ANDERSON KAMBELA MAZOKA — 1ST PETITIONER
LT GENERAL CHRISTON SIFAPI TEMBO — 2ND PETITIONER
GODFREY KENNETH MIYANDA — 3RD PETITIONER

v

LEVY PATRICK MWANAWASA — 1ST RESPONDENT
THE ELECTORAL COMMISSION OF ZAMBIA — 2ND RESPONDENT
THE ATTORNEY GENERAL — 3RD RESPONDENT

SUPREME COURT
SAKALA, C.J., LEWANIKA, D.C.J., CHIRWA, CHIBESAKUNDA, MAMBILIMA, CHITENGI AND SILOMBA JJS
On various dates between 22nd July, 2002, 30th November, 2004 and 16th February, 2005.
SCZ/EP/01/02/03//2002

Constitutional law-Jurisdiction-Constitution confers the Supreme Court with jurisdiction to decide whether a person has been validly elected.

Constitutional-law Electoral Act-the Electoral Act which voids an election of a candidate to the National Assembly does not apply to a Presidential Election Petition.

Constitutional law-Candidacy-a person becomes a candidate and therefore qualified to stand for the Presidential elections well before nomination day.

Constitutional law-Vacancy in office of President-Article 38 of the Constitution catering for vacancy in the office of the President is sufficient.

Civil Procedure-Presidential and Parliamentary Election Petitions ought not and must not follow the course of existing clogged system.

Civil Procedure-Standard of proof-Standard of proof required to prove a Presidential Election petition is higher than balance of probability and must be proved to a convincing degree of clarity.

Civil procedure-Function of pleadings-to give fair notice of the case to be met and to define issues to be ajudicated upon.

Prof. M.P. Mvunga, S.C., of Messrs Mvunga Associates
Mr. S. Sikota, of Central Chambers
Mr. J. Mwiimbu, of Messrs Jack Mwiimbu and Company for the 1st Petitioner

Mr. C.K. Banda, S.C., of Messrs Chifumu Banda and Associates
Mr. E. Mwansa, of Messrs Ernest Mwansa and Associates for the 2nd Petitioner.

Dr. J.B. Sakala, S.C., of Messrs J.B. Sakala and Company
Mr. S.M. Malama, of Jacques and Partners
Mr. M.M. Mundashi, of Mulenga Mundashi and Company, for the 1st Respondent.

Hon. George Kunda, S.C., Attorney-General
Mr. J. Jalasi, Principal State Advocate
Mr. D. Sichinga, Acting Chief State Advocate for the 2nd and 3rd respondents.

Held:

1. Elections be it Presidential or Parliamentary by their nature of demanding a quick resolution, ought not and must not follow the course of the existing clogged court system which has very slow wheels of resolution because of the strict requirements of adherence to rules of pleadings, practice, and procedure. Matters pertaining to elections must be determined very expeditiously, lest they be rendered an academic exercise at the end.

2. It is trite law that the primary rule of interpretation is that words should be given their ordinary grammatical and natural meaning. It is only if there is ambiguity in the natural meaning of the words and the intention cannot be ascertained from the words used by the legislature, that recourse can be had to the other principles of interpretation.

3. Article 41(2) of the Constitution confers the Supreme Court Jurisdiction to decide whether a person has been validly elected as President.

4. Section 18 of the Electoral Act, which voids an election of a candidate to the National Assembly does not apply to Presidential Election Petitions.

5. Under Article 41(2) of the Constitution, the election of a President can be challenged on any question, either of law relating to the election of a President or the validity of the

election itself. Thus, any question relating to the legitimacy of a Presidential election including corruption, bribery, and non-compliance with the relevant law can be considered under Article 41 (2) of the Constitution.

6. In trying the question alleged, the Supreme Court is at large to examine the conduct of the Presidential election itself or indeed the compliance to the provisions of the applicable law. Should the court be satisfied, on any proven facts, that a candidate was not validly elected or indeed that the relevant laws were not complied with, so as to negate the legitimacy of the election, it will void such an election.

7. It is not within the sprit of the Constitution that when the incumbent President's election has been nullified there should be interregnum, with no one to take care of the affairs of the state thereby leading to chaos. Article 38 of the Constitution relating to vacancy in the office of the President is sufficient.

8. A person becomes a candidate for purposes of participating in Presidential election from the day that he or she accepts the nomination or sponsorship of a political party.

9. The standard of proof must depend on the allegations pleaded. Given the national character of the exercise where all the votes in the country form a single electoral college, the proven defects must be such that the majority of the voters are prevented from electing the candidate whom they preferred; or that the election is so flawed that the defects seriously affect the result which can no longer reasonably be said to represent the true free choice and free will of the majority of the voters.

10. As regards burden of proof, the evidence adduced must establish the issues raised to a fairly high degree of convincing clarity.

11. The function of pleadings, 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 matters in dispute between the parties. Once the pleadings have been closed, the parties are bound by their pleadings and the court has to take them as such.

12. In a case where any matter not pleaded is let in evidence, and

not objected to by the other side, the court is not and should not be precluded from considering it. The resolution of the issue will depend on the weight the Court will attach to the evidence of unpleaded issues.

13. The courts however do not condone in any way shoddy and incomplete pleadings. Each case must be considered on its own facts. In a proper case, the court will always exclude any matter not pleaded, more so where an objection has been raised.

14. There were flaws, incompetence and derelictions of duty on the part of the Electoral commission of Zambia. However, any negative impact arising out of these flaws affected all candidates equally and did not amount to a fraudulent exercise favouring the 1st respondent.

15. On the evidence presented, there is no basis upon which to find that the election was rigged and that it was not free and fair. The elections while not being totally perfect, were substantially in conformity with the law and practice.

16. According to the findings, 30 allegations out of the 36 were not proved. The few partially proved allegations were not indicative that the majority of the voters were prevented from electing the candidate whom they preferred, or that the election was so flawed that the dereliction of duty seriously affected the result which could no longer reasonably be said to reflect the true choice and free will of the majority of the voters.

Cases referred to:

(1) *Northman v Barnet Council [1978] 1 ALL ER 1243.*
(2) *Pyx Granile Company Limited v Ministry of Housing and Local Government [1960] A.C. 260.*
(3) *Lewanika and Others v Chiluba (1998) Z.R. 79*
(4) *Miyanda v Handahu (1993-1994) Z.R. 187*
(5) *Miyanda v Attorney General (1985) Z.R. 185*
(6) *Banda v The People (1986) Z.R. 105*
(7) *Re The Nomination Paper of A.C. Ngoma and the Federal Electoral Act (1958) NLR 974,*
(8) *The Controverted Election for the Electoral District of Two Mountains*

[1912] 47 C.S.C. 183

(9) *Sahu v Singh and Another [1985] LRC 31*

(10) *The Attorney-General and Another v Lewanika and Others (1993 - 1994) Z.R. 164.*

(11) *Mwamba and Another v The Attorney-General of Zambia [1993] 3 LRC 166*

(12) *Sussex Peerage Case [1843-1845] (65RR) 11*

(13) *Seaford Court Estates Limited v Asher [1949] 2KB 481.*

(14) *Shimonde and Another v Meridien BIAO Bank (Z)Limited (1999) Z.R. 47*

(15) *Mlewa v Wghtman. (1995 - 1997) Z.R. 171*

(16) *Bater v Bater, (No. 2) [1950] 2 ALL ER 458*

(17) *Zulu v Avondale Housing Project Ltd. (1982) Z.R. 172*

(18) *Mwelwa v The People (1975) Z.R. 166.*

(19) *Mohamed v The Attorney General (1982) Z.R. 49*

(20) *Mundia v Sentor Motor Limited (1982) ZR 66*

(21) *London Passenger Transport Board v Moscrop [1942] SC 332*

(21) *Zambia Electricity Supplies Corporation Limited v Red-Line Limited (1990-1992) Z.R. 170*

(22) *Jere v DVR/SGT Shamayuwa and Another (1978) Z.R. 204*

(23) *Re Robinson Settlement, Grant v Hobbs [1978] 1Ch.D.728*

(24) *Kearny Company Limited v Agip Zambia Ltd, Asphalt and Tamar (1985) Z.R. 7*

(25) *Bank of Zambia v Anderson and Another (1993-1994) Z.R. 47*

(26) *Attorney General v Mubiana Appeal Number 38 of 1993 (unreported).*

Legislation referred to:

Constitution of Zambia, Cap.1: Articles: 34,35, 38 (1) (2) (3), 41 (1) (2), 75 (2)

Electoral Act, Cap. 13: Sections: 2, 8, 9 (1), 17, 18 (2), 20, 27 (1)

Electoral (Amendment) Act, No. 23 of 1996: Section 9 (3)

Interpretation and General Provisions Act, Cap.2, Section 10, 20 (3) 20 (4)

Electoral (Presidential Elections) Statutory Instrument Number 109 0f 1991 Regulations: Reg. 17.

Supreme Court rules, Cap. 25: Rule 72A

Election Petition Rules, Cap. 13: Rule 4 (1)

Electoral (General) Regulations Statutory Instrument Number 108 0f 1991Reg. 3, 22 and 23

Electoral (Conduct) Regulations of 1996:7 (I) (*l*)

General Editor's note:

This is an abridged version of the judgment in this matter. It only covers pages 1 to 63 and 310 to 316 of the judgment.

SAKALA C. J.: delivered the Judgement of the Court.

The trial and the determination of this Consolidated Presidential Election Petition of 2002 has seemingly taken a long period to complete and justifiably so, the delay caused a lot of anxiety in the nation and others. Yet, the number of the actual days, when the court sat and heard witnesses, arguments and submissions in support of various interlocutory applications, does not reflect the long duration the Petition has taken. The Court sat for 89 days in all to hear evidence, arguments and submissions. The Petition commenced in January 2002 and Judgement is being delivered today three years and one month from the dates the separate petition were filed.

The circumstances, some of which were procedural, leading to the protracted trial, were, in most instances, unavoidable and beyond the control of the court. In fact, the court was all along desirous to complete the matter as quickly as possible. To put the record straight, it is necessary to allude to some of the circumstances leading to this protracted trial. There are three petitioners and three respondents in this petition. While the 3rd petitioner appeared in person, the other two petitioners were represented. On the part of the 1st and the 2nd petitioners, there were initially seven counsel of record. There were also seven counsel on the part of the Judgements. The 1st petitioner filed his original petition on 15th January 2002, while the 2nd petitioner filed his original petition on 16th January 2002. The 3rd petitioner, who represented himself, filed his original Petition on 17th January, 2002, and subsequently; he filed an Amended Petition on 17th March, 2002. The filing of these petitions was followed by various interlocutory applications and rulings before single Judges of this court. These are on record. The respondents, too, initially filed separate Answers to each of the separate petitions. The 1st respondent filed his Answer to the 1st and the 2nd petitioners' petitions on 14th May, 2002, while the 1st respondent's Answer to the 3rd petitioners' Petition was filed on 18th July, 2002. The 2nd and the 3rd respondents filed a joint Answer to the 1st and the 2nd petitioners' petitions on 4th June, 2002.

