Rib

IN THE CONSTITUTIONAL COURT HOLDEN AT LUSAKA (APPELLATE JURISDICTION) **2021/CCZ/A0034**

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

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

IN THE MATTER OF: **SECTIONS 81, 83, 98, 99, 100(2), 106 AND 108 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016**

IN THE MATTER OF: **THE PARLIAMENTARY ELECTION FOR MANDEVU CONSTITUENCY OF THE DISTRICT OF LUSAKA HELD ON THE 12TH DAY OF AUGUST, 2021**

BETWEEN:

AARON MULOPE **APPELLANT**

AND

CHRISTOPHER SHAKAFUSWA **1ST RESPONDENT**

ELECTORAL COMMISSION OF ZAMBIA **2ND RESPONDENT**

CORAM: Mulenga, Mulonda, Munalula, Musaluke and Mulongoti, JJC on 19th May, 2022 and 29th July, 2022

For the Appellant: **Mr. M. Moono of MJ Michaels Legal Practitioners**

For the 1st Respondent: **Mr. N. Botha and Ms. M. Phiri of Makebi Zulu Advocates**

For the 2nd Respondent: **Mrs. T. M. Phiri and Mr. M. Bwalya, In House Counsel**

JUDGMENT

Mulenga, JC delivered the Judgment of the Court.

Cases cited:

1. **Green Nikutisha and Another v The People (1979) Z.R. 261**
2. **Abdulahi v Elayo [1993] 1NWLR 332**
3. **Andine Ali Tembo v The People (2011) 1 Z.R. 221**
4. **Nkhata and Four Others v The Attorney General (1996) Z.R .124**
5. **R v Sussex Justices, Ex Parte McCarthy [1924] 1 K.B. 256**
6. **Zambia Consolidated Copper Mines Limited v Mutale (1995 – 1997) Z.R. 144**
7. **Richwell Siamunene v Gift Sialubalo CCZ Selected Judgment No. 58 of 2017**
8. **Steven Masumba v Elliot Kamondo CCZ Selected Judgment No. 58 of 2017**
9. **Lewanika and Others v Chiluba SCZ Judgment No. 14 of 1198**
10. **Charles Nakasamu v Simon Kakoma and Electoral Commission of Zambia Appeal No. 2021/CCZ/A0012**
11. **ZESCO v Redline Haulage Limited (1990-1992) Z.R. 170 (S.C.)**
12. **Austin Liato v Sitwala Sitwala CCZ Selected Judgment No. 23 of 2018.**
13. **Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and the Attorney General CCZ Selected Judgment No. 51 of 2018**

Legislation referred to:

1. **The Electoral Process Act No. 35 of 2016**
2. **The Evidence Act Chapter 43 of the Laws of Zambia**

Works referred to:

Patrick Matibini, 'Zambia Civil Procedure: Commenting and cases' Volume 2, Lexi Nexis, 2017

Introduction

[1] This is an appeal against the Judgment of the High Court at Lusaka in respect of the Petition filed by Aaron Mulope, the Appellant, in which he challenged the election of Christopher Shakafuswa, the 1st Respondent, as Member of Parliament for Mandevu Constituency in the 12th August, 2021 general elections. The notice of appeal was filed on 16th December, 2021.

Background

[2] The Appellant and the 1st Respondent were among the nine (9) candidates who contested the Mandevu Parliamentary election. The 1st Respondent who stood on the Patriotic Front (PF) ticket polled 56,527 votes

and the Appellant who stood on the United Party for National Development (UPND) ticket came out second and polled 37,644 votes. The Appellant then petitioned the election and alleged a series of electoral misconduct on the part of the 1st Respondent, namely that the 1st Respondent engaged in violence and intimidation of the Appellant and his supporters in four wards in the constituency; altered votes in Chaisa ward through his agents; distributed money and mealie meal in the constituency and defied the campaign ban imposed by the 2nd Respondent by holding campaign meetings. With respect to the 2nd Respondent, the Appellant alleged that there was non-compliance to the electoral provisions as the 2nd Respondent's agents failed to account for some GEN 20 forms and transposed votes when entering them in the electronic system at the totalling centre.

[3] During the trial, the Appellant, as Petitioner, did not take the stand but called twenty (20) witnesses, the 1st Respondent testified as RW1 and called four (4) witnesses while the 2nd Respondent only called one (01) witness (RW6). Out of the seventeen (17) allegations, no evidence was tendered by the Appellant on five (5) allegations which were summarily dismissed.

[4] After reviewing the evidence and the submissions, the trial Judge discounted the Appellant's evidence on all allegations touching on violence and intimidation on the basis that the evidence came through partisan witnesses whose credibility was highly questionable and lacked corroboration

in the main. In the trial judge's assessment, the Appellant failed to proffer cogent evidence to show that the 1st Respondent was involved in the alleged violence and intimidation.

[5] With regards to the allegations of bribery, the trial Judge equally found that no cogent evidence was tendered against the 1st Respondent and that the partisan witnesses' credibility was questionable. It was added that the evidence of the partisan witnesses lacked corroboration. The trial Judge preferred the evidence of the 1st Respondent which was unshaken. Regarding the allegation of campaigning during a campaign ban, the trial Judge held that the Appellant failed to prove that the 1st Respondent campaigned during the ban and further, that even assuming that he did, there was no proof that this affected the majority of the electorate.

[6] With regards to the allegations made against the 2nd Respondent, the trial Judge found that the evidence of the Appellant's witnesses was contradictory on important aspects of the allegation and that the Appellant had thus failed to prove any of the allegations to the requisite standard. The Petition was thus dismissed.

[7] Dissatisfied, the Appellant has advanced the following ten (10) grounds of appeal:

1. **The trial Judge erred in law and fact when he held that the 1st Respondent was duly elected as Member of Parliament for Mandevu Constituency.**

2. **The trial Judge misdirected himself when he failed to properly assess the evidence of the wide malpractices committed by the 1st Respondent.**
3. **The trial Judge misdirected himself when he failed to attach appropriate weight to the Petitioner's witnesses' evidence.**
4. **The trial Judge erred in law and fact when he prohibited the Petitioner from calling additional witnesses to give evidence on matters generally pleaded in the Petition yet the said evidence was relevant to the matters in dispute.**
5. **The trial Judge misdirected himself when he held that the 1st Respondent's campaigning during the ban did not affect voters from electing the candidate of their choice.**
6. **The trial Judge erred in law and fact when he failed to consider that the documentary evidence the 1st Respondent relied upon (at pages 13-15 of the 1st Respondent's bundle of documents) was hearsay evidence.**
7. **The trial Judge misdirected himself when he held that it was inconceivable that the 1st Respondent was displaying a PF party symbol at Matayela Polling Station because ZNBC was recording the 1st Respondent as he cast his vote.**
8. **The trial Judge misdirected himself when he held that the 1st Respondent's alibi was easily verifiable because the PF virtual rally was beamed on many TV stations when the 1st Respondent himself failed to present any evidence to confirm his attendance at the same.**
9. **The trial Judge erred in law and fact when he made contradictory findings of law and fact in favour of the 1st Respondent.**
10. **The trial Judge erred in law and fact when he held that the 2nd Respondent conducted the elections in compliance with the law and yet there was evidence of multiple flaws in the conduct of the elections by the 2nd Respondent.**

Appellant's arguments in support of the appeal

[8] The heads of argument in support of the appeal were filed on 11th February, 2022. The arguments mainly recounted portions of his witnesses' testimonies and the Appellant argued in respect of grounds two and three that the trial Judge did not properly assess the evidence of PW1-PW6; PW8, PW10-PW12 and PW14-PW20. According to the Appellant, the trial Judge undermined the testimonies of the Appellant's witnesses without reason.

