

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2011/HP/EP/62

(Civil Jurisdiction)

**IN THE MATTER OF: ARTICLE 72 (1) OF THE CONSTITUTION OF THE
REPUBLIC OF ZAMBIA**

AND

**IN THE MATTER OF: SECTION 93 (1) OF THE ELECTORAL ACT NO. 12 OF
2006**

AND

**IN THE MATTER OF: CHASEFU PARLIAMENTARY CONSTITUENCY
ELECTIONS HELD IN ZAMBIA ON 20th SEPTEMBER,
2011**

B E T W E E N:

BONIFACE P. BOTA

PETITIONER

AND

**CHIFUMU KINGDOM BANDA SC
ELECTORAL COMMISSION OF ZAMBIA**

1st RESPONDENT

2nd RESPONDENT

**BEFORE THE HON. JUSTICE NIGEL K. MUTUNA, ON 20TH DAY OF JANUARY,
2012.**

For the Petitioner : Mr. S. K. Simwanza of Messrs Lungu & Company
For the First Respondent : In person
For the Second Respondent: Mr. N. Yalande and Mr. P. Mulenga of Messrs AM
Wood and Company

JUDGMENT

Cases referred to:

- 1. *Mabenga -VS- Wina & others (2003) ZR page 110.***
- 2. *Lewanika & others -VS- Chiluba (1998) ZR page 79.***
- 3. *L.A. Mumba -VS- P.W.M. Daka Appeal No. 38 of 2003 page 22.***

Other authorities referred to:

- 1. *The Electoral Act, Number 12 of 2006***
- 2. *Halsbury's Laws of England 4th edition***

The Petitioner, Boniface Paul Bota commenced this action against the Respondents, Chifumu Kingdom Banda SC, First Respondent, and Electoral Commission of Zambia, Second Respondent on the 20th of October, 2011. The action is presented by way of petition, pursuant to section 93 of the ***Electoral Act, No. 12 of 2006*** of the Laws of Zambia whose prayer is for the nullification of the election of the First Respondent as a member of parliament for Chasefu Constituency.

The petition reveals that the Petitioner contested the parliamentary elections conducted by the Second Respondent and held on 20th September, 2011, for the Chasefu Constituency in the Eastern Province of the Republic of Zambia. The other candidates who contested the elections were, the First Respondent, Yotam Banda, Dalitso Ngulube, Standson Zimba and Mbale Hambani. Following the elections, the candidates polled the following results, that is to say; the First Respondent 11 429 votes, Yotam Banda 3, 859 votes; the Petitioner 1, 067 votes, Daliso Ngulube 591 votes, Standson Zimba 192 votes and Mbale Hambani 112 votes. As a consequence of this, the Returning Officer declared the First Respondent as duly elected member of parliament for Chasefu Constituency.

The petition went on to reveal that contrary to the declaration made by the Returning Officer, the First Respondent was not validly elected because he engaged in certain illegal practices during the campaign period, intended to lure voters. The illegal practices complained of were the donation of hammer mills, an oxcart, wireless phones and bicycles to Headmen and baby kits to Kanyanga hospital. It was alleged further that the First Respondent engaged in spreading of false and malicious statements about the Petitioner and ferrying of the electorate to polling stations and distributing food to them.

As a consequence of the said illegal practices allegedly committed by the First Respondent, the Returning Officer and other agents, it was alleged that, the final result of the elections was not a reflection of votes cast by voters as the electorates were prevented from electing their preferred candidate.

The First Respondent's answer was filed on 20th December, 2011, while the Second Respondent filed its answer on 16th November, 2011. By the said answers, both Respondents denied the Petitioner's allegations.

The hearing of the Petition began on 3rd January, 2012 and concluded on 9th January, 2012.

The Petitioner paraded six witnesses. PW1 was Boniface Paul Bota, the Petitioner. In his evidence, he began by stating that he contested the Parliamentary seat in Chasefu Constituency on 20th September, 2011. He went on to state the particulars of the other persons who contested the seat, the number of votes that each of them received and the party ticket they stood under. To this end he testified that, the First Respondent contested on the FDD ticket, Yotam Banda, MMD, Dalitso Ngulube, UPND, Standson Zimba, ZED, Hambani Mbale, NMP, whilst he stood on the PF ticket. He proceeded

to testify that during the campaign period the First Respondent characterized his campaign with bribery and false statements as a way of grooming the would be voters. As a result of the said acts, the First Respondent was declared the victor on 23rd September, 2011.