After close of pleadings, the matter was set down for hearing for 22nd July, 2002. On that day, interlocutory matters, which are also on record, were raised. The hearing of witnesses could not start on that day.

The matter was adjourned to 23rd July, 2002. After, again, disposing of some interlocutory matters on that day, the hearing of evidence could not proceed. The matter was adjourned to 16th September 2002. On the same 23rd July, it transpired that the earlier Order for Directions issued by the Court, in relation to pleadings, had not been fully complied with. Consequently, a fresh Order for Directions had to be issued. This fresh order was in the following terms; that the petitioners file their Amended Consolidated Petition by 31st July 2002; that the Amended Consolidated Answer be filed by 12th August 2002; that the Reply, if any, be filed by 22nd August, 2002; that Discovery and Inspection be completed by 2nd September, 2002; that the Bundle of Documents and Pleadings be filed by 9th September 2002; and that the hearing of the Amended Consolidated Petition be commenced on 16th September, 2002. In the course of hearing the Petition, it transpired that this fresh order was also not fully complied with in that discovery and inspection seemed not to have been done. As a result of this failure to fully comply with the order of discovery and inspection, fresh documents continued to surface in the midst of hearing a witness resulting in further arguments and rulings. All in all, the exchange of pleadings took about nine months.

The hearing of evidence from witnesses commenced on 16th September 2002. The 3rd Petitioner closed his case on 6th October, 2003, while the 1st and the 2nd Petitioners closed their case on 10th October, 2003, after all the petitioners had called a total of 76 witnesses. Although it took 57 days to hear evidence, arguments and submissions on behalf of the three petitioners, there were in between the hearings 20 long adjournments for a variety of reasons. Some of the reasons were difficulties encountered by the parties in securing the attendance of witnesses, counsel seeking instructions from their respective clients and also the Courts' work schedule. There was also the problem of securing suitable hearing dates convenient to all the parties as well as the Court. The hearing of the evidence on behalf of the respondents commenced on 10th November, 2003. They closed their case on 6th October, 2004; after hearing evidence from 80 witnesses.

The hearing of the respondents' case took 32 days with 11 long adjournments in between the hearings. After the close of the respondents' case, the court invited written submissions from the parties. The petitioners were to file their written submissions by 29th October, 2004. But the 1st and the 2nd petitioners filed their written

submissions on 4th November, 2004. The 3rd petitioner filed his written submissions on 19th November 2004, instead of 29th October, 2004, as directed by the court. The respondents were directed to file their responses to the petitioners' written submissions by 21st November, 2004. Instead, the 1st respondent filed his written submissions on 25th November, 2004, while the 2nd and the 3rd respondents filed their written submissions on 26th November, 2004. Thus, again the dates directed by the court were not followed thereby contributing to the long period the petition has taken.

As a consequence of not following the directed dates, the petitioners, who had been directed to file their written replies, if any, by 26th November, 2004, to enable the court to sit on 30th November 2004, for oral submissions, were unable to file their replies by 26th November 2004. The court, however, sat on 30th November, 2004. But the petitioners insisted on their right to file written replies. The court granted them the application to file their replies by 7th December, 2004. On the same 30th November, 2004, the court reserved judgment to a date after the written replies by the petitioners had been filed and the date for delivery of judgment was to be communicated to the parties. This is the history of this consolidated petition leading to this unprecedented long period it has taken.

We have deliberately delved into this detailed history of this petition in order to bring out two points. The first point is that the events leading to the long period it has taken to complete this matter were unavoidable and in the interest of justice. The second point is that elections, be it Presidential or Parliamentary, by their nature of demanding a quick resolution, ought not and must not follow the course of the existing clogged court system which has very slow wheels of resolution because of the strict requirement of adherence to rules of pleadings, practice and procedure. Matters pertaining to elections, must be determined very expeditiously lest they be rendered an academic exercise at the end. During the hearing of this petition, on a number of occasions, the court passionately appealed to the parties to expedite the bringing of witnesses to court. The Court also expressed its serious concerns at the slow pace the petition had been proceeding. At one stage, the court was even told by counsel that "it can take as long as it takes". Indeed, the long history of the trial of this petition cannot be said that it was the court's intention that it goes on *ad inifinitum*, as suggested in some quarters. Issues of bereavements, which were some of the issues leading to long adjournments, were matters beyond anyone's

control. The long period it has taken the court to conclude this matter is very much regretted.

It has taken two months and eight days to render this judgment after the petitioners filed their replies. This was on account of the complexity of the case, and the novel constitutional issue based on the special jurisdiction of this court given to it by the Constitution. The court had to examine the issue of jurisdiction carefully as it was raised and argued for the first time. We shall deal with the issue of jurisdiction and other related matters later in this judgment. It was also necessary for the court to do a thorough research in the matter. Apart from that, the court had to study the evidence of all the 156 witnesses contained in 11 box files of typed transcripts of evidence. The typed evidence alone runs into 7,180 pages. The court had also to study over 500 pages of written submissions by the parties and study the authorities referred to it. We are indebted to counsel on both sides and the 3rd Petitioner for the detailed learned written submissions. In addition to all that has been said, in the course of hearing the petition, the court had to contend itself with the schedule of other cases in Lusaka, Kabwe and Ndola.

Having explained the long journey the petition has taken, we now turn to deal first with the preliminary issues of jurisdiction and/or remedies, as raised in the written arguments and submissions on behalf of the 2nd and the 3rd respondents. The 3rd petitioner also raised an issue of conflict of interest on the part of the learned Attorney-General, suggesting that he had no *locus standi* in this matter. Before we deal with the preliminary issues, we must allude to the provisions of the Constitution under which the petition was brought. The petition was made pursuant to Article 41 (2) of the Constitution of Zambia. This Article reads:

> *"(2) Any question which may arise as to whether*
>
> *(a) any provision of this Constitution or any law relating to election of a President has been complied with;*
>
> *(b) any person has been validly elected as President under Article 34; shall be referred to and determined by the full bench of the Supreme Court."*

The first and most cardinal preliminary issue, is the one raised by the respondents with regard to the jurisdiction of this Court to hear and determine this petition.

But when arguing the point, it was argued together with the issue of remedies. The respondents consider the issue of jurisdiction to be very critical in that they first raised it through a Notice of Motion filed in this Court on 13th November, 2002, pursuant to Order 14A, as read with Order 33, rules 3 and 7, of the Rules of the Supreme Court, 1999 Edition. In our ruling of 19th November, 2002, we said that this Petition could not be properly determined through the Motion which was before us because the issues raised in the Notice of Motion went to the very root of the petition. Consequently, we declined to entertain the motion and advised the parties to raise the issue in their submissions at the conclusion of the hearing of the petition. It would appear that the petitioners anticipated that the respondents would again raise the issue of jurisdiction in their submissions and consequently, the petitioners made submissions on the issue of jurisdiction to the extent that the respondents were relegated to the position of replying.

The 1st and the 2nd petitioners referred us to Article 41(1)(2) of the Constitution and submitted that these provisions are not ambiguous in terms of content and construction pertaining to the determination and alidity of the election of the President in Zambia. They argued that the role of the Court in a Presidential election Petition is to resolve disputes between different parties of the society, so that society does not degenerate into anarchy, otherwise parties to Presidential elections would have, as their only recourse, to take their grievances to the streets. They submitted that this Court has the jurisdiction to determine the matter on merits. It is the 1st and the 2nd petitioners' further submission that the Supreme Court of Zambia is endowed with the final authority to determine and interpret the laws of the land. One of the authorities to which they referred us is the case of *Northman v Barnet Council*[1], at page 1246 in which Lord Denning stated, *inter alia,*

"The literal method is now completely out of date. It has been replaced by the approach, which Lord Diplock described as purposive approach.....
In all cases now in the interpretation of statutes we adopt such a construction as will promote the general legislative purpose underlying the provision. It is no longer necessary for the Judges to wring their hands and say: "There is nothing we can do about it." Whenever the strict interpretation of the statute gives rise to an absurd and unjust situation the Judges can and should use their good sense to remedy it by reading words in, if necessary so as to do what Parliament would have done, had they had the situation in mind."

This decision was confirmed by the House of Lords in [1979] 1 ALL ER Page 142.

The 3rd petitioner also submitted extensively on the issue of jurisdiction of this court to determine these petitions and cited to us several authorities in support of his submissions. He stated that there is a presumption against the ouster of the jurisdiction of courts. According to the 3rd petitioner, it would be contrary to public policy to oust the jurisdiction of the full bench of this court in view of Article 41(2) of the Constitution whose purpose and effect is to grant special and/or exclusive jurisdiction to the court to hear and determine Presidential election petitions. For this submission, the 3rd petitioner referred us to various authorities, one of which was Lord Simonds' statement in the case of *Pyx Granile Co. Limited v Ministry of Housing and Local Government*[2], where he said, when considering whether a statute had excluded the right of a subject to have recourse to courts of law, that: -

> *"It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words."*

The 3rd petitioner submitted further that under Article 41(2) of the Constitution, this court has at the end of the hearing, to determine whether the 1st respondent or any other person was duly elected as President of Zambia. He also stated that as a participant in the last Presidential elections, he was claiming his rights as guaranteed in the Constitution of Zambia and that those rights be enforced or applied to him (sic) According to the 3rd petitioner, these constitutional rights cannot be abridged by law or waived by any official. Finally, the 3rd petitioner submitted that it would be a judicial scandal of the century if, after three years of hearing the petition, the court, in frustration, failed to give a remedy after finding the 1st respondent guilty.

On behalf of the 1st respondent, it was submitted that there was no law under which this election may be nullified. We were referred to our earlier decision in the case of *Lewanika and Others v Chiluba*[3], in which we stated, inter alia, that: -

> *"Since a Presidential Election is conducted under the practices and procedures set out by or under the Electoral Act, Cap 13 of the Laws of Zambia (1995) edition, this Court had determined quite early in the proceedings that guidance would be sought from that Act on many of the issues that arose, for example, the grant of indemnities to witnesses. In the same vein, we had to look to the Act and the Regulations when*

considering the issues of bribery and corruption; irregularities; and the flaws. We also had to borrow from the principles as set out in Section 18 of Cap 13 which reads....."

Counsel also referred us to Article 41 of the Constitution, which empowers this Court to determine whether any person has been validly elected as President and/or whether any provision of the Constitution or any law relating to the election of the President has been complied with.

In short, Counsel for the 1st respondent concedes that this Court has power to hear and determine a Presidential Election Petition. However, Counsel argued that under Article 38 of the Constitution, a vacancy in the office of the President can only occur when:-

(a) a sitting President dies; or
(b) resigns; or
(c) is impeached; or
(d) is incapacitated; or
(e) the National Assembly is dissolved.