[9] Arguing ground four, the Appellant took issue with a Ruling made by the trial Judge on an objection raised on evidence being given by PW13 for being outside the scope of the Petition. The Appellant argued that the Ruling prevented him from calling further witnesses to testify on the myriad allegations. He cited the case of **Green Nikutisha and Another v The People**[1] wherein it was stated that:

> **The need for calling other witnesses arises when doubt is cast upon the evidence of a witness to the extent that further evidence is required to corroborate that witness and thus remove the doubt...**

[10] The Appellant maintains that he should have been allowed to call further witnesses to remove doubt on PW13's testimony. Further, that PW13's evidence should have been allowed because it related to bribery allegations of which the 1st Respondent was aware of. The Nigerian case of **Abdulahi v Elayo**[2] was also cited in support of the proposition that since election petition matters hinge on public interest, the ordinary rules of civil procedure do not apply strictly.

[11] The argument on ground five is basically that the 1st Respondent's acts of campaigning throughout June and July, 2021 during a campaign ban was a misconduct which violated paragraph 4(1)(f) of the Code of Conduct and this gave him an extra opportunity to sway more voters and therefore created an unfair environment. The Appellant posited that there were two campaign bans effected by the 2nd Respondent. One was based on escalating

violence between the PF and the UPND and the other one effected on 15th June, 2021 was due to the increase in Covid-19 infections. Based on this, campaigning was restricted to a maximum of three (3) people conducting door to door campaigns and one vehicle for public address campaigns. We were thus urged to set aside the trial Judge's finding that there was no evidence that the 1st Respondent's act prevented the majority of voters from voting for their preferred candidate because it was based on the absurd premise that the Appellant was required to prove that the voters who voted for the 1st Respondent were swayed due to campaigns during the ban.

[12] The Appellant's argument on ground six was that the correspondence produced by the 1st Respondent to establish his alibi for two weeks following 18th June, 2021 was hearsay in line with the case of **Andine Ali Tembo v The People**[3] and section 3(1) of the Evidence Act Chapter 43 of the Laws of Zambia, because there was no evidence that the doctor who signed the letter was the one who conducted or saw his Covid-19 test results. Further, that the payment receipt in support of the letter from CFB Medical Centre was for malaria test and x-ray results. Hence, that the confirmation of the Covid-19 result was by a doctor who had no personal knowledge of the matter. Therefore, that the trial Judge was wrong to rely on it and that this showed his biased assessment of evidence. The Appellant cited the cases of **Nkhata and Four Others v The Attorney General**[4], on failure to properly assess or

evaluate evidence, and **R v Sussex Justices, Ex Parte McCarthy**[5], on the need for justice to be seen to be done. We were urged to reverse the trial Judge's finding on this issue.

[13] Ground seven takes issue with the trial Judge's finding that it was inconceivable for the 1st Respondent to display his party symbol on polling day knowing that he was being recorded by a public broadcaster. The Appellant posits that this finding had no factual basis as no video evidence was produced by the 1st Respondent. Citing the case of **Zambia Consolidated Copper Mines Limited v Mutale**[6], the Appellant argued that a finding of fact not supported by evidence is a question of law and that this ground should be upheld.

[14] Regarding grounds eight and nine, the Appellant submitted that the finding that the 1st Respondent could not have campaigned at a polling station was equally not supported by any evidence. He posited that PW11 and PW12 testified that on 11th August at around 1800 hours, the 1st Respondent was campaigning and soliciting for votes from them by giving them K170.00 each. In the Appellant's view there was no evidence confirming the 1st Respondent's alibi that he was at the Government Complex attending a virtual rally. Further, that RW4's testimony was at variance with that of the 1st Respondent in that RW4 said he left with the 1st Respondent at 1900 hours while the 1st Respondent did not either mention the time he left

or that he was with RW4 but one Joseph Chipili. The Appellant added that the trial Judge's notes indicated Godfrey Chikonde who was not mentioned by the 1st Respondent, and who was not the same as RW4, Alex Chikonde. Further, that the trial Judge did not consider that RW4 was a witness with a possible interest to serve when he was a recipient of financial support from the 1st Respondent. Hence, that the trial Court was not impartial in the assessment of the 1st Respondent's evidence.

[15] As regards the allegation relating to the totalling center, the Appellant argued that there was no evidence supporting the trial court's finding that the 1st Respondent arrived at the scene after the commotion in light of the Appellant's witnesses who spoke of seeing the 1st Respondent at the scene before the commotion. That the video clip did not show where the 1st Respondent was walking from. Further, that the allegation on the commotion at the totalling center was in relation to the 2nd Respondent's conduct of elections.

[16] The Appellant proceeded to itemise four contradictory findings that the trial Judge made, namely; the finding that the 1st Respondent was not connected with the alleged murder of Joram Leta in the face of PW5's testimony that the 1st Respondent was in a PF branded vehicle from which some cadres disembarked and joined in beating Joram; penalising the Appellant for not providing the actual dates of the ban when the trial Judge

noted that the period of the ban was in the public domain; finding that the environment at the totalling center did not prevent the majority of voters from electing their preferred candidates when there was evidence of violence which affected the credibility of the results by the manner in which the ballot boxes and results forms were being handled as evidenced on page 363 of the record of appeal; and the finding that the electoral process had no flaws when the Appellant adduced evidence of violence at the totalling center and the fact that the declaration form for the results was only witnessed by the 1st Respondent's agent.

[17] The Appellant purported to submit on grounds ten and eleven when the memorandum of appeal only contains ten grounds of appeal. We will thus consider ground ten in the manner it is outlined in the memorandum of appeal, namely that the trial Judge erred when he held that the 2nd Respondent's conduct of the elections were in compliance with the law when there was evidence of multiple flaws.

[18] In arguing this ground, the Appellant highlighted the alleged electoral flaws that his evidence brought to the fore. He argued that the video evidence showed the acrimonious environment at the totalling centre during the tallying of votes and that RW6 testified to some presiding officers having erroneously sealed the ballot paper account forms, record of proceedings, statement of rejected votes and announcement of results forms in the ballot

boxes. These flaws coupled with the discrepancy in the dates on the declaration form and the testimony of RW6 as to when the 1st Respondent was declared winner as well as the fact that only the 1st Respondent's agent signed the declaration form all pointed to the flaws that characterised the Mandevu parliamentary elections. That this non-compliance affected the validity of the election as provided in section 97(2)(b) of the Electoral Process Act No. 35 of 2016 (EPA) The Appellant thus urged us to uphold the appeal.