Under cross examination, PW1 clarified that the bribery comprised the First Respondent's distribution of hammer mills and bicycles. The hammer mills were distributed at Senior Headman Munyukwa's village and Jimusango's village of Chief Mpikamalaza. He testified further that he did not know who purchased the hammer mills or that they had an inscription on them marked GRZ - GIDD.

PW1 went on to state that the serial number of the hammer mill left at Munyukwa's village was 7451 but that he did not know the serial numbers of the other hammer mills. He also stated that he did not know the women's clubs they were distributed to. Upon perusal of the document at page 1 of the First Respondent's bundle of documents, he conceded that government donated the hammer mills to Chesefu Constituency. He also conceded that government has an going programme to empower women in all the 150 constituencies country wide. He however, stated that at the time the First Respondent was handing over the hammer mills he was not a member of parliament but a candidate, as such he was not acting on behalf of government.

As regards the allegations that the First Respondent made false allegations against him, PW1 testified that he did not attend any of the rallies held by the First Respondent. He stated further, that he had agents who attended the First Respondent's rallies who would testify regarding the allegation.

As regards the allegation of bribery in the form of an oxcart to village Headman Lusuntha, PW1 testified that he was not aware that the oxcart was

donated by the Ministry of Community Development and Social Services. He also testified that he does not know that Headman Lusuntha's junior wife is a chairperson of one of the women's clubs. He went on to state that he is not against the government aiding women's clubs during an election year but that it is wrong to distribute the donations before elections.

On the claim against the Second Respondent, PW1 testified that there were no electoral malpractices perpetrated by the Second Respondent.

In re-examination, PW1 testified that the documentary evidence produced by the First Respondent does not reveal when the hammer mills were taken to the constituency or the women's club they were donated to. Further that, the documents do not also show the date of delivery of the oxcart to the constituency. He however, stated that the donation of the hammer mill and ox cart was done around August and September 2011.

PW2 was Foreman Mtonga a Senior Group Headman in Chief Mpikamalaza's area at Kachingila village. He testified that in August last year the First Respondent passed by his village at Jimusangu and presented a hammer mill to the women's clubs. At the time of the presentation the First Respondent informed the persons gathered, that the hammer mill was donated by government and that he was merely requested to deliver it.

Under cross examination PW2 testified thus; the handing over of the hammer mills was done by the First Respondent at Mpikamalaza school; this was to the women's clubs, namely Jalawe, Bindila, Jimusangu, Chaweya and Tiyeseke, whose representatives were present at the ceremony; during the handover, the First Respondent stated that the hammer mill was donated by government and that he had merely been sent to hand it over; the hammer mill was not handed over to the Headman; and the ox cart at Choboli was also presented to the women's clubs.

PW3 was Capson Gondwe of Chimundenka village in Chief Magodi's area, a Vice Headman in the village. His testimony revealed that some time in August or September, 2011, he and other village Headmen were called to Kanyanga hospital to witness the official opening of the maternity ward. There were a number of people present including the First Respondent. He stated further that he noticed a large quantity of assorted clothing for babies which the First Respondent donated. Upon making the donation, the First Respondent stated that he was donating the clothing because he acknowledged the suffering of the people as most of the babies born did not have clothes. He testified further that, the First Respondent urged the gathering to vote for him as their member of parliament. At this point the hospital staff collected the clothing and the Petitioner arrived and accosted the sister-in charge of the hospital, one Sister Jacquelin Vachet and wondered why the hospital had allowed the First Respondent to distribute the clothing when he was not the area member of parliament.

PW3, went on to testify that the First Respondent later departed for Emusa and that he and other persons followed him. Prior to his arrival at Emusa, the First Respondent stopped over at a police post and distributed chitenge material, T. Shirts and caps. He testified further that, on another occasion at Khulikuli School, the First Respondent gave him a picture which depicted two men kissing. The Court's attention was drawn to the Petitioner's bundle of document where the said picture was produced. He went on to state that he does not know if anyone else received the picture. His reaction to the picture was that he and the other residents should not vote for the Petitioner and the then Presidential candidate Michael Sata, but rather, the First Respondent and Rupiah Banda, the then Republican President.