In view of this, counsel submitted that there is a yawning *lacuna* as to what happens when the court nullifies the election of a President in that the law does not provide for the occurrence of a vacancy and a remedy as a result of such nullification. In this regard, it was argued that Section 18 of the Electoral Act cannot be relied upon because on a proper construction of Section 18 of the Electoral Act, which falls under Part VI and which avoids the election of a candidate to the National Assembly, does not apply to a Presidential candidate. It was further argued that while by virtue of Regulation 17, Electoral (Presidential Elections) Regulations, Part IV of the Electoral (General) Regulations, which creates electoral offences under which an election may be nullified, apply to Presidential elections, this Regulation does not and cannot amend the principal Act because it is a subsidiary legislation. It was the 1st respondent's position that Section 18 of the Act, therefore, does not apply to a Presidential election. In the view of the 1st respondent, this court cannot fill in the *lacunae* created by Article 41 of the Constitution by reading into the Electoral Act matters which have not been provided for. It was argued that the intention of the legislature was very clear, which is that Part VI of the Electoral Act was not intended to cover Presidential elections. It was submitted that if this was the case, the legislature would have said so in Act 23 of 1996, which amended Part 111 dealing with Presidential elections.

To buttress this submission, the 1st respondent referred us to our decision in the case of *Miyanda v Handahu*[4] where we said:-

"It is not what the legislature meant to say or what their supposed intentions were with which the court should be concerned; the court's duty is to find out the expressed intention of the legislature. When the language is plain and there is nothing to suggest that any words are used in a technical sense or that the context requires a departure from the fundamental rule, there would be no occasion to depart from the ordinary and literal meaning and it would be inadmissible to read into the terms anything else on grounds such as of policy, expediency, justice or political exigency, motive of the framers and the like.....

On the prayers in the petition, the 1st respondent submitted that the orders being sought by the petitioners are in the nature of declarations. It was argued that while it is conceded that this court can grant a declaration, the question the 1st respondent poses is: in view of the Constitutional *lacuna*, how far can any such declaration made by the court be effective, useful and beneficial to the country and the people of Zambia? Relying on the case of *Miyanda v Attorney General*,[5] the 1st respondent submitted that a declaration, being a discretionary remedy, can only be made on proper principles and considerations and will not be made when it will serve no useful purpose. It is the 1st respondent's position that should the court make the orders, it has to accept that it will be involved in the enforcement of the said orders and give direction as to what will happen after nullification of the Presidential election. Consequently, the 1st respondent invited this court to hold that in view of the *lacunae* in the law, the success of this Petition will be of an academic value only.

Submitting on behalf of the 2nd and the 3rd respondents, the learned Attorney-General stated that the issue of jurisdiction was fundamental. He echoed the submissions on behalf of the 1st respondent that the Constitutional provisions are deficient and have a serious *lacunae*. He pointed out that the law does not prescribe any grounds upon which the election of a President may be annulled. According to him, the office of President cannot become vacant as a result of an election petition. He also referred us to Article 41(2) of the Constitution and submitted that this provision is vague in that it does not stipulate what particular provision of the Constitution or any law should be contravened so as to lead to the nullification of a Presidential election and the grounds upon which the Supreme Court should rely to determine whether a President has been validly elected.

The learned Attorney-General also referred us to the case of *Lewanika and Others v Chiluba (3)*, and submitted that in this case, the propriety of resorting to Section 18 of the Electoral Act, in resolving issues raised in election Petitions originated under Article 41(2) of the Constitution, was not raised and not fully argued. He was of the view that had these arguments in relation to Section 18 been raised, this court could have decided otherwise on the use of this Section in Presidential election petitions. He urged us to depart from the approach that we adopted in the *Lewanika and Others v Chiluba case (3)*, by not relying on the grounds prescribed in Section 18 of the Electoral Act. The learned Attorney- General urged us to overrule this decision, arguing that there are sufficient reasons for us to do so. For this submission, he referred us to the case of *Banda v The People*[6], in which this Court held, *inter alia*, that in order to have certainty in the law, the Supreme Court should stand by its past decisions even if these are erroneous unless there is a sufficiently strong reason requiring that such decisions should be overruled. He went on to state that the Court relied on Section 18 of the Electoral Act because the Constitution and the Electoral Act do not provide specific grounds for nullifying a Presidential election.

On the submissions by the petitioners that this court can seal gaps and *lacunae* in the law and grant the remedies sought, should the strict interpretation of the statutes lead to an absurd and/or unjust situation; the learned Attorney-General submitted that the authorities relied on by the petitioners do not apply to the interpretation of electoral statutes. According to the learned Attorney-General, decided cases are to the effect that electoral legislation should be construed strictly and that courts should not rewrite or read new provisions into such legislation. He referred us to the case of Re *The nomination paper of A.C. Ngoma and the Federal Electoral Act*,[7] where the Court quoted from the Canadian Case of, *The Controverted Election for the Electoral District of Two Mountains*,[8] in which Davies J stated that:-

> *"In construing the Section of such an important Public Act as the one under consideration, I think that while we should be careful, on the one hand, not to allow merely technical or formal objects to prevail so as to defeat the manifest purpose and intention of the Act, on the other, we should not attempt to re-write the Act or to strain the clear, precise language of its Sections so as to render them innocuous."*

The learned Attorney-General also extensively quoted from the Indian case of *Sahu v Singh and Another*[9], in which Chandrachud, C.J. threw out a challenge to the election of the President on the ground that

he was not a suitable candidate. The enabling legislation, in that case, did prescribe the grounds upon which the election of a candidate could be declared void and suitability was not one of such grounds. The Court was of the view that the ballot box was to be the sole judge of the suitability of the candidate.

The learned Attorney-General further submitted that while Section 18 of the Act only covered Parliamentary election petitions, Sections 8 and 9 of the Electoral Act governed Presidential election petitions. According to the learned Attorney General, Section 9 of the Act is as vague as Article 41(2) of the Constitution in that it does not prescribe grounds for nullifying a Presidential election. He went on to state that in view of this, this Court should revisit it's decision in the *Lewanika and Others v Chiluba* (3) case to the extent that the Court sought guidance from Section 18 of the Electoral Act.

In his further submissions, the learned Attorney-General stated that neither the Constitution nor the Electoral Act prescribe remedies which may be granted to a petitioner in a Presidential election petition. The statutes merely empower the court to determine whether;

(a) any provision of the Constitution or law relating to election of the President has been complied with; and/or

(b) any person has been validly elected as President under Article 34.

The learned Attorney-General pointed out that under this law, the starting point is the Constitution itself. He went on to state that the only provision of the Constitution relating to the election of the President is Article 34. This article prescribes among others, the qualification of candidates in a Presidential election; when a Presidential election would be held; and how the Presidential poll would be conducted.

He stated that the court also has to consider other laws apart from the Constitution and consider whether they have been complied with. According to the learned Attorney-General, these other laws are Part III of the Electoral Act, and the Electoral (General) Regulations as extended by the Electoral (Presidential elections) Regulations.

He submitted that these provisions are in contrast to Section 20 of the Electoral Act, which clearly prescribes the remedies that may be granted in a Parliamentary election petition. The learned Attorney-

General submitted that if it was proved, at the end of this petition, that there was non-compliance with the laws, there is no provision either in the Constitution or the Electoral Act, under which this court would grant the remedies sought. He stated that the Constitution does not provide for a vacancy in the office of President arising from nullification of a Presidential election. According to the learned Attorney-General, it was not the intention of the legislature that an incumbent President should vacate office pursuant to an election petition. He found support for this submission in Articles 35 and 38 of the Constitution, which prescribe instances when the office of the President can become constitutionally vacant.

The learned Attorney-General also raised the issue of the limitation period under Section 27(1) of the Electoral Act which provides that Parliamentary election petitions should be determined within 180 days of the presentation of the petition to the High Court. He stated that there is no similar provision applicable to a presidential petition. The learned Attorney-General submitted that should this Court hold that provisions relating to Parliamentary election petitions should be applied in determining Presidential election petitions, then Section 27(1) of the Electoral Act should also apply. To support his submission, the learned Attorney-General relied on the case of *Re The Nomination Paper of, A.C. Ngoma and the Federal Act (7)*, which according to him, expounded the principle that Courts must ensure that the provisions of Electoral Acts are properly complied with. He submitted that the idea behind prescribing the period of 180 days was to cure the mischief of delaying Petitions for long periods until they become an academic exercise. He submitted further that this period is mandatory and should be complied with. He stated that since the petition in this case went well beyond the 180 days period, we should dismiss it for want of prosecution. According to the learned Attorney- General, there was inordinate delay in prosecuting the action and that passing judgment now would be catastrophic and disruptive to the nation. He also stated that such nullification would bring into question, the agreements and appointments made by the 1st respondent. He submitted that the correct status of the matter is that it is illegally before the court, having exceeded the prescribed period by two and half years.

In reply, the 1st and the 2nd petitioners made an extensive joint submission, the sum and substance of which is that the respondents raised the issue of jurisdiction too late in the day. They pointed out that by the time the respondents raised the issue of jurisdiction, the pleadings

had been closed and some witnesses had even given evidence. Further, the 1st and the 2nd petitioners said that a preliminary issue should be raised at the first available opportunity before pleadings from the side raising the preliminary issue. In short, the 1st and the 2nd petitioners are saying that the respondents cannot raise the issue of jurisdiction after submitting to the jurisdiction of the court. Citing Article 41(2) of the Constitution, the 1st and the 2nd petitioners submitted that this court has the jurisdiction to determine a Presidential election petition. Quoting the definition of the word "determination" from Blacks Law Dictionary 6th Edition and the Concise Oxford Thesaurus compiled by Betty Patrick 1995, the 1st and the 2nd petitioners submitted that the word determination in Article 41(2) of the Constitution means *decision, conclusion, judgment, verdict, opinion, decree, solution, result, arbitration, settlement, diagnosis or prognosis.* It was argued that to determine a case is to *decide, resolve, conclude, end, terminate or finish an argument.* The 1st and the 2nd petitioners say the court must therefore *determine* this petition.

It was emphasized that the jurisdiction of the Supreme Court to hear a Presidential election petition is not only provided for by Article 41(2) of the Constitution, but also by Section 9(3) of Act Number 23 of 1996 which provides that: -

> *"Any question by any person which may arise as to whether any provision of the Constitution or any law relating to nomination or election of President has been complied with shall be referred by the Returning Officer or by such person to the full bench of the Supreme Court within 14 days of the person elected as President being sworn-in in accordance with Clause 9 of Article 34 of the Constitution."*

The 1st and the 2nd petitioners then drew the court's attention to the fact that in the 1996 Presidential election petition, the Supreme Court conclusively determined the petition regarding the validity of the election of Frederick Jacob Titus Chiluba. In this case, the 1st and the 2nd petitioners argued, the Supreme Court has jurisdiction to determine the validity of the election of the 1st respondent.

On the argument that there is a *lacuna* in the law in that the Constitution does not prescribe the grounds upon which the election of a President may be annulled, the submission on behalf of the 1st and the 2nd petitioners is that the Supreme Court had, in the 1996 Presidential election petition against Frederick Jacob Titus Chiluba, already ruled that Section 18 of the Electoral Act applies. It was argued that the holding by the Supreme Court in case of *Lewanika and Others v Chiluba (3)*, that

Section 18 of the Electoral Act also applied to Presidential Election Petitions was consistent with the preamble to the Electoral Act which says that the provisions relate, *inter alia*, to the election to the office of the President. It was argued further that by virtue of Regulation 17 of the Electoral (Presidential Elections) Regulations, Part IV of the Electoral (General) Regulations, apply with necessary modifications to the election of a President. Further, it was submitted that by Statutory Instrument Number 17 of 2002, the Supreme Court Rules were amended so as to introduce Rule 72A which states that:

"The provisions of the Election Petition Rules under the Electoral Act shall apply with necessary modifications to Presidential Petitions."