1st Respondent's arguments in opposition to the appeal

[19] The 1st Respondent filed his heads of argument in opposition on 6th May, 2022. In addressing ground one, he submitted that the trial Court was on firm ground in holding that he was duly elected because the Appellant failed to prove his allegations to the required high standard of convincing clarity. The case of **Richwell Siamunene v Gift Sialubalo**[7] was cited to the effect that the burden of proof lay on the one alleging, in this case the Appellant, to prove the allegations. It was contended that the issue of non-conducive environment at the totalling center and the submission that the trial Judge was biased in evaluating the evidence of PW1, PW14 to PW18 was devoid of merit as the evidence of the witnesses was highly questionable and manifestly discredited as demonstrated at pages J137 to J141 of Judgment.

[20] With regard to grounds two and three, it was the 1st Respondent's contention that the evidence of PW1 and PW2 as partisan witnesses on the allegations of violence was not corroborated to eliminate the danger of falsehood in line with the case of **Steven Masumba v Elliot Kamondo[8]**. That corroboration was required not only because of the reduced weight of the evidence but also the high standard of proof as held in the case of **Richwell Siamunene v Gift Sialubalo[7]**. Further, that the allegation in the Petition was that PW2 was beaten by 100 people on 19th May, 2021 but his testimony was that he was beaten by three (3) people namely Machende, Martin and Katiti and not the 1st Respondent. Furthermore, that the 1st Respondent produced documentary evidence that he tested positive for covid-19 on 16th June, 2021 and was advised to be in self isolation for 14 days during which period he was alleged to have visited the market at Chipata bus stop.

[21] The case of **Lewanika and Others v Chiluba[9]** was cited wherein it was observed that:

> **The question that occupies my mind is, in this particular case, whose duty is it to prove what is asserted, namely that Luka Kafupi Chabala is the father to the respondent? Without much ado, the burden is upon the petitioners who should satisfy the Court that Luka Kafupi Chabala is the father and in doing so <u>they cannot be assisted by the respondent.</u>** *(emphasis added)*

[22] The 1st Respondent submitted that this was reiterating the principle that it was not for the 1st Respondent to prove that he was in isolation but for the

Appellant to prove that he was not so confined. Therefore, that the trial Judge was on firm ground in holding that the allegation was not proved.

[23] Responding to ground four, the case of **Mazoka and Others v Mwanawasa and Others**[10] was cited as reiterating that the function of pleadings was to define the issues and determine matters in dispute on which the court has to adjudicate. Further, that the defined bounds of an action cannot be extended without leave of court and consequential amendments as stated in the case of **Lyons Brooke Bond (Z) Ltd v Zambia Tanzania Road Service Ltd**[11]. The 1st Respondent thus contended that the trial Judge was on firm ground when he disallowed the evidence of PW13 which attempted to enlarge the issues defined in the petition without first seeking leave to amend the pleadings.

[24] In response to ground five, the 1st Respondent posited that the Appellant did not establish that he was holding political campaigns during the period when the 2nd Respondent suspended campaigns for UPND and PF. The evidence of PW20 who said he attended the 1st Respondent's rallies confirmed in cross examination that he did not know when the 2nd Respondent imposed the ban or when it was lifted. The only evidence submitted by the Appellant were the pictures that the 1st Respondent posted on a social media platform during the ban and the same did not prove that

he was campaigning during the ban. Further, that it was not also demonstrated that the alleged misconduct was widespread.

[25] With regard to ground six, it was argued that the 1st Respondent's testimony that he tested positive for covid-19 on 16th June was supported by documentary evidence in form of the letter from Zambia National Public Health Institute and a receipt from CFB Medical Center and could not be said to be hearsay on the basis that the doctor who diagnosed him was not brought before court.

[26] The 1st Respondent, in addressing ground seven, submitted that the allegation that he displayed the fist as a PF symbol at Matayela polling station was not proved and that the Appellant's arguments that he should have produced a video to prove that he did not display a fist was not tenable. That it was incumbent on the Appellant to prove that he was displaying a PF symbol. Further, that RW2 who was with the 1st Respondent and the ZNBC crew testified that he was not aware of any display of the PF symbol and was not even cross examined by the Appellant. He urged this Court to take judicial notice that the PF symbol was a boat and not a fist as alleged.

[27] As regards grounds eight and nine, it was the 1st Respondent's contention that the Appellant's allegations of bias against the trial Judge were made in the absence of evidence and thus, the Appellant's counsel

should be admonished. The case of **Sebastian Zulu v The People**[12] was cited in support.

[28] Addressing the four alleged contradictory findings, the 1st Respondent submitted that the testimony of PW5 on the beating and alleged murder of Joram Leta was that they were attacked by a mob of PF cadres and that Joram was later hit with a panga in the presence of the 1st Respondent. However, PW5 confirmed that when the matter was reported to the police the 1st Respondent was not mentioned and neither was his agent. That PW5 was the lone witness who testified to this allegation and was at great pains to explain how he identified the 1st Respondent as having been with the persons who allegedly assaulted Joram.

[29] As regards the issue of campaigning during the ban, it was argued that the trial Court did not contradict itself in stating that the Appellant should have produced evidence to show that 26th July, 2021 fell within the campaign ban and further explained that the Appellant should have reported to the 2nd Respondent by filing a complaint. Hence, that the allegation was not proved to a fairly high degree of convincing clarity.

[30] Regarding the commotion at the totalling center, the 1st Respondent submitted that PW15 stated that the commotion occurred when a UPND local government candidate confronted the returning officer over his votes which were given to the PF local government candidate while PW16 said the

confrontation was over the delay in announcing the results. PW18 contradicted the testimony of PW15 and PW17 on what led to the commotion. PW15 and PW17 both said the 1st Respondent was present during the commotion and that they were assaulted. However, PW15 produced a medical report which was not signed or stamped by the hospital he allegedly attended while PW17 did not produce any medical report. That there was no proof that the 1st Respondent was present during the commotion or that he was seen leaving the scene in the video. It was added that there was also no evidence that the commotion influenced the voters or affected the result. He urged this Court to dismiss the appeal with costs.

2nd Respondents Arguments in opposition to the appeal

[31] The 2nd Respondent's heads of argument generally reiterated the law on election petitions with regard to the burden and standard of proof required for allegations brought under section 97(2) (a) and (b) of the EPA.

[32] The 2nd Respondent addressed ground ten and submitted based on the recent decision in the case of **Charles Nakasamu v Simon Kakoma and Electoral Commission of Zambia**[13] that the minor flaws that characterised the Mandevu parliamentary elections did not affect the election results as envisaged by section 97(2) (b) and (4) of the EPA because there was substantial compliance to the provisions of the EPA. That there was no evidence on record to prove that the election was so flawed and was not

conducted in substantial conformity with the law or that the minor flaws affected the election results. Hence, that the Appellant failed to prove the allegations against the 2nd Respondent to the required standard. It was added that the International Foundation for Electoral Systems Guidelines for Understanding, Adjudicating and Resolving Disputes in Elections (2011 p86/7) further provide that election results should not be disregarded lightly. It was concluded that the appeal should be dismissed with costs.

Determination

[33] We have considered the Record of Appeal, the Judgment of the trial Court, the grounds of appeal and the heads of argument filed by the parties.

