MICHAEL CHILUFYA SATA Vs RUPIAH BWEDZANI BANDA, ELECTORAL COMMISSION OF ZAMBIA, THE ATTORNEY-GENERAL

SUPREME COURT

CORAM: MAMBILIMA, DCJ, CHIRWA, CHITENGI, SILOMBA AND MWANAMWAMBWA, JJS

17th February, 2009 and 11th March 2009

SCZ/8/EP/01/2008

Flynote

Presidential election petition, application for recount of votes, when can it be granted?

Headnote

The Petitions sought an order for a recount of votes cast in all the 150 constituencies in the country on he ground that, some of the Returning Officers were not duly gazetted; that voters in two constituencies, ie Sinjembela and Kalabo Central Constituencies, voted a day after the appointed poll date and that some of the election documents on which the election results were written had anomalies.

Held:

i. Recount is not granted as of right but an evidence of good ground for believing that there has been a mistake.

ii. Allegations of non compliance with election laws have no relevance in an application for a recount.

iii. An order for recount is interlocutory made only on the basis of cogent evidence justifying the making of such an order.

iv. Matters deposed to in an affidavit, and are contested, do not amount to evidence.

v. Application for recount declined.

For the Petitioner: Mr. B.C. MUTALE, SC, Messrs. Ellis & Co; Mr. W. KABIMBA of Kabimba & Co; Mr. Kelvin BWALYA, KBF Partners; Mr. W. MUBANGA, Permanent Chambers, Mr. M. KAPUMPA of Kapumpa & Associates; Mr. M. PIKITI of Pikiti and Company; Mr. E. LUNGU of Andrea Masiye & Co.

For the Respondents: Mr. M. MALILA, SC, Attorney-General; Mr. D.Y. SICHINGA, SC Solicitor-General; Prof. MVUNGA, SC of Mvunga & Associates; Mr. C.L. MUMDIA SC of C.L. Mundia & Co.; Mr. A. SHONGA, of Messrs Shamwana & Co. and Mr. M. BANDA, of Banda, Watae and Associates.

CASES REFERED TO:

1. PARAGRAPH 940, HALSBURY'S LAWS OF ENGLAND 4TH EDITION
2. GEORGE PHIRI VS GEZANI PHIRI (1979) ZR 126
3. WISAMBA VS MAKAYI (1979) ZR 295

LEGISLATION REFERRED TO:

1. THE ELECTORAL ACT, NO. 12 OF 2006

RULING

MAMBILIMA DCJ delivered the Ruling of the Court.

By summons, the Petitioner has moved this Court for an Order that Constituency Returning Officers in all 150 Constituencies in Zambia should "... produce to the Court all tendered, counted, rejected spoilt or disputed ballot papers relating to the election held on 30th October 2008 and that the said ballot papers can be inspected and all the votes recorded therein and cast in the said election in each of the said Constituencies recounted in such manner as the Court may order and that the Court makes such

consequential orders or directions..." as it will deem fit on the grounds and facts disclosed in the Petitioner's affidavits.

The Petitioner filed an affidavit in support of the summons and a further supplementary affidavit. These affidavits contain various allegations; which in the main, impugn the conduct of the elections of 30th October 2008 by the 2nd Respondent, the Electoral Commission of Zambia. Mr. MUTALE, SC, for the Petitioner, summarized the allegations as falling into three categories.

1. The first category comprise of allegations that in some Constituencies, elections were supervised by persons who were not legally authorised to conduct the elections. In paragraph 17 of his affidavit in support of the summons, the Petitioner named these Constituencies as Chisamba, Mwembeshi, Muchinga, Serenje, Milengi, Nakonde, Mbala, and Senga Hill. The Petitioner alleges that Returning Officers in these Constituencies were not duly gazetted. To buttress this point, the Petitioner exhibited the Government Gazette of 27th October 2008, in which by Gazette Notice No. 455 of 2008, the 2nd Respondent published the names of persons appointed to be returning officers in the Presidential elections in named Constituencies.

