2) (a) and (c) of the Electoral Act No. 2 of 1991. Paragraph (a) in our view is not superflous.

This appeal cannot succeed. It is therefore dismissed with costs.

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M.M.S.W.Ngulube,
CHIEF JUSTICE.

.....
E.L. Sakala,
SUPREME COURT JUDGE.

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M.S. Chaila,
SUPREME COURT JUDGE.