[34] The Petition and therefore the appeal, is anchored on section 97(2)(a) and (b) of the EPA. Section 97(2)(a), (b) and (4) provide as follows:

> **(2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that:**
>
> ***(a)* a corrupt practice, illegal practice or other misconduct has been committed in connection with the election—**
>
> **(i) by a candidate; or**
>
> **(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent;**
>
> **and the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;**
>
> ***(b)* subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such**

provision and that such non-compliance affected the result of the election;

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

[35] Section 97(2)(a) relates to corrupt practice, illegal practice or other misconduct on the part of the candidate or with the candidate's knowledge and consent or approval or with the knowledge and consent or approval of the candidate's election or polling agent and that the majority of voters were or may have been prevented from electing the candidate preferred. Under subsection (b) it must be proved that there was non-compliance to the provisions of the law in the conduct of elections and that such non-compliance affected the result of the election.

[36] We have stated in a plethora of cases such as **Nkandu Luo v Doreen Sefuke Mwamba and Attorney General**[14] that the burden of proof lies on the petitioner to prove his allegations and that the standard of proof is a fairly high degree of convincing clarity.

[37] We note that this appeal essentially challenges the findings of fact by the trial Judge in relation to the assessment of the evidence of the Appellant's witnesses. In considering this appeal we take into account what we stated in the case of **Masumba v Kamondo**[8] that partisan witnesses are to

be treated with caution and require corroboration in order to eliminate the danger of exaggeration and falsehood. This entails appropriate scrutiny and circumspection on the part of the trial Court.

[38] That said, we note that ground one of the appeal is general and is anchored on the other grounds and we will thus address it after considering the other nine (9) grounds. Grounds two and three also fall in this general category as they assail how the Judge dealt with all the evidence that came through the Appellant's witnesses on the specific allegations covered by grounds five to ten. We will thus consider grounds two and three after dealing with the six grounds and determine if the trial Judge properly assessed the evidence of the Appellant's witnesses. We will first address ground four.

[39] Ground four assails the trial Judge's interlocutory ruling on an objection raised by the 1st Respondent in respect of the evidence of PW13 on the basis that PW13 was testifying to unpleaded matters.

[40] The Appellant has argued that the ruling was erroneous and prevented the Appellant from calling further witnesses to remove doubt on PW13's evidence and to testify on the bribery allegation of which the 1st Respondent was aware. It was the Appellant's further contention that since election petition matters hinge on public interest, the ordinary rules of civil procedure do not strictly apply. The 1st Respondent's position is that the function of

pleadings is to define issues in contention for determination and the defined bounds cannot be extended without leave of court and consequential amendments. It was added that the evidence of PW13 attempted to enlarge the issues defined in the Petition.

[41] We have perused the Petition and it is clear from pages 163-164 of the record of appeal that the allegations touching on bribery were restricted to the dates of 11th August, 2021 and 24th July, 2021. PW13's testimony sought to bring in evidence of the bribery allegations that were said to have taken place on 12th August, 2021. The trial Judge found that this was a new allegation not canvassed in the petition and therefore that PW13 could not be allowed to give evidence on the allegations which were not specifically covered in the petition.

[42] We wish to state that pleadings play a very important part in defining issues in contention in election petitions as in any other proceedings. They ensure that there is a level playing field in that each party knows the issues which are in contention and no party is ambushed. In the case of **Mazoka and Others v Mwanawasa**[10] the Supreme Court stated as follows at pages 176-177:

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

proper case the court will always exclude matters not pleaded more so where an objection has been raised.

[43] We endorse this position. Thus, in so far as PW13's testimony attempted to attest to allegations not contained in the petition, it veered out of the scope of the petition. It follows that the 1st Respondent had every right to object to the evidence on matters that are not pleaded and the trial Judge was on firm ground to strike out that particular portion of PW13's testimony so as to avoid trial by ambush. We thus see no merit in ground four and dismiss it.

[44] Ground five attacks the trial Judge's finding that the Appellant failed to prove that the 1st Respondent's campaigns during a ban did not affect the majority of the voters. The Appellant's contention is that the 1st Respondent violated section 4(1)(f) of the Electoral Code of Conduct when he campaigned throughout June and July, 2021 during the campaign ban. Further, that there were two bans effected, one was effected due to violence between the PF and the UPND and the other was effected on 15th June, 2021 due to the increase in covid-19 infections and required that only a maximum of three (3) people could conduct door to door campaigns. The 1st Respondent's position is that the Appellant did not prove that he was campaigning during the ban and PW20 did not know when the ban was imposed or when it was lifted. He further argued that the pictures he posted

on social media during the ban did not prove that he was campaigning during the ban.

[45] We have perused the record of appeal. The evidence on the allegation to do with campaigning during the ban effected by the 2nd Respondent came through PW19 and PW20. PW19, Jane Kachinga, testified to seeing the 1st Respondent campaigning on 26th July, 2021 in the company of the PF Secretary General Davies Mwila while on board a green vehicle with a public address system. PW20, Pathias Kaswende, stated that on various dates in July, but which actual dates he could not remember, he saw the 1st Respondent hold campaign rallies. The 1st Respondent on the other hand asserted that by 26th July, 2021, the 2nd Respondent had lifted the ban on campaigns.

[46] The trial Judge was thus faced with the question of whether or not 26th July, 2021 fell within the campaign ban imposed by the 2nd Respondent. After reviewing the evidence, he stated at page J131 of the Judgment as follows:

> **I have no doubt that the date when the partial and full lifting of the ban on political campaigns were made, is in public domain as the 2nd Respondent used to hold press briefings and the same were publicised by many media platforms. Nonetheless, the Petitioner did not produce documentary evidence to prove that 26th July, 2021 fell within the period of the ban of political campaigns. That notwithstanding, the issue of conducting political campaigns during the ban is a matter which should have been reported to the 2nd Respondent ..... Further, the Petitioner has not demonstrated how the alleged conduct of the 1st Respondent during the ban prevented or was likely to have prevented the majority of prospective voters from electing a candidate of their choice.** (Emphasis added)

[47] It is apparent that the trial Judge found that the Appellant had failed to prove that 26th July, 2021 fell within the period of the ban of political campaigns. However, he proceeded to make a further finding that the Appellant had equally not demonstrated how the alleged misconduct of campaigning during the ban prevented or likely prevented the majority of prospective voters from electing a candidate of their choice.

[48] This further finding, which the Appellant takes issue with, was predicated on a finding that the Appellant had failed to prove the alleged campaigns on 26th July, 2021 fell within the period of the ban.

[49] On perusal of the evidence on this allegation, we cannot fault the trial Judge's finding. There was no evidence before him indicating that 26th July, 2021 fell within the period of the campaign ban. The press statement by the 2nd Respondent produced at pages 286-291 of the record of appeal did not in any way establish the allegation made by the Appellant as it does not highlight the defined period of the campaign ban so as to enable a deduction of whether 26th July, 2021 fell within that period. The social media pictures also did not establish that the activities depicted were carried out during the period of the campaign ban.

[50] In light of the finding that the allegation that the 1st Respondent campaigned on 26th July, 2021 disregarding the ban was not proved, the trial Judge did not need to proceed further to consider the effect that the

campaign may have had on the majority of voters because this became inconsequential. Having so stated, we cannot fault the trial Judge's finding on this issue as the alleged misconduct had not been proved. It follows that ground five lacks merit and is dismissed.