Mr. MUTALE submitted that this Gazette Notice confirms that returning officers for the named constituencies were not duly gazetted. He went on to state that in paragraph 15 of the affidavit in opposition, sworn by one, Priscilla Mulenga ISAAC, the 2nd Respondent acknowledged this error. In the said paragraph 15, one Priscilla Mulenga ISAAC deposed that names of all Returning Officers were duly gazetted. With regard to Chisamba, she deposed that the Returning Officer died prior to the election date and another Returning Officer was duly gazetted. For Muchinga and Serenje Constituencies in Serenje District, Ms ISAAC deposed that the names of the Returning Officers were inadvertently transposed in the Gazette Notice and so were the names of Returning Officers for Senga Hill and Mbala Central constituencies in Mbala District.

For Mwembeshi Constituency, Ms ISAAC deposed that the names of the returning officer, which were James MALUPANDE, were erroneously recorded and abbreviated as James M. SIAME. On Nakonde and Chembe, Ms ISAAC deposed that the names of the Returning Officers were duly gazetted. In support of her contention, she exhibited the same Gazette Notice No. 455 of 2008 and another Gazette Notice No. 538 of 2008. The latter Notice is in respect of Chisamba, Mazabuka Central and Bwacha Constituencies.

It was Mr. MUTALE's submission, however that they had looked at all Gazettes prior to 30th October 2008 and there was none replacing Gazette Notice 455 of 2008. According to him, the only inference to

be drawn was that elections in the named Constituencies were conducted by unauthorised persons. On the deposition by Ms ISAAC with regard to Muchinga, Serenje, Senga Hill and Mbala, that the names were merely transposed, Mr. MUTALE submitted that this was a startling defence. According to him, the error was so serious that it invalidates what was done.

On the averment by the Respondent with regard to Mwembeshi Constituency, that the names of the Returning Officer were erroneously recorded as James M. SIAME when he was in fact James MALUPANDE, Mr. MUTALE submitted that such a contention is untenable, as, on the face of it, these were two different individuals. He submitted that it was pertinent for the Respondents to show, by documentary evidence that this is one and the same person. He went on to state that in sum, all the named Constituencies were managed by persons who had no legal mandate to do so.

2. The second category of allegations, as submitted by Mr. MUTALE are that in Sikongo and Sinjembela Constituencies voting took place on 31st October and 1st November 2008 contrary to Section 25, 26, 28 and 29 of the Electoral Act. In paragraph 12 of his affidavit in support of the summons for a recount, however, the Petitioner deposed that in Kalabo Central Constituency voting was conducted on 31st October and 1st November 2008, a period outside the prescribed voting day of 30th October 2008.

Mr. MUTALE contended that the Respondents have affirmed in their affidavit in opposition that voting took place on different days in the named constituencies.

In paragraph 10 of the affidavit in opposition, the Respondents deny that voting was conducted on 31st October and 1st November in Kalabo Central Constituency as alleged by the Petitioner in paragraph 12 of his affidavit in support. Ms ISAAC deposed that it was in Sinjembela Constituency where in one, out of the 64 polling stations, that voting was conducted on 30th October 2008. This was at Lipaneno Basic School. Ms ISAAC also deposed that in Sikongo constituency, elections were conducted on 30th October 2008 in 47 out of 51 polling stations. Voting was extended and conducted on 31st October at Keletwa polling station and on 1st November 2008, at Sinyanganya School, Nangandu and Sinyanganya Polling Stations. According to Ms Isaac, the extension was due to a breakdown of motor vehicles delivering election materials and election officers.

Mr. MUTALE in his submission referred to the Press Statement by the Chairperson of the Electoral Commission of Zambia stating that voting, in named polling stations, took place on 31st October 2008 and 1st November 2008. He submitted that this statement negates any assertion that voting in these

areas was extended. He submitted that Section 29 of the Electoral Act is very clear on what ought to have been done and the Respondents failed to comply with the law.