It was also argued that since the Election Petition Rules which apply to Parliamentary election petitions also apply to Presidential election petitions, it follows that Rule 4(1) of the Election Petition Rules also applies to the Presidential Election Petitions. Rule 4(1) provides that:

"The petitioner shall state the right of the petitioner to petition under Section 18 of the Act."

It was then argued that it was for this reason that in the Frederick Jacob Titus Chiluba Presidential Petition, the Supreme Court said: -

"Since a Presidential Election is conducted under the practices and procedures set out by or under the Electoral Act, Cap 13 of the Laws of Zambia (1985 edition), this court had determined quite early in the proceedings that guidance would be sought from that Act on many of the issues that arose, for example, the grant of indemnities to witnesses. In the same vein, we had to look at the Act and the regulations when considering the issues of bribery and corruption, irregularities and the flaws. We also had to borrow from the principles set out in Section 18 of Cap 13 which reads....."

According to the 1st and the 2nd petitioners, the issue of applicability of the Electoral Act and the Regulations made thereunder has, therefore, been long settled by this court after due attention and consideration.

It was further submitted that the argument by the respondents that the interpretation of Regulation 17 and Section 18 of the Electoral Act and Articles 34 and 41 of the Constitution that a Presidential election, cannot be annulled, does not fall within the terms of the phrase in Article 41(2), that:

"Any question which may arise as to whether -

(a) any provision of this Constitution or any law relating to the election

of a President has been complied with or

(b) any person has been validly elected as President under Article 34 shall be referred to and determined by the full bench of the Supreme Court."

It was argued that the interpretation the respondents put on the rules and the Constitutional provisions does not accord with the natural and ordinary meaning of the words in the phrase quoted above; nor with the clear purpose of Articles 34 and 41 of the Constitution. It was argued further that the interpretation does not comply with the guarantees that statutes and the Constitution shall be interpreted in a manner which will give life to the intention of Parliament provided by the Supreme Court in the case of the *Attorney-General and Another v Lewanika and Others*[10]. It was the submission of the 1st and the 2nd petitioners that the respondents have cited no authority to support the interpretation they seek to place on Articles 34 and 41 of the Constitution and Regulation 17 and Section 18 of the Electoral Act.

On the argument on lapse of 180 days within which to complete the hearing and determination of the petition, it was submitted that this court ruled on that issue in 1996 when it said that the provision in the law that election Petitions must be completed within 180 days should not be interpreted as an endorsement that an election petition begun in good time must be stopped and thrown out because the nature of the case takes it beyond the 180 days limit. It was argued that in fact, numerous election petitions take more than 180 days and the court should take judicial notice of that fact.

On the submissions that the nullification of the election would bring into question the agreements and appointments made by the 1st respondent, it was submitted, on behalf of the 1st and the 2nd petitioners, that on the authority of *Noris case*, which was adopted by this Court in *Mwamba and Another v The Attorney-General of Zambia,*[11] the agreements and appointments made by the 1st respondent will remain valid notwithstanding that his election has been nullified. As to the possibility of chaos, it was submitted that like in the Ukraine, nullification of the election of the 1st respondent will not be catastrophic but will lead to peace. On a rather personal note, it was also argued that the 1st and the 3rd respondents should not talk about *lacunae* in the law now because the 1st respondent was once a Solicitor-General and at one time leader of the House and the 3rd respondent is the learned Attorney-General. They stated that the 1st respondent and the learned Attorney-General should

therefore, have seen those *lacunae* and made the necessary amendments to the law. It was submitted that if there are *lacunae* in the law, then the learned Attorney-General is taking advantage of his own default or inefficiency.

And by pleading the *lacunae*, the learned Attorney-General is failing to protect the rights of the aggrieved parties in the election process.

On the argument by the 2nd and the 3rd respondents that the election of the 1st respondent cannot be invalidated by a mere violation of Election Regulations, it was submitted that in Zambia, violation of Electoral Regulations can lead to the nullification of a Presidential election. On the case of *Sahu (9)*, relied on by the 2nd and the 3rd respondents, it was submitted that, that case is irrelevant as the issue at hand is not one of suitability of the 1st respondent but the validity of his election.

On what would happen in the event of the election of the President being annulled, it was submitted that by virtue of Sub Article 2 of Article 38 of the Constitution, the Vice President or in his absence a member of the Cabinet elected by the Cabinet shall perform the functions of the President in accordance with Article 34 until a new President assumes office. According to the 1st and the 2nd petitioners, the word "whenever" in Sub Article 2 of Article 38 is contrasted with Sub Article (1) of Article 38 which talks about specific incidents. Therefore, it was argued, Sub Article (2) of Article 38 will apply regardless of the manner the President vacates office and covers all unforeseen circumstances. It was argued that these unforeseen circumstances include nullification of the President's election under Article 41 of the Constitution. Relying on Section 10 of the Interpretation and General Provisions Act, it was argued and submitted that Sub Articles (1) and (2) of Article 38 should be taken notice of separately in that Sub Article (1) provides for the time within which an election should be held when a vacancy occurs, whereas Sub Article (2) provides that whoever shall act as President will continue until the next elections are held. Further, it was argued that these Sub Articles are distinct and provide for different scenarios.

In his reply to the respondents' submissions, the 3rd petitioner repeated his earlier submissions on jurisdiction. He pointed out that by virtue of the *Lewanika case* (3), the application of Section 18 of the

Electoral Act to a Presidential Election Petition is the correct legal position. He said that any uncertainty has been resolved by the promulgation of Statutory Instruments. He pointed out that Regulation 17 of the Electoral (Presidential Elections) Regulations makes Part IV of the Electoral (General) Regulations applicable with necessary modifications to an election of a President as they apply to and in respect of elections of members of the National Assembly. On the application of the other Electoral Regulations to Presidential elections, the 3rd petitioner echoed the submissions of the 1st and the 2nd petitioners. Further, the 3rd petitioner echoed the submissions by the 1st and the 2nd petitioners on what should happen after nullification of the Presidential election.

The 3rd petitioner submitted extensively on the issue of 180 days limitation and cited several authorities, but the import of the 3rd petitioner's submissions is that the issue of limitation has been raised late and that in any case there is already a precedent by this court where an Election petition has taken more than 180 days to dispose of. The 3rd petitioner also submitted on conflict of interest in so far as the learned Attorney-General's appearance in these proceedings is concerned. However, we do not think that these submissions go to the issue of jurisdiction raised by the respondents. Therefore, we do not intend to go into the submissions related to conflict of interest. We are, however, satisfied that there is no conflict of interest in the present petition.

We have given our anxious consideration to the submissions by the parties on the issue of jurisdiction. It is common cause that the only provision under which a Presidential election petition can come before the Supreme Court is Article 41 of the Constitution. As we understand the submissions and the arguments, the critical issue being canvassed by the respondents is that while this Court has the power to hear and determine any question which may arise as to whether a person has been validly elected as President or indeed, whether the provisions of the Constitution or any other law relating to the election of a President has been complied with, this Court has no jurisdiction to grant the remedies which the petitioners are seeking in this petition.

Article 41(2) of the Constitution provides as follows:

> *"41.(1) .....*
>
> *(2) Any question which may arise as to whether: -*
>
> *(a) any provision of this Constitution or any law relating to election of a President has been complied with;*

(b) any person has been validly elected as President under Article 34; shall be referred to and determined by the full bench of the Supreme Court."

The question is; what mandate has this provision given to this court? It is trite law that the primary rule of interpretation is that words should be given their ordinary grammatical and natural meaning. It is only if there is ambiguity in the natural meaning of the words and the intention of the legislature cannot be ascertained from the words used by the legislature that recourse can be had to the other principles of interpretation. Tindal C.J. in the old English case of *Sussex Peerage,*[12] lends credence to this view when he said that: -

"If words of a statute are in themselves precise and unambiguous then no more can be necessary than to expound those words in their natural and ordinary sense."

Indeed, as Lord Denning observed in the case of *Seafood Court Estates Limited v Asher*[13]: -

"A Judge must not alter that of which it (a statute) is woven, but he can and should iron out the creases."

Looking at the words used in Article 41(2) of the Constitution, it is clear to us that this court has been clothed with the mandate to determine whether any person has been validly elected as President and/or whether any provisions of the Constitution or any law relating to the election of a President has been complied with.

The Concise Oxford Dictionary, 9th Edition, at Page 368 defines *"determine"* to mean: -

(a) find out or establish precisely;
(b) decide or settle;
(c) be a decisive factor in regard to;
(d) make or cause a person to make a decision;
(e) bring or come to an end; and
(f) fix or define the position of.

We have no doubt in our minds that the meaning of the word *"determine"*, in the context it is used in Article 41(2) calls upon this court to find out or establish precisely or decide whether a person was validly elected as President of Zambia and/or whether the applicable laws were followed. Clearly, therefore, Article 41(2) of the Constitution confers this court with the jurisdiction to decide whether a person has been validly

elected as President. As such, the submissions by the petitioners that this court has jurisdiction to hear and determine this Petition are well grounded. Indeed, even Counsel for the 1st respondent conceded that this Court has jurisdiction to hear and determine the election of a President.

5. Their only quarrel was that there is no legal provision under which we can nullify the election of a President. In trying to show that this court has no power to annul the Election of the President and grant the remedies sought, the respondents took us through the provisions of the Electoral Act and the relevant Regulations made thereunder and the Constitution,

10. arguing that there is no express provision stipulating the grounds upon which an election of the President may be nullified and specifying the remedies to be granted in the event of such nullification. It has been argued by the respondents, that while by virtue of Regulation 17 of the Electoral (Presidential Elections), Regulations, Part IV of the electoral

15. (General) Regulations applies to Presidential elections Petitions, Section 18 of the Electoral Act, which voids an election of a candidate to the National Assembly on the grounds stipulated therein, does not apply to Presidential election petitions. The respondents pointed out that there has been no amendment to the Electoral Act for Section 18 to apply to

20. Presidential election petitions. It has been argued that Regulation 17 cannot therefore purport to amend Section 18 as the petitioners have argued.

We agree with these submissions because Regulation 17 specifically refers to Part IV of the Electoral (General) Regulations. We

25. agree that subsidiary legislation cannot amend provisions of the principal legislation: *Shimonde and Another and Liners v Meridien BIAO Bank (Z)*[14]. In the event, all the submissions by the petitioners to that effect are not tenable.

Part IV of the Electoral (General) Regulations provides for corrupt

30. and illegal practices and election offences, which in fact are offences for which a candidate may be liable. It is clear to us that the intention of Regulation 17 of the Electoral (Presidential Elections) Regulations was to apply the corrupt, illegal practices and other election offences to a Presidential candidate.