Under cross examination PW3 revealed that he is not a member of the PF Party and that he does not belong to any party having been a member of

Kapwepwe's UPP. He went on to state that he does not recall the exact date when the events at Khulikuli occurred but that it was sometime in September, 2011. He also stated that he does not know the agents that the First Respondent was with nor does he know if the other persons present were members of MMD because the masses wore clothing with various party colours. Further, that the speech by the First Respondent at Khulikuli focused on developmental issues.

As regards the events that occurred at Kanyanga hospital, PW3 testified that he does not recall the date when they occurred but that it was between August and September. He testified further that he does not know who provided the funds for construction of the maternity ward, but that it would not surprise him if the funds came from the constituency development fund (CDF) and donations by Italians. He went on to state that the clothing donated by the First Respondent were heaped on the ground and Sister Jacqueline Vachet as representative of the hospital took charge of them.

In re-examination, PW3 clarified that the events at Kanyanga hospital occurred about a week before the elections.

PW4 was Timothy Banda of Zinyoni village in Chief Magodi's area, a volunteer teacher at Magodi community school. His testimony revealed that, in the last week before the elections, the First Respondent visited Magodi community school to address the teachers and pupils. When the First Respondent arrived, PW4 and the others teachers requested him to support them because as volunteer teachers they were not paid. They also requested him to donate money to enable them purchase roofing material for a structure they were constructing at the school.

PW4 testified further that in his speech, the First Respondent recounted what he had done for the constituency as member of parliament for which the

audience thanked him. He then went on to explain why they should vote for him and the then Republican President, Rupiah Banda. He ended his testimony by stating that the First Respondent gave a bicycle to the Group Headman of Zinyoni village who happens to be his nephew.

In cross examination PW4 was non committal on whether or not he saw the First Respondent give a bicycle to his nephew, Headman Zinyoni.

PW5 was Jelasi Chizinga of Elinyaweni village in Chief Magodi's area. His testimony related to the allegation that the First Respondent donated a hammer mill to a Headman at Egichikeni village in Magodi ward. He testified that the hammer mill was not donated to the Headman by the First Respondent but rather the women's clubs of Egichikeni village. He stated further that the donation was made at the time just before the elections between the 15th and 30th November. He went on to state that he was present when the hammer mill was brought and that there were a lot of other persons present as well.

PW5 testified further that, when the First Respondent presented the hammer mill to the women's clubs he counseled them on how they should conduct their activities as clubs. The First Respondent then urged them to vote for him in return for the good gesture he had extended to them. As a result of the donation of the said hammer mill, the people present were joyous and so was PW5 who was encouraged to vote for the First Respondent and advised his three wives to do likewise.

In cross examination PW5's evidence revealed the following; that he did not know the exact date when the donation of the hammer mill was made by the First Respondent; he did not know the exact number of people who were present during the presentation of the hammer mill, neither could he remember anyone who was present; there was no one who gave a vote of

thanks after the presentation; he did not know if Mama Nya Hara or Mama Shonga were present at the presentation; he did not know which ladies or number of ladies the hammer mill was handed over to; and there was only one women's club that he knew of, being Magodi women's clubs. He testified further that there is no Headman at Egichikeni village and that Senior Chief Magodi the fifth is the one who superintends over Egichikeni village. He went on to state that there was no meeting held during the presentation nor did he know if campaign material was distributed. He was however, aware that the First Respondent solicited for votes.

PW5 ended by stating that the hammer mill is still at the village but that he is not aware that it is marked GRZ- GIDD.

In re-examination, he stated that the hammer mill was donated in August last year.

PW6 was John Moyo, a Group Headman, in Chimudomba village, Chief Magodi's area in Lundazi. His testimony related to the allegation that the First Respondent had given a hammer mill to Headman Munyukwa of Lubelezi ward. He testified that towards the end of August 2011, the First Respondent visited his village and donated a hammer mill to the women's clubs. This was in the presence of a number of people whom the First Respondent urged to vote for him in view of the gesture he had extended to their community. There was joy and excitement in the community and the gathering resolved that the First Respondent was the man to vote for.