Mr. KAPUMPA augmented the submissions by Mr. MUTALE on this point. He submitted that the statement by the Chairperson of the Electoral Commission of Zambia was issued on 2nd November 2008, after the gazetted time for the elections had expired. According to Mr. KAPUMPA, this was contrary to Section 29 of the Electoral Act which requires that such extensions be gazetted before the elections. He likened the statement by the 2nd Respondent to closing the stables after the horses have run away.

3. The last category of allegations by the Petitioner relate to alleged anomalies in the documentation processed during the elections of 30th October. In his paragraph 11 of his affidavit in support of summons seeking a recount, the Petition deposes that "the electoral process in terms of recording and announcement of results at polling stations, constituency polling totalling centres, district totalling centres and the national centre at Mulungushi Conference Centre revealed discrepancies anomalies and disparities which can only be reconciled or finally determined by way of ballot scrutiny and recount."

The Petitioner then goes ahead to name some Constituencies and polling stations where there are alleged disparities in the total number of votes cast and used ballot papers; differences between the results recorded in words and figures; and where at verification, some ballot boxes were found to be unsealed. In his supplementary affidavit in support, the Petitioner exhibits more documents to support his contention of malpractices in the administration of the electoral process. Mr. MUTALE submitted that the pattern of errors continued throughout thereby bringing into serious doubt, the authenticity of the results and hence the need to recount to establish the true position.

In their heads of arguments, Counsel for the Petitioner have referred us to a number of authorities in support of the Petitioner's summons. They have referred us to paragraph 940 of the Halsbury's Laws of England (1) in which its learned authors state that:-

"A Petition which asks for recount and claims the seat is a good petition even if it asks for nothing more, the usual practice is for an application for a recount to be made by summons to a Judge ... on an affidavit showing grounds in which the application is based."

Counsel then referred to a number of Zambian cases in which the issue of a recount arose. In one such case, of GEORGE PHIRI VS GEZANI PHIRI (2), we have been referred to the holding by HADDEN J when he said: "The Court may make an interlocutory order for a recount in the proceedings brought by way of an election petition if the evidence justifies the making of such an Order." We have also been referred to the holding of CULLINAN J in the case of WISAMBA VS MAKAYI (3) where he said that "although the Act does not provide for a recount, there is a common law right in the matter and this is done by way of interlocutory summons supported by affidavit before the trial of the Petition." We have been referred to other cases which show that the request for a recount is through an interlocutory application.

We have also been referred to our own decision in SCZ/EP/01/2002 between ANDERSON KAMBELA MAZOKA VS LEVY PATRICK MWANAWASA, THE ELECTORAL COMMISSION OF ZAMBIA AND THE ATTORNEY-GENERAL. It was Mr. MUTALE's submission that in our Ruling in this case, we acknowledged previous High Court decisions and the common law remedy available to a Petitioner for a recount if there is evidence justifying the making of such an Order. He submitted that the question now was whether the Petitioner had adduced enough evidence in support of his summons. According to Mr. MUTALE, the answer is in the affirmative in that there was more than cogent evidence in the Petitioner's three affidavits to justify the granting of an order for a recount.

In response, Counsel for the Respondents relied on the affidavit in opposition sworn by Priscilla Mulenga ISAAC. According to them, this affidavit has rebutted all the allegations in the Petitioner's three affidavits. In the said affidavit in opposition, the Respondent denies that there were any disparities between the total number of votes cast and the total number of used ballot papers in the named polling stations. It is stated that the perceived disparities are actually rejected ballot papers and to buttress their point, they produced announcement forms for the polling stations concerned.

For Kasempa Constituency, it was deposed that the error alluded to were corrected before the declaration of the results with the sanction of agents present and to this effect they have exhibited an agreement signed by party representatives acknowledging the corrections. On the disparities between the results in figures and in words, in the named Constituencies, it is deposed that the results in figures are paramount and these were authenticated by various party agents and monitors. Announcement forms have also been exhibited. The affidavit in opposition has also responded to the various other issues raised by the Petitioner.