35. Section 18 of the Electoral Act, however, empowers the High Court to void the election of a candidate as a Member of the National Assembly on the grounds stipulated therein. Our understanding of this provision is that anyone who intends to impugn the election of a candidate to the National Assembly must invoke the jurisdiction of the

High Court under Section 18(1) of the Electoral Act and the election of such candidate shall only be declared void on proof of any of the grounds specified in Sub Section 2.

However, under Article 41(2) of the Constitution, the election of a President can be challenged on any question, either of law relating to the election of a President or the validity of the election itself. In trying the question alleged, this Court is at large to look at the conduct of the Presidential election itself or indeed the compliance of the provisions of the applicable law. Should the Court be satisfied, on any proven facts, that a candidate was not validly elected or indeed that the relevant laws were not complied with, so as to negate the legitimacy of the election, it will void such an election.

In our view, Section 18 of the Electoral Act does not directly apply to Presidential election petitions. To argue otherwise would be to limit the wide Provisions of Article 41(2) of the Constitution under which this court is at large to consider any grounds in resolving questions referred to it. Any question relating to the legitimacy of a Presidential election, including corruption, bribery, non-compliance with the relevant law etc. can be considered under Article 41(2) of the Constitution. Our use of the word "borrow" in relation to Section 18 of the Electoral Act, in the *Lewanika and Others v Chiluba judgment*(3), should be understood in this context. The issue of jurisdiction was not raised and fully argued in that case. Had the issue been fully argued in the *Chiluba case*, we would, no doubt, have given the full meaning and extent of Article 41(2) of the Constitution. In any event, the arguments by the respondents if taken to their logical conclusion suggest that a Presidential election cannot be challenged at all and that Article 41(2) of the Constitution is of no consequence. This, in our view, could not have been the intention of the framers of our Constitution.

The respondents also submitted that in the event that we hold that Section 18 of the Electoral Act applies to Presidential election petitions, we should also hold that Section 27(1) of the Electoral Act, which prescribes the time limit of 180 days within which to determine an election petition, should also apply to a Presidential election petition. We have found that Section 18 of the Electoral Act does not directly apply to Presidential election petitions. We have found no law, which suggests that Section 27(1) of the Electoral Act applies to Presidential election petitions. Though for different reasons, we uphold the petitioners' submissions that the 180 days limitation does not apply.

On the other hand, even if Section 27(1) would be applicable, strict adherence to it, would lead to a number of illogicalities and absurdities in both Parliamentary and Presidential elections, in that regardless of any reason, a petition which exceeds 180 days must cease or collapse in midstream without any determination. This, in our view, would be most unsatisfactory. Perhaps, this explains why the Section is silent on what should happen when a petition has exceeded 180 days. We take note that in practice most Parliamentary election petitions and even the last Presidential election petition exceeded 180 days.

Another argument advanced by the respondents is that the law does not provide for a vacancy in the office of the President consequent upon nullification of the election of the holder of the office of President. We do not find much force in these arguments because in view of what we have said, the corollary to the finding by the court that the holder of the office of President was not validly elected, or that his election cannot be upheld by reason of non-compliance with the laws relating to the election of a President, is that there will be a vacancy in the office of the President. In short, we find Article 41(2) of the Constitution to be comprehensive and to have envisaged a vacancy in the office of the President in the event that his election is nullified. As to how such a vacancy will be filled, it goes without saying that it will be through an election since there are no any other constitutional means for any one to ascend to the office of the President. In such an event, the court will have to order a fresh Presidential poll to be conducted in a specified time. The provisions of the Constitution in Article 38(1) are that a vacancy created in terms of that Sub Article shall be filled within 90 days. And we do not see the court departing from the spirit of this Article in the event that a fresh Presidential poll is ordered.

There have been arguments and submissions from the parties as to the constitutional arrangement in the event that the election of a sitting President is nullified. Without going into the details of the arguments and submissions, we find Sub Articles (2) and (3) of Article 38 of the Constitution to be sufficient. It is our opinion that these provisions stand alone and independent of Sub Article (1) of Article 38 of the Constitution, as argued by the Petitioners. We have reached this conclusion because Sub Article (2) of Article 38 does not refer to a vacancy which may be created pursuant to Sub Article (1) of Article 38 of the Constitution. Sub Article (2) of Article 38 starts with the words: *"Whenever the office of the President becomes vacant ....."*. *The*

Concise Oxford Dictionary, 9th Edition, on Page 1595, gives the natural meaning of the word.

"whenever" as *"at whatever time; on whatever occasion etc."*

In the event, we hold that Sub Article (2) of Article 38 of the Constitution applies to a vacancy in the office of President, however caused.

The arguments by the respondents that Sub Article (2) of Article 38 of the Constitution will only operate when there is a vacancy created by Sub Article (1) of Article 38 is, therefore, untenable because it fails to take into account the election of a President, which has been declared invalid under Article 41(2) of the Constitution. The arguments by the respondents if taken to their logical conclusion would lead to an absurd situation. If, for example a Presidential candidate would have been found to have cheated on age or citizenship thereby contravening Article 34 of the Constitution, it cannot be validly argued that such a situation would not create a vacancy in the office of the President. Article 38 of the Constitution should not be interpreted in isolation but in light of all the other relevant provisions in the Constitution, one of which is Article 34. It is not within the spirit of the Constitution, as the arguments by the respondents suggest, that when the incumbent President's election has been nullified there should be an *interregnum*, with no one to take care of the affairs of the state, thereby leading to the chaos the respondents fear. In conclusion, we hold, on the preliminary issue of jurisdiction, that this court has the jurisdiction to hear and determine this petition and if proven, grant the remedies sought.

Another related preliminary issue raised by the 2nd and the 3rd respondents, in their joint written submission, was for us to determine when one becomes a candidate in a Presidential election. Their contention is that a person becomes a Presidential candidate only upon nomination as per the definition of candidate in Section 2 of the Electoral Act. Section 2 reads as follows:-

"Candidate means any person nominated as a candidate for an election."

The 2nd and the 3rd respondents further contended that in terms of Section 2, a candidate is a person who goes through the prescribed process of nomination for an election and has filed nomination papers to qualify as a candidate. The 2nd and the 3rd respondents also contended

that in relation to Section 18(2) of the Electoral Act, which, inter alia, deals with electoral offences and mal-practices, for which an election may be annulled, can only apply to a Presidential candidate after he or she has lodged his or her nomination papers. In consequence thereof, it was the view of the two respondents that all Presidential candidates were only answerable for illegal and corrupt practices committed after they lodged their nominations on the 1st December, 2001 and not otherwise. The two respondents have also drawn our attention to the definition of candidate in Statutory Instrument No. 108 of 1991, dealing with Electoral (General) Regulations and Statutory Instrument No. 109 of 1991, which deals with Electoral (Presidential Elections) Regulations and which, in their view, have expanded the definition of the term candidate. The Electoral (General) Regulations (S.I. No. 108 of 1991) define candidate as follows: -

"Candidate means a person who, in relation to an election, has lodged or intends to lodge his nomination papers."

And the *Electoral (Presidential Elections) Regulations (S.I. No. 109 of 1991)* define *a candidate* as follows: -

(a) in relation to any period before the close of the period appointed under regulation 3 for receiving nomination in an election, any person intending to stand for election in such election; and

(b) in relation to any period after the close of the period under regulation 3 for receiving nominations in an election, any person validly nominated as a candidate in such election.

It was contended by the 2nd and the 3rd respondents that these two definitions of candidate in the regulations are at variance with the definition in Section 2 of the Electoral Act in that the regulations purport to include persons who intend to stand for elections. The two respondents contended that the added meaning given to the term candidate in the two Regulations is contrary to Section 20(2) of the Interpretation and General Provisions Act, Chapter 2, of our Laws, which provides that: -

"Terms and expressions used in Statutory Instruments shall have the same meaning as in the written law under which the Statutory Instrument was made."

The two respondents also referred us to our decision in the case of *Shimonde and Freight and Another v- Meridien BIAO Bank (Z) Limited (14),*

in which we subordinated a Statutory Instrument to the enabling Act in the following words:-

"In choosing to apply a rate of interest upon a judgment debt based on the current bank rates at the time, the learned Commissioner relied on Statutory Instrument No. 174 of 1990, which amended the rate of interest specified at the time in the High Court Rules. However, that statutory instrument in fact flew in the teeth of the Judgments Act, which prevailed over the subordinate legislation and which decreed 6% of the rate of interest on a money judgment. The decisions of this court, such as Bank of Zambia v Anderson, *and Another* and Mubiana, *made it very clear that the provisions of an Act of Parliament could not be ignored or over-ridden by a mere statutory instrument. See Section 20(4) of the Interpretation and General Provisions Act, chapter 2. The Judgments Act has since been amended and it accords with what the statutory instrument had proposed. However, the fact still is that at the time of the judgment herein, it was not lawful to award more than 6%."*

On the basis of the Interpretation and General Provisions Act and our reasoning in the Shimonde case (14), the 2nd and the 3rd respondents submitted that the definition of candidate should be restricted to those persons who have actually filed nomination papers; that only when candidates are nominated in terms of the Electoral Act are they answerable for their conduct as candidates.

The other issue that was canvassed in the written submissions, and which has a bearing on the meaning given to candidate was in respect of the nomination process as provided for in the Electoral (Presidential Elections) Regulations under Statutory Instrument No. 109 of 1991. The respondents quoted Regulation 5 in full, but what is of relevance to their subsequent argument is Regulation 5(2)(a) which provides as follows: -

"5(2) A nomination paper shall-

(a) state the political party of which the candidate is a member or by which he is sponsored and the symbol that the candidate proposes to use."

In terms of the foregoing Regulation, the 2nd and the 3rd respondents contended that political parties merely sponsor candidates; that a person does not become a candidate at the time that he or she is selected or elected by a political party; but that he or she becomes a candidate after going through the nomination process. Consequently, the position of the two respondents, which forms the gist of their submissions, is that the evidence led by the petitioners relating to the

events, which occurred before the filing of the nomination papers, is irrelevant and should, therefore, be excluded. We note that the 1st and the 2nd petitioners did not, in their reply, address the issue as to when one becomes a candidate. On the other hand, the 3rd petitioner, although not directly replying on this issue, condemned the learned Attorney-General for not playing his role of defending the public interest for which purpose he was joined to the proceedings or indeed for which he holds office. According to the 3rd petitioner, the learned Attorney-General exhibited a conflict of interest between his office and his personal relationship with the 1st respondent by raising the issue of when one becomes a candidate.

We have considered the submission of the 2nd and the 3rd respondents with regard to the question of candidate in a Presidential election. The question we have been asked to answer is: when does a person become a candidate in a Presidential election? Since we are dealing with a Presidential election petition, we find that the genesis of a candidate, his or her nomination and qualification to run for the office of President must be in Article 34(3) of the Constitution. The relevant part of this Article provides: -

"34(3) A person shall be qualified to be a candidate for election as President if: -

(d) he is a member of, or is sponsored by, a political party".