In cross examination PW6 stated thus; he did not know the date when the hammer mill was donated as he was overcome with excitement; he did not know which women's clubs the hammer mill was donated to although he knew that it was not donated to the Headman; he did not know that the hammer mill was donated by government through the First Respondent; and

that he did not hear the First Respondent encourage other women to set up clubs so that they could benefit from the donation of hammer mills.

At the end of PW6's evidence, the Petitioner closed his case.

The First Respondent, Chifumu Kingdom Banda SC, opened his defence testifying as RW1. His evidence revealed that he was first elected to Parliament in the year 2006, on the FDD ticket. He served a five year term which expired on 28th July, 2011, following the dissolution of Parliament.

During the five year term, Parliament passed a bill in which funds were allocated to the Ministry of Community Development and Social Services, Gender in Development Division (GIDD), which funds were meant to empower women in all the 150 constituencies in the country. Arising from this, in the year 2010, the GIDD bought 150 hammer mills for distribution to each of the 150 parliamentary constituencies. The Ministry and GIDD did not have funds to transport the hammer mills to the parliamentary constituencies, so they requested the area members of parliament to meet the cost of transporting them to their respective constituencies and present them to women's clubs. Since RW1 was member of parliament for Chasefu constituency, in the year 2010, he was given hammer mills to present to the women's clubs in his constituency. To this end, RW1 drew the Court's attention to document at page 1 of his bundle of documents which he stated confirms that he received hammer mills from government. He also drew the Court's attention to documents at pages 2 and 3 of the same bundle, which he stated were stock records indicating the distribution of the hammer mills.

RW1 then proceeded to comment on the allegations contained in paragraph 5 of the Petition.

As regards paragraph 5(ii)(c) he testified that the allegation was that between 1st August, 2011 and 20th September, 2011, in the course of his campaign he did offer and in fact did distribute hammer mills to Headman Munyukwa in Lubelezi ward, Headman Lusuntha (Smart Mtonga) in Choboli ward, Headman Mutwalo in Susa ward, Headmen Egichikeni and Kamzoole in Magodi ward. RW1 denied that he donated a hammer mill to Headman Munyukwa and stated that he presented it to Kangobe women's clubs of Munyukwa. He testified further that PW6 confirmed the fact that he handed over the hammer mill to a women's club.

With respect to the allegation regarding Headman Lusuntha, RW1 denied having donated a hammer mill to the Headman. He stated further that PW2 confirmed that he did not donate the hammer mill to Headman Lunsuntha. He also denied having given Headman Mutwalo a hammer mill and stated that the Petitioner did not even lead evidence to substantiate the allegation.

With respect to the allegation concerning Headman Egichikeni, he denied having donated a hammer mill to the Headman. He stated further that, the hammer mill was presented to the women's clubs known as Chipulikano, Nkhumbilo, Chigwilizano and Samelani on 5th January, 2011, during recess of parliament. PW5 confirmed this fact in his evidence and also that there is no Headman Egichikeni, *per se*, because, the functions of headman in that area are conducted by Senior Chief Magodi the fifth himself. RW1, also denied giving Headman Kamzoole a hammer mill and stated that no evidence was in fact led by the Petitioner to prove that particular allegation. Further that, the hammer mills were the property of government and that he was merely requested to present them on behalf of government to his constituency.

RW1 proceeded to comment on the allegation contained in paragraph 5(ii)(a) of the petition. He testified that the allegation was that he gave bicycles to Headman Munyukwa in Lubelezi ward, Headman Zinyoni in Kajilime ward

and Headmen Egichikeni and Kamzoole in Magodi ward. He denied the allegations and stated that no evidence was led by the Petitioner or indeed his witnesses to prove the allegations. As regards the allegation about Headman Zinyoni, he testified that PW4 who was brought to prove the allegation, failed to answer, under cross examination, if he physically saw RW1 give a bicycle to the Headman.