Mr. SICHINGA, Solicitor-General, submitted that there is insufficient evidence before us to grant the Order sought. He stated that all the allegations by the Petitioner have been contradicted or adequately explained in the affidavit in opposition. He submitted that the case of MAZOKA AND MWANAWASA,

referred to by Mr. MUTALE, was on all fours with the current application in that while the Petitioner has given details of allegations in various Constituencies and polling stations, there is no evidence given by the witnesses to the said allegations. He observed that the Petitioner does not state that he was present at all the stations where the anomalies allegedly occurred.

Mr. SICHINGA further submitted that, as in this case, the 3rd Petitioner in the MAZOKA case, Brigadier General MIYANDA had applied for an Order of recount before the hearing of the Petition. He relied on two affidavits, giving details of reports received from the field. He went on to state that this Court, in that case, rejected affidavit evidence and said that what was said in the affidavits was not evidence. According to Mr. SICHINGA, the position of the Court was that in not having heard evidence by the person mentioned, there was no evidence. Mr. SICHINGA submitted that the Court, in this case, has not heard any of the witnesses on whom the Petitioner has relied. He contended that affidavit evidence cannot merit an order for a recount. He went on to state that the affidavit in opposition, when responding to the various allegations contained in the Petitioner's affidavit, reveals that various issues are highly contentious. He submitted that evidence must be led from the various possible witnesses before such an application can be considered favourably. Mr. SICHINGA also submitted that it was unnecessary for the Petitioner to seek a recount of all 150 Constituencies when his allegations relate to about 24 constituencies and a few other polling stations. He urged us to reject the application.

Mr. MUNDIA, on behalf of the 1st Respondent filed written submissions which he augmented with oral arguments. He endorsed the submissions by Mr. SICHINGA. Mr. MUNDIA submitted that the allegations in the Petitioner's affidavits do not go to the root of the need for a recount. According to Mr. MUNDIA, the various discrepancies alluded to did not affect the Petitioner alone, but all the four Presidential candidates. He went on to state that in most, if not all the exhibits relied on, the results were authenticated by representatives of the parties and even where there was a mistake, like in Kasempa, there was a correction which was accepted by political parties.

Mr. MUNDIA further submitted that it was totally extravagant for the Petitioner to apply for a recount in all 150 Constituencies when no evidence has been led as to why a recount should be done. He stated that a recount is not a right, but granted at the discretion of the Court, upon evidence being adduced. He stated that in this case, all that we have is purported evidence of the Petitioner from his informants but no cogent evidence from those who gave him the evidence. He further stated that the Petitioner's general statements are not evidence, and, what is alleged has been explained by the Respondents. Mr. MUNDIA submitted further that in all cases where a recount has been ordered, it was after hearing the evidence. He argued that in this case, the Petitioner is putting the cart before the horse. He contended that the MAZOKA case is very clear and it has laid down guidelines one of which is that evidence has to be called.

Professor MVUNGA, in his submission stated that the MAZOKA case is the leading authority in this application and according to him, this application falls in that ambit unless the Petitioner can show to the contrary. He submitted further, that a recount is ordered at the trial stage, when the Court has benefited from the evidence. He went on to state that affidavit evidence, citing named sources, who have not been called or cross examined, most of it being conjecture, speculation and raising contentious issues, cannot be resolved by affidavits but on full trial. He gave an example of the allegation related to SIAME AND MALUPANDE, the returning officer for Mwembeshi constituency whom the Respondents insist that he is one and the same person. According to Professor MVUNGA, this is a conflict which can only be resolved at full trial. Professor MVUNGA also referred us to Electoral Regulations which provides for a recount at a polling station. He stated that no recount was done at any polling station, suggesting satisfaction with the process. He submitted that this application was an afterthought, prompted by the margin of victory. According to Professor MVUNGA, the Petitioner now wants a recount in case he won.

On the prayer, that a recount be ordered in all 150 Constituencies, Professor MVUNGA submitted that, this request is disproportionate to the complaints made in the affidavit, which relate to a lesser number of constituencies. He argued that if a recount was to be ordered in the other constituencies not cited, it would amount saying that the Petitioner had an automatic right to a recount without reason and this would be contrary to the law, including the common law.