[51] Ground six takes issue with the trial Judge's alleged failure to consider that the documentary evidence proffered by the 1st Respondent to establish his alibi was hearsay evidence. It is the Appellant's position that in the absence of evidence that the doctors who signed the letters were the ones who conducted the covid-19 test on the 1st Respondent, the letters were hearsay evidence in line with section 3(1) of the Evidence Act and the case of **Andine Ali Tembo v The People**[3]. The 1st Respondent's position on the other hand is that the letters could not be said to be hearsay on the basis that the doctor who diagnosed him was not brought before court.

[52] The 1st Respondent testified that he was diagnosed with covid-19 on 16th June, 2021 and was in quarantine at his home for fourteen (14) days and only left his home for medical attention. The letter from the Zambia National Public Health Institute dated 13th September, 2021 was confirming that the 1st Respondent had tested positive to SARS-Cov-2 on 16th June, 2021. Explaining the post-dated letter, the 1st Respondent stated that he requested for the write up following the service of the petition on him. The 1st Respondent also produced a receipt dated 17th June, 2021 said to have

been a confirmation of his payment for lab tests and x-ray and a note dated 13th September, 2021 indicating that the 1st Respondent was diagnosed with covid-19 on 17th June, 2021. This particular evidence was tendered following a question soliciting the 1st Respondent's reaction to an allegation that he watched his supporters assault PW3 and PW9 on 18th June, 2021.

[53] PW3, Innocent Simwinde, and PW9, Simon Mwansa, were alleged to have been beaten up in the presence of the 1st Respondent. PW3's testimony was that on 18th June, 2021 around 20:30 hours, the 1st Respondent was present when his supporters stopped by PW3's market stand and beat him up to a point that he found himself at Chipata Clinic around mid-night. PW9 testified that he was harassed and beaten by some of the 1st Respondent's supporters on 18th June, 2021 at the market on instructions from the 1st Respondent who was seated in the vehicle. Both PW3 and PW9 did not produce medical reports.

[54] Weighing this evidence, the trial Judge discounted the evidence of PW3 and PW9 on account of lack of corroborative evidence seeing as they were partisan witnesses. Further, that their credibility was seriously brought into question. The trial Judge then proceeded to explain his preference for the 1st Respondent's version of events on the basis that the 1st Respondent's testimony was not shaken in cross examination and that his explanation on the documents tendered in support of his version was reasonable. In the trial

Judge's view, the 1st Respondent's alibi was not negated by the Appellant and he concluded that the evidence adduced by PW2, PW3 and PW9 did not in any way prove that the alleged illegal acts of violence were committed by the 1st Respondent or with his knowledge and consent or approval.

[55] The Appellant takes issue with the trial Judge's statement that he believed the 1st Respondent's explanation as regards his documents on the basis that the documents supporting the 1st Respondent's position were hearsay in nature and were inadmissible in line with section 3(1) of the Evidence Act.

[56] We have considered this issue and what is clear is that the trial Judge was faced with two conflicting stories and as we have stated in **Austin Liato v Sitwala Sitwala**[16], a trial court faced with conflicting narratives, is mandated to make a finding on the evidence before it, having seen and heard the witnesses. What falls to be considered is whether the evidence supported the trial Judge's finding.

[57] First, we wish to state that PW3 and PW9 were indeed partisan witnesses whose testimonies required corroboration. There having been no corroborative evidence, the trial Judge was on firm ground to find that the allegations they spoke to were not proved to the required standard. He need not have even alluded to the alibi raised by the 1st Respondent.

[58] Second, the Appellant has raised two issues concerning the documents produced by the 1st Respondent, that they were not admissible and constituted hearsay evidence. Section 3(1) of the Evidence Act which the Appellant has relied upon provides as follows:

> **3. (1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say:**
> **(a) if the maker of the statement either-**
> **(i) had personal knowledge of the matters dealt with by the statement; or**
> **(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and**
> **(b) if the maker of the statement is called as a witness in the proceedings:**
> **Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is outside Zambia and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.** (Emphasis added)

[59] This section provides for admissibility of documentary evidence under two scenarios, namely where the maker of the statement is called as witness under subsection (1)(b) and where he is not called as a witness under subsection (1)(a). In cases where the maker of a statement is not called as a witness, the statement is admissible under two conditions, that is, where he has personal knowledge of the matters and where he has no personal knowledge but is making the statement in the course of performance of his

duty based on information given to him by one who has personal knowledge. It is the latter position that was in issue with respect to the documents. The documents were therefore admissible in the same way that the medical reports for the various witnesses were admissible without calling the medical personnel or police officers to take the stand.

[60] We now turn to consider whether the same constituted hearsay evidence. Patrick Matibini in his book Zambian Civil Procedure: Commentary and Cases Volume 2 at at page 1056 quotes Murphy on Evidence as defining hearsay evidence as follows:

> **Evidence from any witness which consists of what another person stated (whether verbally, in writing, or by any other method of assertion such as a gesture) on any prior occasion is inadmissible, if its only relevant purpose is to prove that any fact so stated by that person on that prior occasion is true. Such a statement may however, be admitted for any relevant purpose other than proving the truth of facts stated in it.**

[61] Further, he discusses the issue of documentary evidence on pages 1064 to 1065 as follows:

> **Apart from calling witnesses to testify on oath, evidence may also be given by the production to the court of documents that are admissible in evidence. A document may be:**
>
> > **real or documentary evidence. The purpose for which it is produced determines how it is classified..... Documentary evidence may be adduced to prove what it states, in which case it is hearsay or as original or circumstantial evidence or as evidence that shows consistency or inconsistency on the part of a witness.**

[62] Thus, while we agree with the Appellant that the documents constituted hearsay evidence with respect to proving the truth thereof, it is also true that

they could be used as evidence that shows the consistency or inconsistency on the part of a witness. The trial Judge did not discuss the hearsay nature of the documentary evidence but stated that he believed the 1st Respondent's explanation of the documents and their dates. He proceeded to state at page J104 of the Judgment that the allegation that the 1st Respondent consented to the alleged assault of PW2, PW3 and PW9 was not proved because not only were the said witnesses discredited in cross examination but the alibi of the 1st Respondent was also not negated. The trial Judge concluded that the evidence adduced by PW2, PW3 and PW9 did not prove that the alleged acts were committed with the knowledge, consent or approval of the 1st Respondent. Ground six fails and is dismissed.

[63] Ground seven challenges the finding that it was inconceivable for the 1st Respondent to display a PF symbol (a raised clenched fist) at Matayela Polling Station knowing that ZNBC, a public broadcaster, was recording him as he cast his vote.

[64] The Appellant contends that this finding had no factual basis as no video evidence was produced by the 1st Respondent. The 1st Respondent's position is that the allegation that he was displaying a fist as a PF symbol was not proved by the Appellant and that it was not for the 1st Respondent to assist the Appellant in proving his case by producing the video evidence.