As regards, allegation 5(ii)(c) that RW1 donated baby kits to Kanyanga hospital in Lubelezi ward, RW1, denied the allegation and stated that he attended the ceremony at Kanyanga hospital in his individual capacity and as a person who had contributed to the construction of the maternity ward. He testified further that he did not sit at the high table nor did he address the persons present. Further that, he did not donate any baby kits at the ceremony. By way of clarification, he stated that during the Easter period in 2011, as a gesture of good will, he did donate baby clothes to the hospital.

As regards the allegation at paragraph 5(ii)(d) of the petition, that RW1 donated an oxcart to Heandman Lusuntha (Smart Mtonga) of Choboli ward, RW1 testified that the said ox cart was donated to two women's clubs. The ox cart was purchased by government using funds from GIDD. The presentation was made in mid June, 2011, when parliament was in recess, prior to its dissolution on 28th July, 2011, and the beneficiary women's clubs were Lusunthu and Chibinganyama. Further that, PW2 had confirmed that RW1 gave the ox cart to the women's clubs and that it came from government.

As regards the allegation in paragraph 5(i) of the petition that RW1 acting in concert with his agents and members of the MMD, spread malicious and false statements against the Petitioner, RW1, denied the allegation. He testified that prior to filing his answer, he had requested for further and better particulars from the Petitioner to specify the names of the agents and

members of MMD with whom he is alleged to have acted in concert with. These particulars were not furnished and neither did any of the Petitioner's witnesses testify in that respect. The only witness who testified on this allegation was PW3 but he did not supply information as to the names of the agents or MMD members who RW1 allegedly acted in concert with. He stated further that, the allegation that he spread malicious and false statements against the Petitioner had not been proven. This was particularly so, because the picture that PW3 referred to in justifying the allegation did not refer to the Petitioner but rather the then Presidential candidate Michael Sata. He went on to state that the writings on the reverse of the picture were in Nyanja therefore, it could not have been distributed in a Tumbuka speaking area. He ended by stating that if he had spread such malicious and false statements, the Petitioner should have reported him to the conflict management committee or the police.

As regards the allegations in paragraph 5(ii)(e) of the petition that RW1 donated wireless phones in Lubelezi, Khuyu and many other wards, in order to lure the electorate to vote for him, RW1 denied the allegation. In doing so he began by stating that Khuyu is not a ward but a school. He went on to state that he donated pay phones to Khuyu basic school and Munyukwa basic school Parent Teacher Associations (PTA) to enable them raise funds. The donations were not made at public rallies but rather at meetings he had with the Honorary Secretaries of the two schools who happened to be the headmasters and the chairpersons of the PTAs. He ended by stating that in any event the Petitioner did not lead evidence on the said allegations.

RW1 also denied the allegations contained in paragraph 5(iii) of the petition to the effect that he and his agents supplied false information to the Second Respondent resulting in a candidate called Alinet Chavula contesting as Christine Zimba. He stated in this respect that the Petitioner not only failed

to furnish further and better particulars on the allegation but also neglected to lead evidence on it.

Under cross examination RW1's testimony mainly restated his evidence in chief save for the following clarifications; the letter at page 1 of his bundle of documents does not specifically say that he would transport the hammer mills to the constituency; the proof that he delivered the hammer mill he collected from the Ministry of Community Development and Social Services on 1st October, 2010 to his constituency on 5th January, 2011 is in his evidence-in-chief and the witnesses he would parade; the evidence tendered by the Petitioner's witnesses proved that he delivered the hammer mills to women's clubs; the constitution of Zambia grants every Zambian the freedom of association, there is therefore nothing wrong in Headman Munyukwa being a member and trustee of FDD; he was not aware if Headman Munyukwa campaigned on his behalf; and a parliamentary candidate contests a parliamentary seat in his own name and not as an appendage to the party or as a proxy of his leader. The campaign, of such candidate, is based on his own projects and his reputation, therefore, any malicious attacks against his leader do not affect him.

RW1 concluded by stating the following; the elections in Chasefu constituency were conducted within the provisions of the Electoral Code of Conduct; there were no failings on the part of the Second Respondent in the conduct of the elections; the Second Respondent did not campaign on his behalf or give him any preferential treatment; he did not act in concert with the Second Respondent or any of its agents in any illegal activity as alleged by the Petitioner; and he therefore agreed with the Petitioner's testimony that there were no electoral malpractices conducted by the Second Respondent.