On the first category of anomalies cited by the Petitioner, that elections in some constituencies were conducted by persons who were not legally authorised to do so; Professor MVUNGA submitted that if this Court were to rule that these persons were not legally authorised to conduct the elections, we would be talking of the validity of the election. According to him, Mr. MUTALE's submission on the mandate of the officers who conducted the elections is misplaced. He argued that one cannot ask for a recount of an election when they are saying that it was not valid.

On the second category of anomalies cited by the Petitioner; that elections in Sikongo and Sinjembela were conducted on 31st October and 1st November 2008, Professor MVUNGA submitted that the Petitioner had taken solace in the admission that this was so. He argued that even if it is assumed that this Court were to nullify the results on that account, this would not amount to recount. He submitted that the Petitioner's argument in this respect is misplaced.

On the third category of alleged anomalies cited by the Petitioner, Professor MVUNGA submitted that the anomalies disclosed and in certain respects confirmed by the Respondents in the affidavits on record, bring to light controversies on which it would be difficult to make conclusive findings of fact,

clearly suggesting that trial is unavoidable. He submitted that this application for a recount is farfetched and should be dismissed with costs.

Mr. SHONGA, in his submission stated that correct reliance had been made on the MAZOKA decision by the Solicitor-General and other Counsel for the Respondents. He went on to state that the aspect of a recount has properly been dealt with in the MAZOKA decision. He stated that the manner in which the Petitioner had brought his application is no different from how General MIYANDA sought to do it in MAZOKA case. According to Mr. SHONGA, the net result must be the same as the result in the MAZOKA case.

Mr. SHONGA's secondary argument on this point was that there is insufficient evidence. He submitted that the three categories of alleged improprieties relied on by the Petitioner have one thing in common; they stem from the alleged failure by the electoral officers to comply with certain provisions of the law. He stated that these are not the type of allegations capable of moving this Court to look favourably on the Petitioner's application. According to Mr. SHONGA, a significant part of the driving force behind the application in the MAZOKA case stemmed on exactly that; allegations that electoral officers had not followed the Electoral Act. He went on to state that in addressing this aspect this Court stated:-

"The other issues raised by the third Petitioner relating to non compliance by the returning officer with certain Articles of the Constitution and the Electoral Act have no relevance to the application for a recount and would be better dealt with by way of submission at the conclusion of the hearing of the Petition."

Mr. SHONGA, relying on this portion of our Ruling, submitted that allegations touching on alleged breach of the Electoral Act by electoral officers have no place in this application.

On the allegation that voting time was unlawfully extended in some polling stations, Mr. SHONGA referred us to paragraph 10(2) of the affidavit in opposition where in rebuttal, it was deposed that such extension was done in accordance with electoral regulations. He submitted that such extensions were governed by Regulation 23 of the Electoral General Regulations 2006.

On the prayer that a recount be ordered in all 150 constituencies, Mr. SHONGA requested this Court to allow each constituency and polling station to be treated differently. He stated that the fact that an allegation has been made with respect to 24 constituencies cannot be any stretch of imagination be

construed to apply to the remainder of the constituencies. He further stated that based on the rebutted allegations in 24 constituencies, this Court is being asked to order a recount in all 150 constituencies. He urged us not to allow this to happen and to dismiss this application with costs.

In response to the various submissions on behalf of the Respondents, Mr. KAPUMPA submitted that Mr. MUNDIA's reference to the Electoral Act, as to whether the postponement of an election at a polling station ought to be gazetted was totally misplaced. He stated that Mr. MUNDIA tried to argue that only the general time table ought to be gazetted but what he did not appreciate is that elections in this country are conducted at the polling stations. Mr. KAPUMPA submitted that when the law is referring to postponing an election date, it must be an election vis-à-vis a polling station. He went on to state that under Section 29 of the Act, a postponement must be gazetted and publicized in the media.

On Professor MVUNGA's submission that recounts were not requested for under Regulation 43, Mr. KAPUMPA submitted that there is a proviso to this regulation which provides that such a request may be refused. According to Mr. KAPUMPA, chances are that a refusal in this case was inevitable. He stated that this application is interlocutory and if granted, it may help the Court when it comes to the main trial of the Petition.