[65] The evidence on this allegation that the 1st Respondent instilled fear and intimidation in would be voters came through PW8, Doubt Chibale, and PW10, Judah Njekwa, who testified that the 1st Respondent went to Matayela Polling Station in the company of a group of people and waved a clenched fist. PW8 added that the 1st Respondent also told people to vote for him. That there was confusion and the voting process was suspended. He was afraid and so were other people who left the queue and returned to their homes.

[66] The 1st Respondent denied this allegation and narrated how he, in the company of his wife and RW2, Adrian Banda, went to vote at Matayela polling station and that the voting was covered by ZNBC TV. RW2 stated that he did not see the 1st Respondent raising the clenched fist at the electorate and that the voting was incident free. RW2 was not cross examined.

[67] The trial Judge was thus presented with conflicting narratives which he needed to resolve on the evidence adduced before him. The trial Judge found PW8 to be lacking in credibility and that as a partisan witness his testimony required corroboration. The trial Court noted that PW10 corroborated PW8's testimony but that however, the inconsistencies in PW8's testimony on other unrelated assertions constrained the court's reliance on his testimony. The trial Judge concluded that the Appellant had not proved the allegation to the threshold required by section 97(2)(a) of the EPA.

[68] The trial Court further stated that it was inconceivable to believe that the 1st Respondent would display a party symbol in full view of the ZNBC TV crew that was covering the event. It is this portion of the judgment that the Appellant posits was made without any factual basis.

[69] In election petitions, the trial Judge is required to determine whether the allegations are proved or not and not whether they are inconceivable. We thus find merit in this ground in that the trial Judge erred in holding that it was inconceivable for the court to believe that the 1st Respondent displayed a party symbol knowing full well that he was being recorded by a public broadcaster. This ground succeeds and is upheld. This however, does not translate to mean that the Appellant proved the allegation to the required standard.

[70] Grounds eight and nine were argued together. Ground eight challenges the trial Judge's holding that the alibi put up by the 1st Respondent against the allegations of bribery was easily verifiable seeing as the PF Virtual rally, an event the 1st Respondent was said to have attended, was televised by many television stations. Ground nine alleges that the trial Court made contradictory findings in favour of the 1st Respondent.

[71] The Appellant posits that the trial Judge's evaluation of evidence was biased in favour of the 1st Respondent and that he made contradictory findings on four allegations. The 1st Respondent on the other hand contends

that the allegations of bias were made in the absence of evidence and hence, the Appellant's counsel should be admonished. Further, that the trial Court did not make any contradictory findings.

[72] We will address the issues in the order in which they were argued. The alibi involved the bribery allegation. The specific allegation was that on 11th August, 2021, the 1st Respondent was distributing money in return for votes in Mandevu Constituency. The evidence came through PW11, Muliana Muhau, and PW12, Kondwani Ng'ona, who attested to having attended a PF meeting addressed by the 1st Respondent at Mr Tamba's residence in Raphael Chonta ward, on 11th August, 2021 at around 1800 hours. They each received a sum of K170.00 from the 1st Respondent.

[73] The 1st Respondent denied this allegation and narrated his activities on 11th August, 2021. He stated that he was involved in face mask and sanitizer distribution activity with the former President, Mr Edgar Chagwa Lungu. That he later attended a Patriotic Front (PF) virtual rally at the Government Complex till around 18:00 hours. This version of events was confirmed by RW4, Joseph Chikonde, who added that the 1st Respondent only left Government Complex around 19:00 hours due to traffic congestion.

[74] The trial Judge discounted the evidence of PW11 and PW12 for contradicting each other on the aspect of how they were invited to the meeting with PW11 saying they were at his home while PW12 said it was

while they were on their way from Chipata market. Further, that PW12's evidence was full of inconsistencies and he appeared to have been coached on what to say in his testimony. The trial judge went on to point out that the 1st Respondent's version of events on 11th August was more believable because it could be easily verified.

[75] The trial Judge had the opportunity of seeing and hearing the witnesses first hand. His conclusion of finding difficulties believing the alleged bribery was founded on his assessment of the witnesses. He added that the evidence of PW11 and PW12 was not cogent. He concluded that the Appellant had not discharged the burden of proof to the requisite standard to show that the 1st Respondent engaged in acts of bribery on 11th August, 2021.

[76] The Appellant referred to the trial Judge's "written notes" and made a number of allegations regarding the evidence of RW4. We have not had sight of the said notes and will therefore not comment on the same. We only wish to state that the issue of the evidence of RW4 was not critical in view of the trial Court's finding that the evidence of PW11 and PW12 had not proved the allegation to the required standard.

[77] As regards when the 1st Respondent left the Government Complex, the 1st Respondent said that the rally finished slightly before 1800 hours after which he left the venue. He was never asked to state the exact time he left

the venue. RW4 equally said that the rally finished at around 1800 hours but that the 1st Respondent left the venue at around 1900 hours because of the traffic congestion at the venue. Therefore, the trial Judge's statement regarding the 1st Respondent's alibi did not have a bearing on the overall finding on this allegation. It is clear from pages J127 to J129 of the Judgment that the trial Judge first highlighted his view on the evidence of PW11 and PW12 before making the subject statement.

[78] Further, once the trial Court found that the Appellant had not proved the allegation, the issue of the statement was of no consequence. That said, we see no merit in this ground of appeal and it fails.

[79] In the heads of argument in support of ground nine, the Appellant itemises four findings by the trial Judge which the Appellant alleges are contradictory.

[80] The first finding relates to the alleged murder of Joram Leta at the hands of the 1st Respondent's supporters. The Appellant alleges that the trial Judge contradicted himself when he stated that Appellant had failed to connect the 1st Respondent to the alleged murder after he highlighted PW5's testimony that the 1st Respondent was in a PF branded vehicle registration number ACL 2021.

[81] PW5, Gift Phiri, testified that he watched as his older brother was beaten by the 1st Respondent's supporters on 19th July, 2021 in full view of

the 1st Respondent who was in a PF branded vehicle. The said Joram died the following day. The 1st Respondent denied being present and having any involvement in the issue.

[82] Assessing the evidence at pages J117 to J124 of the Judgment, the trial Judge did not believe PW5's evidence that the 1st Respondent was present when the deceased was attacked by his supporters. This was based on the fact that the evidence of PW5 as a partisan witness, required corroboration and further that PW5 testified that he never mentioned the 1st Respondent when giving his statement to the police. This was despite him mentioning Machette, Martin and Katman as being among the PF cadres that beat up the deceased. It was the trial Court's further finding that PW5 was at great pains to explain how he identified the 1st Respondent as being with the alleged attackers and that his evidence was discredited. It is thus clear from the trial Court's findings that he explained why he did not believe the testimony of PW5 connecting the 1st Respondent to the allegation before stating as follows on page J123:

> **I find the evidence of PW5 to have been greatly discredited in cross examination and the same is manifestly unreliable with respect to placing the 1st Respondent at the center of the brutal violence against the person of Joram Leta.**

[83] Having perused the record of appeal, we cannot fault the trial Judge's findings. We thus have difficulties appreciating at which point the trial Judge contradicted himself because the first part was just a narration of PW5's

testimony before the assessment of his evidence. The alleged contradiction is without basis.