Section 9(1) of the Electoral Act, which falls under PART III dealing with Presidential elections, makes provision, inter alia, for the filing of nomination papers in the following terms:-

"9(1) A candidate for election as President shall, on such day, at such time and at such place as may be determined by the Commission, deliver to the Returning Officer-

(a) the candidate's nomination paper;"

Regulation 5(2) of the Electoral (Presidential Elections) Regulations provides, *inter alia*, as follows: -

"5(2) A nomination paper shall:-

(a) state the political party of which the candidate is a member or by which he is sponsored and the symbol that the candidate proposes to use."

Further, we note that the term candidate is defined in the Electoral (Presidential Elections) Regulations as: -

"(a) in relation to any period before the close of the period appointed under Regulation 3 for receiving nomination in an election, any

person intending to stand for election in such election; and

(b) in relation to any period after the close of the period under regulation 3 for receiving nominations in an election, any person validly nominated as a candidate in such election."

Having considered the provisions in Article 34(3) of the Constitution, Section 9(1) of the Electoral Act and Regulation 5(2) of the Electoral (Presidential elections) Regulations, we find that a person becomes a candidate, for purposes of participating in a Presidential election, from the day that he or she accepts the nomination or sponsorship of a political party. We are, therefore, satisfied that in terms of the constitutional provisions, the Electoral Act and the Regulations made thereunder, a person becomes a candidate and, therefore, qualified to stand in the Presidential elections well before nomination day. This is so because in Zambia now, political parties nominate and announce the names of their candidates for Presidential elections well before the Electoral Commission of Zambia (ECZ) fixes a date for nomination. This practice enables prospective Presidential candidates to campaign well before the nomination day. If we were to accept the submissions by the 2nd and the 3rd respondents that a person becomes a Presidential candidate on nomination day, we would have the absurd situation of a prospective Presidential candidate engaging in corrupt and illegal practices prior to nomination only to stop on nomination day. Clearly, that is not the spirit or intent of the Constitution, the Electoral Act and the Regulations made thereunder. From the foregoing discussion on candidate, we are satisfied, on the evidence of Michael Chilufya Sata, (PW3) and Vernon Johnson Mwaanga, (PW4), that the 1st respondent, Levy Patrick Mwanawasa, was nominated and accepted nomination by the Movement for Multi- Party Democracy (herein referred to as MMD), as Presidential *candidate* on 24th August, 2001. We find that, that was the date the 1st respondent became a Presidential *candidate* for the purpose of the Presidential elections held in Zambia between 27th and 31st December, 2001. We have also considered the point raised by the 3rd petitioner, that the learned Attorney-General, as counsel representing the 2nd and the 3rd respondents, has abandoned his role of defending the public interest by raising the issue of candidate which is for the benefit of the 1st respondent, thereby creating a conflict of interest. We do not agree with him that the issue raised by the learned Attorney-General is not of public interest.

Related to the question of when one becomes a Presidential candidate, the respondents, in answer to the evidence adduced by the petitioners that the MMD and the Parliamentary and Local Government candidates were agents for the 1st respondent, submitted that the notion flies in the teeth of the Electoral (General) Regulations, particularly Regulation 67. Referring to the *Lewanika and Others v Chiluba* case (3), where we held that not all one's political party members can be agents and that agents must be appointed as provided for in Regulation 67 of the Electoral (General) Regulations, it was argued that the 1st respondent can only be responsible for the agents he appointed himself and since there is no evidence that he appointed any agents, the policy of MMD that Parliamentary and Local Government candidates were agents for the 1st respondent was an internal MMD arrangement, which could not be accepted as legally binding on the 1st respondent.

In reply to these submissions, the 1st and the 2nd petitioners, in their joint submission, countered, relying extensively on Halsbury's Laws of England, Volume 15, 4th Edition, particularly from paragraphs 376 377, 698, 701 and 703, that according to MMD tradition, all Parliamentary candidates were election agents for the Presidential candidate and that this had not been rebutted by the 1st respondent and that in fact even the respondents' witnesses confirmed this tradition. Following this, it was submitted that, all canvassers were agents for the 1st respondent. Further, it was submitted that having been sponsored by a political party, the party was a political association and as such the political association was an agent for the 1st respondent.

Although the petitioners made references to pages 376 377 and 655 and 701 and 703, their submissions are on canvassers, political associations, candidate being an agent himself and candidates' wife being an agent. These are discussed in other paragraphs such as 619 at page 481; paragraph 621 at page 482. We take it that the paragraphs quoted by the two petitioners were quoted in error, but they meant to discuss canvassers and political associations as agents. They submitted that there was sufficient evidence that the MMD's policy was that the Parliamentary and Local Government candidates were agents for the 1st respondent and that the evidence did not suggest that every member of MMD was agent for the 1st respondent. For this submission, they relied on the evidence of Sata, (PW3), Mwaanga, (PW4), Kalumba, (PW48), Machungwa, (PW51) and Sakeni, (RW53). They submitted that according to Halsbury's Laws of England Vol.15, 4th Edition, at page 377, where it is acknowledged that where a candidate adopts either

individually or collectively, the work that is done by a political association in such a manner as to benefit by its agency regarding the election, the candidate is bound by the actions of such an association. The 3rd petitioner also submitted that it was MMD's policy that all Parliamentary and Local Government candidates were election agents for the Presidential candidate. The 1st respondent must therefore be responsible for all that MMD and its Parliamentary and Local Government candidates did for him. He further referred us to the Halsbury's Laws of England, Vol. 15, 4th Edition, on election agents.

We have considered the submissions by the parties on this issue. It is true in the *Lewanika Others v Chiluba* case (3), we did say that not everyone in one's political party can be an election agent. Further, that an agent had to be appointed under Regulation 67 of Electoral (General) Regulations. Reference to Regulation 67 in the Chiluba case(3) was per incuriam, because Regulation 12 (1) of the Electoral (Presidential Elections) Regulations excludes the application to Presidential Election of Part V of the Electoral (General) Regulations. Part V deals with the appointment of election agents. Under our electoral laws, a Presidential candidate was and is not obliged to appoint election agents. It follows, therefore, that whether one was an election agent of a Presidential candidate is a matter of evidence.

Another argument, raised by the 2nd and 3rd respondents in their written submissions that fall under the category of preliminary issues, relates to the standard and the burden of proof. The two respondents, citing this courts' judgment in *Lewanika and others v Chiluba*[3], pointed out that this court had ruled that the standard of proof required to prove a Presidential election Petition is the same as that required in the Parliamentary election Petitions; that the standard of proof is higher than a mere balance of probability; and that averments in a petition have to be proved to a convincing degree of clarity. It was contended, on behalf of the respondents, that to the proposition enunciated in the *Lewanika and others v Chiluba case(3)*, we must add that since a Presidential election involves all the 150 constituencies; the petitioners must prove electoral malpractices and violations of Electoral laws in at least a majority of the constituencies.

It was pointed out that the petitioners had cited a number of cases relating to Parliamentary election petitions, including the case of *Mlewa v Wightman*[15], for the proposition that once one of the grounds in Section 18 (2) of the Electoral Act is proved to the satisfaction of the court, then

the election would be nullified. It was submitted, on behalf of the 2nd and the 3rd respondents, that different considerations should apply in proving a Presidential election petition. It was contended that we cannot use the same yardstick used in a single constituency election to a 150 constituency election. It was also contended that the petitioners must show that the entire election process was affected and that the majority of voters were prevented or denied the chance to vote for a candidate of their choice.

It was further pointed out to us that in determining this petition, the court is dealing with the security and even the life of the nation, the future of the nation and therefore different considerations to those applicable to Parliamentary elections should be applied. It was submitted, citing Lord Denning, L.J. in *Bater v Bater, (No 2)*[16] that within a set standard of proof, there may be degrees of probability within that standard. It was further submitted that even in this petition, a higher standard within the standard applicable to Parliamentary election petitions should be applied, particularly that serious allegations bordering on criminality are alleged. It was also contended that on the whole, a Presidential election petition cannot be nullified if the petitioners prove only isolated instances of irregularities or wrongdoing. It was submitted that they must prove large scale, deep rooted and comprehensive widespread malpractices, defects and flaws in the electoral process and further that the majority of voters were prevented from voting for a candidate whom they preferred. It was contended that it is not enough to prove that the elections were not perfect. For these arguments and submissions, counsel, on behalf of the two respondents, also relied on this court's decision in the case of *Lewanika and others v Chiluba (3)*.

On the burden of proof, the gist of the arguments and the submissions is that it is trite law that he who alleges must prove; that the petitioners are obliged to call evidence and prove the case to the required standard; and that it is not for the respondents to call witnesses to prove their innocence. It was pointed out that these submissions were made in the light of some comments on behalf of the petitioners about the respondents' alleged failure to call witnesses. It was submitted that there was no need for the respondents to call witnesses because the petitioners' witnesses had failed to adduce cogent evidence. The respondents cited the case of *Zulu v Avondale Housing Project Ltd*,[17] in support of their arguments on the burden of proof.

We have examined the submissions and replies on behalf of the 1st and the 2nd Petitioners, we note that they did not directly advance arguments on standard and burden of proof. The 3rd petitioner, in his main submissions, did not also directly submit on standard and burden of proof. He, however, indirectly made submissions in reply to the 2nd and the 3rd respondents' submissions on standard and burden of proof when he concluded his reply by saying: that the 1st respondent had completely failed to provide a defence and that he, the 3rd petitioner, had discharged the evidential burden of proof. For this submission, he cited the case of *Mwelwa v The People*,[18] where Baron, DCJ, observed that the defence must be given at some time or other; the court will not consider it simply in the form of a speculative argument from the bar.

We have very carefully considered the arguments and submissions on standard and burden of proof. In their Consolidated Petition, the petitioners pleaded general and specific allegations relating to the elections and the electoral process. We shall be alluding to these allegations when we analyse the evidence.

In the case of *Lewanika and others v Chiluba* (3), this court said on standard of proof:

> *"As part of the preliminary remarks which we make in this matter, we wish to assert that it cannot be seriously disputed that Parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probability. It follows, therefore, that in this case where the petition has been brought under Constitutional provisions and would impact upon the governance of the nation and the deployment of the Constitutional power and authority, no less a standard of proof is required. It follows also the issues raised are required to be established to a fairly high degree of convincing clarity."*

On behalf of the 2nd and the 3rd respondents, we have been urged that we must add to what we said in the *Chiluba case*(3), that since a Presidential election petition involves all the150 Constituencies, the petitioners must prove electoral malpractices and violations of electoral laws in at least a majority of the constituencies. It was submitted that different considerations should apply in proving a Presidential election petition and that we cannot use the yardstick used in a single constituency election to a 150 Constituency election.

These arguments are indeed plausible, but beg the question. In our considered opinion, what the respondents are contending here is purely a matter of semantics. We totally agree with the position taken by Lord *Denning in Bater v Bater*[16], where, at page 459, he said:

"The difference of opinion which has been invoked about the standard of proof in these cases may well turn out to be more a matter of words than anything else. It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases, the charge must be proved beyond reasonable doubt but there may be degrees of proof within that standard. Many great Judges have said that in proportion as the crime is enormous so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil Court when considering a charge of fraud will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal Court even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion."