In response to Mr. SHONGA'S submission, that in the MAZOKA case, this Court held that non compliance with electoral laws does not entitle one to a recount: Mr. KABIMBA submitted that the evidence of the Petitioner has not been contradicted by the Respondents. He contended that erroneous recording of results cannot be said to be non compliance with electoral laws so as to oust the jurisdiction of this Court.

On the submission by Professor MVUNGA, that the voting on 31st October and 1st November 2008 in Sikongo and Sinjembela impacted on the validity of the election and could not justify a recount; Mr. KABIMBA questioned how else one can arrive at that situation other than say that those results should be deducted from the main result.

On the submission that there must be evidence before the Court can make an Order for a recount; Mr. KABIMBA submitted that there is nothing in the MAZOKA Ruling to suggest that this evidence must be viva voce, through witnesses. He went on to state that there is sufficient evidence in the three affidavits by the Petitioner, as contested in the affidavit in opposition by the 2nd Respondent. He argued that if, as contended, the affidavit of Ms ISAAC has rebutted the allegations, then there is a ground for this Court to make a determination. Mr. KABIMBA submitted further that while in the MAZOKA Petition, the focus

was between the winning and losing candidates, in this Petition, the focus is on the administration of elections by the 2nd Respondent.

On the late elections in Sikongo and Sinjembela; Mr. KABIMBA submitted that from the statement of the 2nd Respondent published on 2nd November 2008, it is clear that the 2nd Respondent was not aware that elections in the affected areas had not taken place on the election date suggesting that there was no communication between the 2nd Respondent and its officers in the field. Mr. KABIMBA was of the view that if the Order for a recount is not granted, the Petition will be rendered a mere academic exercise.

We have considered the application before us, together with the affidavits in support and in opposition to the summons seeking an order of recount, and the submissions of Counsel. There is no doubt that in a proper case, a Court can order a recount of votes cast in an election. However, authorities cited both at common law and our own cases show that a recount is not granted as of right but on evidence of good grounds for believing that there has been a mistake.

Mr. MUTALE has neatly categorized the alleged anomalies on which the Petitioner's application is founded into three groups. We propose to deal with this application in that Order. We will deal with the first and second categories of the alleged anomalies together.

In the first category of alleged anomalies, the Petitioner alleges that the names of returning officers in Chisamba, Mwembeshi, Muchinga, Serenje, Milengi, Mbala and Senga Hill were not gazetted. The contention in this allegation is that elections in these areas were conducted by unauthorised people. The Respondents in their affidavit in opposition allege that the names were duly gazetted except that in certain instances, the names were transposed or wrongly reflected.

The Gazette Notices publishing the names of returning officers are purported to have been issued under Section 55 of the Electoral Act and Regulation 3(1) of the Electoral (Presidential Elections) Regulations.

The second category relate to voting on 31st October and 1st November 2008. We note that in paragraph 12 of his affidavit in support of the summons for a recount, the Petitioner alleged that voting was conducted on 31st October and 1st November in Kalabo Central Constituency and not Sinjembela and Sikongo. The allegation of conducting elections in Kalabo on 31st October and 1st November 2008 was denied by the 2nd Respondent in their affidavit in opposition. It was in denying the said allegation

for Kalabo that the 2nd Respondent alluded to delays in four polling stations in Sikongo and Sinjembela Constituencies.

In their submissions on this point, Counsel on both sides referred us to provisions in the Electoral Act and the Electoral Regulations. In the Electoral Act, we were referred to, among others, Section 29 of the Electoral Act which provides for postponement of an election at a polling station in a prescribed manner. We were also referred to Regulation 23 of the Electoral (General) Regulations 2006 which allows a presiding officer of a polling station to postpone voting until later in the day or some other day in case of emergency.

It has been argued on behalf of the Respondents that these allegations, if proved, touch on the validity of the elections in the affected areas and would thus not entitle the Petitioner to a recount. Mr. KABIMBA in his response argued that if proved, the figures would be deducted from the totals.