[84] The second alleged contradiction relates to the campaign ban which the 2nd Respondent effected. The Appellant asserts that the trial Judge contradicted himself when in one breath he held that the ban of political activities was in public domain but went on to require the Appellant to prove that 26th July, 2021 fell within the said period.

[85] The allegation relating to the campaign ban has been extensively discussed when considering ground five of the appeal, being the substantive ground. We have considered the Judgment of the trial Court and have difficulty in understanding the contradiction the Appellant seeks to bring out. The trial Judge's view was that while the campaign ban was in public domain, the requirement placed on the Appellant was to prove that as at 26th July, 2021 the said ban was in effect. The two are distinct. It does not follow that public knowledge of the campaign ban automatically placed 26th July, 2021 within the period of the ban. This is more so in view of the 1st Respondent's testimony that the ban was lifted on 20th July, 2021. As earlier stated when considering ground five, the Appellant having alleged that the 1st Respondent campaigned during the ban, he bore the burden of proving that 26th July, 2021 fell within the said period. Having not done so the

allegation was not proved and we see no contradiction in the trial Judge's finding. This allegation is misconceived.

[86] The third alleged contradiction relates to the commotion at the totalling center. The Appellant posits that the video evidence was not produced to show that the 1st Respondent had a part to play in the violence but to show that the 2nd Respondent did not properly conduct the election. Hence, that the trial Judge misdirected himself in concluding that the evidence exonerated the 1st Respondent. Further, that it was contradictory for the trial Judge to hold that the confusion could not have prevented the majority of voters from electing their preferred candidate when the credibility of the results was affected by the mishandling of the results forms and ballot boxes.

[87] We have perused pages J133 to J139 of the Judgment and the allegation as outlined in the Petition. We note that although the Appellant now asserts that the video evidence showing the confusion at the totalling centre was aimed at showing that the 2nd Respondent did not conduct the elections properly, the relevant portion of the petition at page 164 of the record of appeal shows that the allegation was aimed at the 1st Respondent as having stormed the building with PF cadres and committed acts of violence thereby causing commotion and not the 2nd Respondent. The allegation was cast as follow:

> **During the entering of figures by the 2nd Respondent at the Totalling center, the UPND's polling agents raised concerns with regard to the**

transposition of numbers. Whilst waiting for a clarification from the 2nd Respondent, a huge crowd of PF cadres, being members of the 1st Respondent's campaign team, stormed the building and ended up beating the polling agents and the petitioner's constituency manager who ended up losing his front teeth as well as the ward secretary for Ngwerere ward.

[88] The trial Judge considered this on two aspects based on the evidence presented, namely, the allegation of violence against the 1st Respondent and the transposing of figures against the 2nd Respondent. Therefore, in keeping with section 97 (2)(a) of the EPA, the trial Judge was right to first determine if there was evidence linking the 1st Respondent to the confusion. Having found no such evidence was before him, the trial Judge should not have even proceeded to assess its impact on the majority of the voters as the first limb, regarding the misconduct on the part of the candidate, had not been proved. Having gone ahead to do so was undoubtedly redundant but cannot be considered contradictory as argued by the Appellant. There was therefore no contradiction or misdirection in this finding.

[89] The second limb on this issue is that as a result of the violence at the totalling center, the credibility of the election was affected by the mishandling of ballot forms and therefore prevented the majority of the voters from electing their preferred candidate. We wish to state that the issue of whether the majority of the electorate have been prevented from electing their preferred candidate is one that falls for determination under section 97(2)(a) of the EPA and is only in relation to the corrupt or illegal

practices or misconduct attributable to a candidate and not the 2nd Respondent in its conduct of elections.

[90] The issues surrounding the conduct of elections by the 2nd Respondent are covered under section 97(2)(b) which requires proof of non-compliance with the electoral provisions and which non-compliance affects the result. Therefore, it is misconceived to argue that the trial Judge should have held that the allegation was proved against the 2nd Respondent and that the majority of the voters were prevented from electing their preferred candidate based on the commotion.

[91] The last alleged contradiction in findings pertains to the trial Judge's finding that there was no evidence of flaws in the electoral process. The Appellant has argued that this was contradictory in light of the evidence showing violence during the campaign period and at the totalling center. In addressing the allegations against the 2nd Respondent at pages J139 to J146 of the Judgment, the trial Judge's reference to there being no flaws in the electoral process was addressing allegations levelled against the 2nd Respondent and not the 1st Respondent. Hence, the allegations of violence during the campaign period which were levelled against the 1st Respondent were not in issue as they were dealt with separately.

[92] The question which the trial Judge dealt with was whether or not the 2nd Respondent had conducted the election in compliance with the electoral laws

in the face of allegations that the 2nd Respondent's agents had transposed election results and failed to account for some GEN 20 forms. Therefore, the statement at page J145 of the Judgment that there was no evidence whatsoever that the electoral process was flawed throughout from the registration of voters to the declaration of results for the parliamentary election must be considered in line with the conclusion at page J146. This covered the erroneous entry of results with respect to local government elections and that the declaration form for parliamentary elections was only witnessed by the representative of the 1st Respondent. The trial Judge's conclusion was that these were minor flaws that did not affect or change the results for the parliamentary elections. It would have been a different issue had the trial Judge not made the conclusion acknowledging the minor flaws. The trial Judge further held that the Appellant had not proved that the election was not substantially conducted in accordance with the law.

[93] Based on this, we see nothing wrong in the position that the trial Court held. Taking the violence at the totalling center into account, the record shows that the incident was triggered by UPND members who confronted the returning officer regarding an incident of transposition of the local government votes for a ward, when inputting the votes in the computer system. As discussed above, the issue of violence at the totalling centre was alleged against the 1st Respondent and was not considered in determining

whether the election was conducted in compliance with the electoral laws. It is not tenable to do so at this appeal stage. The Appellant's argument on this issue is equally misconceived. Grounds eight and nine fail and are dismissed.

[94] Ground ten challenges the finding made by the trial Judge that the election was conducted in compliance with the law. Further, that the trial Judge failed to consider the multiple flaws in the conduct of elections by the 2nd Respondent.

[95] It is argued that the 2nd Respondent failed to ensure transparency in the counting and tallying of votes due to the acrimonious environment at the totalling center. It was added, that the discrepancy in the dates on the declaration form and when the 1st Respondent was declared winner as well as the fact that only the 1st Respondent's agent signed the declaration form were evidence of the flaws. The Appellant maintains that the election was not conducted in compliance with the law. The 2nd Respondent in addressing ground ten, contends that there was no evidence on record proving that the election was flawed or that it was not conducted in substantial conformity with the law or that the minor flaws affected the results.

[96] We wish to quickly state that ground ten is misconceived as it misapprehends the finding of the trial Judge at page J144 of the Judgment that the Appellant did not prove that the election was not substantially conducted in accordance with the law. The key words are 'substantial

compliance'. The Appellant has thus not shown where the trial Judge said otherwise.

[97] As regards the multiple flaws, we have perused the evidence on the alleged failures on the part of the 2nd Respondent and as we have stated above, the only convincing evidence before the trial Judge had to do with the erroneous entry of results in respect of Roma Ward where the votes for one polling station in respect of the UPND local government candidate were erroneously entered as being for the PF local government candidate. RW6 admitted to this error and testified that the error was rectified after it was confirmed using the GEN 20 form. This issue did not affect the parliamentary election results.