We accept that the issue of standard of proof may turn out to be more a matter of words than anything else. There can be no absolute standard of proof.

The degree must depend on the subject matter. In the case under consideration, the standard of proof must depend on the allegations pleaded. What we said in the *Chiluba case (3)*, when concluding our judgment is on all fours with Lord Denning's remarks in *Bater case*. This is what we said in the *Chiluba case(3)*:

"The bottom line, however, was whether, given the national character of the exercise where all the voters in the country formed a single electoral college, it can be said that the proven defects were such that the majority of the 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 the voters. We are satisfied, on the evidence before us, that the elections while not perfect and in the aspects discussed quite flawed, were substantially in conformity with the law and practice which governs such elections; the few examples of isolated attempts at rigging only served to confirm that there were only a few superficial and desultory efforts rather than any large scale,

comprehensive and deep rooted "rigging" as suggested by the witness who spoke of aborted democracy."

In this passage, we said everything that the respondents are now asking us to do. We find nothing to add to what we said. The standard of proof we shall adopt in this case is that enunciated in the *Chiluba case (3).*

On burden of proof, we said in *Zulu v Avondale Housing Project:*[17]

> *"There is one observation I wish to make before leaving this subject. Mr. Phiri's general approach has been to allege that the respondent had not adduced evidence in support of the allegations in the dismissal letter. I have found that the respondent did in fact adduce such evidence. In the process however I have also pointed out the deficiencies in the appellant's own evidence. It appears that the appellant is of the view that the burden of proof lay upon the respondents and it is on this that I would like to say a word. I think that it is accepted that where a Plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed in any other case when he makes any allegation, it is generally for him to prove those allegations. A Plaintiff who has failed to prove his case cannot be entitled to Judgment, whatever may be said of the opponent's case."*

Earlier in 1982, in *Mohamed v the Attorney General,*[19] this court said on burden of proof:

> *"An unqualified proposition that a Plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A Plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment. I would not accept a proposition that even if a Plaintiff's case has collapsed of its inanition or for some reason or other, judgment should nevertheless be given to him on the ground that a defence set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not even need a defence."*

We held in that case that a plaintiff cannot automatically succeed whenever a defence failed; he must prove his case. It follows that for the petitioners to succeed in the present petition, 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. This is the bottom line we alluded to in the *Chiluba case (3)*.

The last issue raised by the 2nd and the 3rd respondents that falls in the category of preliminary issues is one on pleadings. On behalf of the 2nd and the 3rd respondents, it was pointed out that an examination of the petitioners' pleadings and the evidence adduced in respect thereof reveals that the petitioners either departed from their pleadings in presenting their case or failed to adduce evidence on some of the averments in the consolidated petition; that in some cases the petitioners presented a completely new case from what they pleaded; and that in other cases not a single witness was called to substantiate some of the allegations in the petition. As examples where no evidence was led, the respondents cited the pleadings on *"ghost polling stations"*, destruction or exchange of polling boxes, stuffing of pre-marked ballot papers, Special Branch distributing ballot papers throughout the country, and soldiers shown to have voted, but who were actually out of the country.

It was submitted, on behalf of the respondents, that no evidence was led from many of the Polling Stations mentioned in the Consolidated Petition. It was argued that this court, in the case of *Lewanika and others v Chiluba (3)*, had commented on some of the averments included in a petition but on which no evidence was led. It was submitted that such averments only served the purpose of sensationalizing the Petition, as there was no justification of including such a serious allegation and not call evidence at the end of the day.

On behalf of the respondents, it was further pointed out that in some cases, the petitioners introduced new allegations, which were not pleaded, thereby introducing a new case. This, it was submitted, was done on the basis of some general pleas made in the petition. The examples given were those of the evidence led in respect of the constituencies in Ndola, such as Ndola Central, Bwana Mkubwa and Chifubu. Also cited as examples were some polling stations in Luapula Province, such as Ndoba and Kasanse. In all these, it was submitted, evidence was led on such allegations without even amending the pleadings so as to accommodate the fresh evidence adduced. We were urged not to allow the evidence adduced and to exclude it even at this late stage because the evidence is not supported by the pleadings. The cases of *Mundia v Sentor Motors Limited*[20], and of *London Passenger Transport Board v Moscrop*[21], were cited in support of these submissions.

On behalf of the respondents, we were also urged to follow the reasoning in the two cases and dismiss some of the allegations in the petition on the ground that the petition as drawn is not supported by the evidence. We were further asked to disregard evidence adduced outside the four corners of the petition. On behalf of the 2nd and the 3rd respondents, the learned Attorney-General in his submissions, also invited the court to disregard the argument of the 3rd petitioner that the court was obliged to receive evidence from all constituencies, whether or not specifically pleaded. It was contended that this was a court of law and was guided by rules and that pleadings are very critical, particularly, in allegations of this nature so as to avoid surprises. It was submitted that issues to do with registration of voters as raised by the 3rd petitioner, should not be considered by this court and that in any event, there was no evidence led by the petitioners on the registration of voters.

In reply to the arguments and submissions on behalf of the 2nd and the 3rd respondents, counsel for the 1st and the 2nd petitioners confined their submissions to the question of adequacy of pleadings on motor vehicles only. It was pointed out that the respondents had tried to exclude the overwhelming evidence on use of government motor vehicles by claiming that the same was not pleaded. It was submitted that under the Election Petition Rules adopted by Statutory Instrument No. 17 of 2002, amending the Supreme Court Rules, a petition should only state the holding and the result of the election and should briefly state the facts and the grounds relied on to sustain the prayer, but no evidence should be stated in a petition. However, the court may order such particulars as may be necessary to prevent surprises and unnecessary expense and to ensure a fair and effectual trial.

It was submitted on behalf of the petitioners that in Paragraph 5.VI, the petitioners had pleaded that the respondents were utilizing government facilities and resources and that in Paragraph 4 the petitioners had sufficiently pleaded flagrant violation or non-compliance with the provisions of the Electoral Laws and Regulations made thereunder. It was pointed out that the words *"corrupt"* and *"illegal practices"* encompass the corrupt and illegal use of government vehicles or resources to purchase government vehicles. Detailed arguments and Submissions were advanced on behalf of the 1st and the 2nd petitioners centred on Paragraphs 4(i) and 5. VI of the petition. It was submitted that the pleading in the petition relating to use of government resources as read with the pleading that there were flagrant violations

and non - compliance of Electoral Regulations was sufficient, such that the 1st respondent, in defence, called witnesses from the Road Traffic Commission, Zambia Revenue Authourity and the Government Controller of Transport to testify on the motor vehicles. In addition, a supplementary bundle of documents containing white books of motor vehicles in issue was filed in the court by the respondents and the respondents went as far as making an attempt to show, through documents generated at the Zambia Revenue Authority, that the vehicles in question had duty paid in respect thereof. It was submitted that the respondents were alive to the fact that at all times they had to answer the question of use of government motor vehicles. It was contended that for this reason the respondents cross-examined the petitioners' witnesses on the issue of motor vehicles.

It was argued, on behalf of the 1st and the 2nd petitioners, that when the evidence of the motor vehicles was called, the respondents did not object or state that they were taken by surprise; that when the respondents objected to the subpoena to the Road Traffic Commissioner, they did not base their objection on the grounds that the issue was not pleaded, but instead stated that the documents were government records which related to the security wings. It was submitted that the issue of pleading the vehicles was a desperate last-ditch attempt to exclude the damning evidence which was central and relevant to the petition. It was also argued, on behalf of the 1st and the 2nd petitioners, that in the unlikely event that the court found in the respondents' favour on the issue of pleadings, the respondents are estopped by their conduct from stating that they had been taken by surprise on the issue of motor vehicles. It was submitted that the respondents waived their right to object to the evidence once they cross-examined the witnesses at length and even brought witnesses in an attempt to rebut the evidence of the petitioners on the ground of pleadings.

The petitioners further argued that the purpose of the electoral petition Rules is to ensure a fair and effectual trial. They pointed out that there was no doubt that everyone in the nation knew that part of the petition is about the illegal use of government motor vehicles although the question of the motor vehicles had occupied a lot of time at the trial. In concluding the reply on behalf of the 1st and the 2nd petitioners, it was pointed out that if the court found that the matters were not pleaded, the Zambian cases are to the effect that where there is a failure to object to evidence of unpleaded issues and evidence is led, the court is not precluded from considering that evidence. For this submission, the case

of *Zambia Electricity Supply Coroporation Limited v Red-Line Limited*[22], was cited as an authority. It was also submitted that since so much time has been spent on the issue of motor vehicles and so many documents had been prepared and produced by both sides, it would not be fair to ignore the authority of *Zambia Electricity Supply Coroporation Limited*(22). The 3rd petitioner did not make a direct reply on the submissions on pleadings.

We have carefully considered the arguments and the submissions on the issue of pleadings. We have also examined the Amended Consolidated Petition. The gist of the respondents' submissions on the issue of pleadings is that the petitioners departed from their pleadings in presenting their case and in some cases the petitioners presented a completely new case from what they pleaded. In arguing the issue of pleadings, the respondents also submitted on the petitioners' failure to adduce evidence on some of the averments in the petition or to call witnesses to substantiate some of the allegations in the petition. In dealing with the issue of pleadings, we do not intend to consider the submissions on failure to adduce evidence or to call witnesses. The failure to adduce evidence or to call witnesses will be dealt with later when we review the evidence adduced in the petition.

We also do not wish to allude to the examples cited by the respondents where no evidence was led or where evidence was led. These are also matters to be dealt with when reviewing the evidence. The function of pleadings was aptly stated by Chirwa J (as he then was) in the case of *Mundia v Sentor Motors Ltd*,[23] a case cited by the respondents, when at page 69, he said:

> *"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 matters in dispute between the parties. Once the pleadings have been closed, the parties thereto are bound by their pleadings and the court has to take them as such."*

In the case of *Jere v DVR/SGT Shamayuwa and Another* (21), this court stressed the point on pleadings when it pointed out that *"It is one of the cardinal rules of pleadings for the party to tell his opponent what he is coming to court to prove and to avoid taking his opponent by surprise. If he does not do that, the court will deal with it in one of the two ways. It may say that it is not open to him, that he has not previously raised it and will not be allowed to rely on it; or it may give him leave to amend by raising it and protect the other*

party by letting the case stand down." Thus, in a case where a defence and or, in our view, any matter not pleaded is let in evidence and not objected to by the other side, the court is not and should not feel precluded from considering it.

This is the position emphasized in the case of the *re Robinson Settlement, Grant v Hobbs*[24] when the Court said:

"The rule is not one that excludes from the consideration of the Court, the relevant subject matter for decision simply on the ground that it is not pleaded. It leaves the party in mercy and the Court will deal with him as is just."

In the present petition, the respondents argued on pleadings that the petitioners departed from their pleadings in presenting their case and in some cases presented a completely new case. The petitioners on the other hand advanced detailed arguments based on adequacy of pleadings on motor vehicles. These arguments, in our view missed the point. However, the gist of the petitioners' arguments was that the respondents did not object to the evidence being led and above all they cross-examined the witnesses on all the unpleaded matters.