It is clear to us that in both the first and second categories of alleged anomalies, the allegation is that the Respondents did not comply with the requirements of Electoral laws. Both sides referred to specific provisions of the Electoral Act and its Regulations in aid of their arguments before us.

A request for a recount is premised on allegations of anomalies in the counting, compilation and transmission of results. The purpose and focus, on a recount is to ascertain the correct number of votes cast in favour of each candidate. Should an application for a recount be granted, the ballot papers are counted again and the resulting numbers compiled. It goes without saying, therefore, that if a candidate questions the legality of an election, the number of votes cast in favour of each candidate become irrelevant. The whole process can be voided.

In this case, it is the Petitioner's argument that some returning officers were not duly gazetted as required by law and that in some constituencies, voting was conducted on different dates. Clearly, this is an allegation of non compliance with the law. It goes to the validity of the elections in the concerned constituencies and it is irrelevant to the application for a recount because there is no allegation of any mistake in the counting and compilation of results in the said constituencies. Much as we marvel at Mr. KABIMBA'S ingenious argument on this point, we reiterate our Ruling in the MAZOKA case that issues of non compliance with Electoral laws have no relevance in an application for a recount. The first and second categories of alleged anomalies are, therefore, irrelevant to this application for a recount. Therefore, this application based on these two alleged anomalies cannot succeed.

Coming to the third category of allegations, they relate to alleged anomalies in the documents processed during the elections. These include various allegations touching on disparities between the numbers in figures and those in words; information received from agents who attended verification of unsealed ballot boxes; results not being signed for by presiding officers, agents and monitors.

The Respondents in their affidavit in opposition dispute the various allegations. They state that the numbers used to tally the results were those in figures and not in words; that some perceived disparities were actually rejected ballot papers; that in one constituency where a mistake in compilation was made, corrections were done and signed for by party representatives; that the sealing and unsealing of ballot boxes in named constituencies was done in the presence of party agents because vital documents needed for tallying had been sealed inside the boxes; and that there were no disparities in the verification of ballot paper account in the named constituencies.

The affidavits in support of the application for a recount and the affidavit in opposition to the said application show that what is alleged by the Petitioner is heavily contested by the Respondents. It is common cause that trial in this Petition has not started. The Petitioner is seeking an order of recount upfront, before calling any evidence. This procedure has not been used in the trial of any election petition in our Courts. Cases cited show that an order for recount is interlocutory, made only on the basis of cogent evidence justifying the making of such an order. The question, therefore, is whether evidence adduced through affidavit would be cogent enough to warrant the granting of an order for a recount?

In this case, allegations have been made by the Petitioner. To these allegations there are the makers of the documents which have been exhibited; there are eye witnesses who were present in the polling stations and who can testify as to the actual number of votes obtained by each candidate in those polling stations; or indeed whether it was the numbers in figures and not words which were used for tallying or whether party agents were present when the ballot boxes were sealed and unsealed to retrieve election documents, and there were monitors who witnessed the counting process. While the Petitioner can allude to information collected from his agents, only those agents can testify as to the veracity of the allegations.

We have had occasion to pronounce ourselves on a similar application in the MAZOKA VS MWANAWASA Petition where the Applicant gave details of reports received from his officials in the field without calling the people concerned to give evidence. We stated then that what was contained in the affidavit was not evidence. We have not been persuaded to depart from this holding.

The Petitioner will have to call evidence to prosecute his Petition. He is at liberty, as prayed for in his Petition, to apply for an order of recount which the Court can only grant once there is sufficient doubt cast on the accuracy of the results. As at now, this application is premature and it is refused with costs to the Respondents.

I.C. Mambilima

DEPUTY CHIEF JUSTICE

D.K. Chirwa

SUPREME COURT JUDGE

P. Chitengi

SUPREME COURT JUDGE

S.S. Silomba

SUPREME COURT JUDGE

M.S. Mwanamwambwa

SUPREME COURT JUDGE