[98] Save for this error, the Appellant failed to prove any other infractions on the part of the 2nd Respondent pursuant to section 97(2)(b) of the EPA. The trial Judge considered the highlighted issues and held that the error as regards the transposition of the local government result and the fact that only the 1st Respondent's agent signed the declaration form were minor flaws which did not affect the result. He thus held that the election was substantially held in conformity with the law. Hence, the trial Judge did not fail to consider the alleged flaws in the conduct of elections. This holding by the trial Judge cannot be faulted.

[99] As we have held in **Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and the Attorney General**[14] with regard to proof of allegations under section 97(2)(b) of the EPA, it is not every infraction that attracts the ultimate sanction of nullification of an election. In instances where there has been substantial conformity with the electoral laws, an election will not be nullified. We reiterate this position.

[100] Ground ten also fails and is dismissed.

[101] We now turn to consider grounds two and three which allege that the trial Judge failed to properly assess the evidence regarding the malpractices by the 1st Respondent and that he failed to attach appropriate weight to the Appellant's witnesses' evidence. Arguing these grounds, the Appellant outlined portions of the evidence of PW1 to PW6, PW8 to PW12, PW14 to PW20 as not having been properly assessed. The 1st Respondent's position was that the evidence of PW1, PW14 to PW18 was highly questionable and manifestly discredited as demonstrated on pages J137 to J141 of the Judgment. Further, the evidence of PW1 and PW2, as partisan witnesses, was not corroborated. The 1st Respondent added that he did not have to prove that he was in isolation due to covid-19 but for the Appellant to prove that he was not so confined.

[102] We will not go through the testimony of all the Appellant's witnesses as we have already dealt with that of PW19 and PW20 in ground five, PW3

and PW9 in ground six, PW8 and PW10 in ground seven and PW5, PW11 and PW12 in grounds eight and nine. Therefore, we will only consider the contentions raised in relation to PW1, PW2, PW4, PW6, PW7, PW14 to PW18.

[103] In relation to PW1, Alex Mwansa, the contention is that he was only mentioned on page J101 of the Judgment as having denied receiving any written report of violence. The record of appeal shows that the trial Judge made this remark when considering the issue of corroboration of the evidence of PW2 and PW3 on the allegation of violence. PW1's testimony on violence, was in general terms regarding PF and UPND cadres and did not tie the 1st Respondent to the same. The trial Judge was therefore on firm ground in only discussing his evidence in relation to corroboration. We also note that PW1 was also mentioned at page J139 of the Judgment with regard to the commotion at the totalling centre. This contention is misconceived.

[104] In relation to PW2, Frank Kaonga, it is posited that the trial Judge contradicted himself when he did not attach appropriate weight to the medical report after PW2 explained that the same was for 19th August and not 19th May because the "08" looked like "05". We have perused the record of appeal. In the petition, it was alleged that PW2 was assaulted by about 100 PF cadres on 19th May, 2021 and PW2 in cross examination confirmed several times that the attached medical report was for 19th May, 2021. He

further stated that he could not remember the date when he went to the hospital after the alleged assault on 12th August, 2021. He then later changed and stated that the medical report was for 19th August. Therefore, the trial Judge cannot be faulted for finding that he contradicted himself and lacked corroboration. The allegation thus lacks merit.

[105] As regards PW4, Fred Mutuvu Malilwe, the contention was that his evidence that he was assaulted by the 1st Respondent was completely disregarded on the basis that the medical report relied on stated that he was assaulted by unknown persons when he was illiterate and did not know what the police had written. Our brief response is that this allegation is misconceived as the record of appeal shows that he testified in cross examination that he did not tell the police that he was assaulted by unknown people and further that he did not report the 1st Respondent to the police. It is thus apparent that the trial Court properly assessed the evidence.

[106] The Appellant also contended that the trial Judge failed to attach appropriate weight to the evidence of PW6, Boyd Khondowe, which was supported by PW7, James Kamuti, to the effect that the people who assaulted him were in the company of the 1st Respondent. The trial Judge assessed the evidence of these two witnesses on pages J106 to J109 of the Judgment and highlighted inconsistencies in the testimony of these two witnesses concerning the same incident. He concluded that there was no

cogent evidence proving that the attack was with the knowledge and consent or approval of the 1st Respondent and that the majority of voters were prevented from electing their preferred candidate. Thus, the trial Judge cannot be faulted for the weight he attached to the evidence before him.

[107] The remaining witnesses; PW14, Vincent Chongo, PW15, Kalimukwa Kalimukwa, PW16, Aubrey Nkhata, PW17, Ackim Daka, and PW18, Pamela Mukuka, all spoke on the commotion at the totalling center. The Appellant has argued that there was biased assessment of evidence by the trial Judge because he failed to address the actual incident of violence and only focused on the inconsistencies in the witnesses' evidence in relation to who took them to Chipata Level One Hospital and how they arrived at the University Teaching Hospital.

[108] We have reviewed the record of appeal in terms of the witnesses' testimonies and the assessment by the trial Judge. We note at pages J133 to J139 that contrary to the Appellant's contention, the trial Judge also considered other inconsistencies in the witnesses' testimonies concerning what led to the fracas, the response of the returning officer and where the 1st Respondent was and the words he uttered at the time of the fracas. He also highlighted the fact that PW17's evidence was discredited in cross examination. He also questioned the integrity of the video evidence tendered by PW18 as it was admitted that they were short versions of what was

captured and it was therefore not known what was contained in the parts which were edited. Hence, it is misconceived for the Appellant to argue that the trial Judge only focused on the inconsistencies regarding how some witnesses were transported to the named hospitals.

[109] Grounds two and three lack merit and are accordingly dismissed.

[110] Before we leave these grounds we wish to express our disappointment at the manner in which the Appellant's arguments attacked the partiality of the trial Judge. While counsel is at liberty to advance the best possible arguments to represent his client's interest, the arguments should not unnecessarily cast aspersions on and attack the partiality of the trial Judge without any basis save for the outcome of the matter. We remind counsel, as officers of the court, to always temper submissions with due respect to the bench.

[111] Ground one is essentially not a ground as it merely alleges that the trial Judge erred in holding that the 1st Respondent was duly elected. It cannot succeed as it is apparently premised on the substantive grounds that have failed. It equally fails and is dismissed.

[112] In sum, all the substantive grounds, apart from ground seven, have failed. We accordingly dismiss the appeal.

[113] We therefore, uphold the lower Court's judgment and declare that the 1st Respondent, Christopher Shakafuswa, was duly elected as member of Parliament for Mandevu Constituency.

[114] We order each party is to bear their own costs.

.....

M.S. MULENGA
CONSTITUTIONAL COURT JUDGE

.....

P. MULONDA
CONSTITUTIONAL COURT JUDGE

.....

M.M. MUNALULA (JSD)
CONSTITUTIONAL COURT JUDGE

.....

M.MUSALUKE
CONSTITUTIONAL COURT JUDGE

.....

J.Z. MULONGOTI
CONSTITUTIONAL COURT JUDGE