In our considered opinion, the respondents having not objected to the evidence immediately it was adduced, this Court is not precluded from considering that evidence. At the end of the day, the issue will depend on the weight the Court will attach to the evidence which was let in on unpleaded issues. At this late stage, we cannot therefore exclude the evidence adduced and allowed without objection. This, however, does not mean that we condone in any way shoddy and incomplete pleadings. Each case must be considered on its own facts. In a proper case, the court will always exclude matters not pleaded more so where an objection has been raised. Having set out the history of the petition and having disposed of the various preliminary issues, we now turn to the petition as pleaded.

By their Consolidated petition, the petitioners have advanced several allegations and averments. These allegations are both general and specific. On account of the manner the Petition was presented and argued, we propose to deal with both the general and specific allegations as contained in the Consolidated petition. Paragraph 4 of the Consolidated Petition sets out the general allegations. The paragraph states:

"And your Petitioners say:-

(i) that the election was fraught with general and notorious bribery and corrupt and illegal practices and misconduct by reason of which the majority of the voters were or may have been prevented from electing a candidate of their choice and were therefore disenfranchised.

(ii) that the election and the whole electoral process was not conducted in accordance with the letter and spirit generally of the Constitution of the Republic of Zambia and particularly of Article 34 of the Constitution of Zambia and the Electoral Act, but instead was characterized with flagrant violation or non-compliance with the provision of these laws and regulations made thereunder thereby affecting the results and denying your petitioner a free and fair election, which conduct is not reasonably justifiable in a democratic society.

(iii) that the election result was pre-determined or pre-arranged by Levy Patrick Mwanawasa and/or his agents in Levy Patrick Mwanawasa's favour and therefore was contrary to the spirit of upholding the value of democracy, transparency, accountability and good governance and hence was a sham and was null and void.

(iv) that the Electoral Commission of Zambia was negligent and failed to supervise or superintend the Election in accordance with the electoral Act and its Regulations, thereby facilitating the illegal and fraudulent conduct of several of its officers such as the opening or allowing of ballot boxes in the absence of interested parties and deliberately transporting ballot boxes without seals and unaccompanied by agents of parties."

Before we deal with the specific allegations set out in Paragraph 5 of the Petition, we can here interpose some observations on Paragraph 4. The manner Paragraph 4 was drafted is a classic example of the haphazard approach to pleadings. The petitioners simply set out general statements or allegations without any specifics. Thus, in their final submissions, they never addressed the paragraph apart from reproducing it. As we have already said, pleadings serve a specific function in a civil case. They set out a formal statement of a cause of action. They give a fair notice of a case to be met and to define the issues on which the court will have to adjudicate. Paragraph 4 (iii) as pleaded is most unsatisfactory. The petitioners are challenging an election result of a nationwide constituency. In our view, it is not enough to allege that the election result was pre-determined or pre-arranged by the 1st respondent

and or his agents without defining or stating the fact and not the evidence of how the election result was pre-determined or pre-arranged. As it will be seen later, no evidence was led or adduced on this Paragraph 4 (iii). This particular sub-paragraph (iii) of Paragraph 4 falls away. Sub-paragraphs (i), (ii) and (iv) of Paragraph 4 will be alluded to when considering the evidence of the specific allegations in Paragraph 5. The petitioners have advanced a number of prayers based on these general and specific allegations and averments as outlined in Paragraph 5. We shall refer to these prayers later in the judgment.

The respondents, in their Consolidated Answer, admitted and denied some of the allegations. They admitted that the Consolidated Petition was presented under Article 41 (2) of the Constitution, but denied that the 1st respondent was not validly elected. They admitted that the Consolidated Petition related to the Presidential election conducted on 27th December through out to 31st December 2001; that the petitioners were persons rightly entitled to vote in the elections and had the right to be nominated as candidates and stood as candidates in the elections. They denied all the general allegations in paragraph 4 of the Consolidated Petition. The respondents have joined issue with the petitioners in their Answer.

In the alternative, the respondents pleaded that an election of the President can only be impugned on the basis of Articles 41(2) and 34(3) of the Constitution of Zambia, as read with Part III of the Electoral Act, Cap. 13 of the Laws of Zambia; and that the allegations contained in the Consolidated Petition did not constitute grounds on which an election of the President can be challenged. We have already dealt with this alternative pleading, when we discussed preliminary issues. From our discussion on the issue of jurisdiction, we are satisfied that an election of the President can be impugned on the basis of Articles 41 (2) and 34 (3) of the Constitution. We are also satisfied that the allegations contained in the Consolidated Petition did constitute grounds on which an election of the President can be challenged.

We now turn to the thirty-six specific allegations which the petitioners have pleaded in paragraph 5 of the Consolidated Petition.

General Editors note: This marks the end of pages 1 to 63 of the judgment and the beginning of pages 310-316, being the last part of the judgment.

CONCLUSION

Having considered the evidence and made findings, we must now

conclude our judgment. We take note that in reviewing the evidence, there were some witnesses whose evidence was not considered in great detail or specifically. This is because we considered such evidence to be unhelpful to the issues before us and made no useful contribution to the case. For instance, a number of tapes and newspapers were produced. We did not specifically allude to them, although mentioned, because the point they covered had been adequately dealt with by reference to the evidence of other witnesses. We should also mention that from the evidence of the petitioners, they had a number of grievances which largely and clearly established some shortcomings in the management of the elections. There is also no doubt that on some issues, the parties found it appropriate to vent their feelings in court. Indeed, serious concerns were raised about the ECZ's capacity to manage the Tripartite Elections, and concerns about the use of the public media and the limited access to it by the opposition. There were also complaints concerning misuse of public or government facilities and resources. In our judgment, we have found that some of the allegations have been partially proved, while some have been found not to have been proved as they were not supported by the evidence on record. In some allegations, no iota of evidence was ever adduced. Thus, out of 36 allegations pleaded, 6 were partly supported by evidence and found partially proved. The remaining 30 were found not proved or not supported by any evidence on record. We accept that given the fact that the majority of the voters voted for the opposition as shown by the final result, and also taking into account the shortcomings in the management of the whole election exercise, there was on the whole, reasonable cause for petitioning the election. Some of the allegations and issues were certainly well taken, but some could not have been pursued had the petitioners been possessed of the full facts, while in others had the petitioners accepted the explanation given by the officials concerned.

The petitioners asked for six specific prayers in their Consolidated Petition. The first prayer was for an order for a scrutiny, verification and recount of the Presidential ballot papers. As regards scrutiny, no evidence was adduced to justify an order for scrutiny. The petitioners never adduced evidence relating to the results of verification, which as a matter of law is carried out in all the constituencies by the Returning Officers. We only heard evidence of verification from two constituencies, Livingstone and Kantanshi in Mufulira. Bearing in mind the nature of the Presidential constituency, which is nation wide, verification results from two constituencies cannot in our view, justify a scrutiny of the whole country.

On recount, we dealt with this matter when considering the allegation in Paragraph 5. XXXVI. We find no justification to order a recount. For the foregoing reasons, we decline to grant the prayer for scrutiny, verification and recount.Arising from our conclusion on the first prayer it follows that prayer number three, which is to the effect that after verification, scrutiny and recount, the rightfully elected President should be declared as the rightful and legal winner of the election, falls away.

The other prayers by the petitioners were that: -

"4. *that it may be determined and declared that the Electoral Commission willfully neglected its statutory duty to superintend the election process thereby allowing a fraudulent exercise favouring the 1st respondent.*"

"5. *that it may be determined and declared that the electoral process was not free and fair and that the election was rigged and therefore null and void.*"

We propose to deal with these prayers together. We accept that there were flaws, incompetency and dereliction of duty on the part of the Electoral Commission of Zambia. This is exemplified by the late delivery of election materials and insufficient supply of Presidential ballot papers in the complaining constituencies which led to delays and extension of the gazetted voting period. However, in our view, any negative impact arising out of these flaws affected all candidates equally and did not amount to a fraudulent exercise favouring the 1st respondent. On the evidence which was presented to us, we have no basis upon which we can find that the election was rigged and that it was not free and fair.

The other prayer by the petitioners was that: "2. *that it may be determined and declared that the 1st respondent was not duly elected as President of the Republic of Zambia.*"

According to our findings, 30 allegations out of the 36 pleaded have been found not proved. We have, however, found that 6 allegations have been partially proved. These are:

(a) **Paragraph 5. VI**
Except for the finding that 48 motor vehicles listed in the subpoena to the Road Traffic Commission and appearing

registered in Exhibit P25, under the name 'OP' as government vehicles, and the finding that some of the posters used in the 1st respondent's campaign were paid for using public funds, the whole allegation in Paragraph 5. VI relating to utilizing Government facilities and resources was not found to have been proved.

(b) **Paragraph 5. VII**

We found that only one District Administrator, RW35, Mr. Dennison Chisunka used government facilities and time to campaign for the 1st respondent.

(c) **Paragraphs 5. IX and 5. X**

We found that the allegations in these paragraphs were partly proved in that a pre-paid debate for Presidential candidates which was to be aired on ZNBC television on the eve of the tripartite elections was deliberately and wrongfully cancelled.

(d) **Paragraph 5. VIII**

We found that the allegation that the Presidential results communicated to ECZ were not consistent with the count at the polling station was proved in respect of Dambwa Site and Service polling station 37A in Livingstone Constituency.

(e) **Paragraph 5. XXX1 (b).**

We found that it was proved that MMD sold cheap mealie meal in Kantanshi constituency, during the campaign period which amounted to vote buying as an inducement to secure a vote in it's favour. Apart from the above findings, we have also found that there were flaws in the electoral process and dereliction of duty on the part of the Electoral Commission of Zambia. But as we said in the *Chiluba case (3)*:-

> *"The bottom line, however, was whether, given the national character of the exercise where all the voters in the country formed a single electoral college, it can be said that the proven defects were such that the majority of the 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 present the true free choice and free will of the majority of the voters."*

We are satisfied, on the evidence before us, that the elections, while not being totally perfect as found and discussed, were substantially in conformity with the law and practice. The few partially proved allegations are not indicative that the majority of the voters were prevented from electing the candidate whom they preferred; or that the election was so flawed that the dereliction of duty seriously affected the result which could no longer reasonably be said to reflect the true free choice and free will of the majority of the voters. We, therefore, determine and declare that the 1st respondent, Levy Patrick Mwanawasa, was duly and validly elected as President of the Republic of Zambia.

Finally, on the prayers, there is the question of imposition of security for costs as a condition precedent to the hearing of a petition. According to the petitioners in their prayers, this is a denial of access to the Courts and is contrary to the spirit of the Constitution and other laws, especially in political cases. Security for costs is a matter of law and cannot be challenged in a Presidential election petition. We, therefore, decline to grant the prayer on costs.

For the reasons we have given in our judgment, this petition is unsuccessful and is dismissed. As we have always said on costs in matters of this nature, it is in the interest of the proper functioning of our democracy that challenges to the election of the President, which are permitted by the Constitution and which are not frivolous should not be inhibited by unwarranted condemnation in costs. In the event, it is only fair that each of the parties should bear their own costs.

Petition dismissed