In re-examination, RW1 restated to whom the hammer mills were presented and the dates they were presented. Further that, a specific request was made to the members of parliament by the Ministry of Community Development and Social Services to transport the hammer mills on its behalf to the constituencies.

RW2 was Ruth Banda, a nurse by profession and sister-in-charge of the maternity department at Kanyanga hospital. She testified that on 3rd September, 2011, Chawezi house of the hospital was due to be officially opened. She described it as a 42 roomed house for mothers awaiting delivery whose construction had been funded by donors from Italy and the CDF.

RW2 went on to testify on the persons that attended the ceremony. She stated, in this respect, that the guest of honor was Mulumuzana for Emusa who was representing Chief Magodi the fifth, two representatives of the donors from Italy and Father Andrew Chenjelani on behalf of Bishop Sumaile from Chipata Diocese, as Chief Speaker. In terms of the order of business on the day, the first speaker was Sister Jacquelin Vachet who gave an introduction of the guests and the event. She was followed by the guest of honor, Mulumuzana for Emusa who highlighted developmental projects in the areas. He was followed by a representative of the Italian donors and Father Andrew Chenjelani. The latter gave a background to the project and what the missionaries intended doing for the centre. He also declared the house officially open by cutting the ribbon. The final speaker was Fordson Nyirenda, a retired clinical officer, who gave a vote of thanks. There was an opening and closing prayer as well and the First Respondent was in attendance and he sat on a bench two rows behind her. Further that, the First Respondent did not address the meeting nor did he donate any baby clothing and that he did not stay at the function long.

Under cross examination RW2 testified that the First Respondent had contributed to the construction of the house, hence his being invited to attend the function. She stated further that, the First Respondent was acknowledged, along with others in the speeches, as contributors to the construction of the house. She went on to state that the ceremony was held during the campaign period. She ended by testifying that there was an altercation between Sister Jaqualin Vachet and the Petitioner. This was a threat by the Petitioner to the effect that if the sister allowed the First Respondent to attend the function, PF would retaliate. For this reason, the First Respondent was prompted to leave early.

In re-examination RW2 testified that the altercation was before the commencement of the ceremony and that the First Respondent was not present at that time.

RW3 was Paul M'seteka of Lundazi's Dunda compound, a journalist by profession at Chikaya Community radio station. He testified that on 3rd September, 2011, he was assigned to cover the ceremony to mark the official opening of Chawezi house at Kanyanga hospital. When he arrived, he met the Petitioner who informed him that he did not want the First Respondent to attend the ceremony because he would use it as a means of wooing votes. Further that, the presence of the First Respondent was bound to make people think that he sponsored the construction of the house. He went on to state that when the ceremony began, initially there was a prayer given by a Mr. Nyirongo which was followed by a speech by Sister Jaqualin Vachet. This was followed by a speech by Mulumuzana of Emusa on behalf of Chief Magodi the fifth.

As regards the role played by the First Respondent, RW3 testified that he did not give a speech or donate any baby clothes. The First Respondent did not even stand in the arena or sit at the high table.

In cross examination RW3 testified that the source of the funds for construction of the house was mentioned and that he learned that it was from well wishers in Italy and the CDF. The First Respondent's name was not mentioned as one of the persons who contributed to the construction of the house.

RW4 was Jane Nyirongo, a farmer of Kambenene village, in Chief Magodi's area, and a former councilor for Kajilime ward. She began her testimony by stating that on 15th September, 2011, she, the First Respondent and one Bakili Zulu the FDD district chairman attended a rally at Khulikuli, one of the polling districts. Her attendance was based on the fact that she was a candidate for the local government elections.

In terms of the speeches at the rally, RW4 testified that she spoke first then Bakili Zulu spoke second. The First Respondent was the last speaker and he talked about developmental issues, by highlighting development programmes he had initiated and what he intended doing in future. She went on to deny that the First Respondent circulated the offensive picture in the Petitioner's bundle of documents which she stated she was seeing for the first time. She stated, in this respect, that at the rally they had in their possession pictures of herself and the First Respondent which they circulated. She also denied that the First Respondent made any allegations to the effect that the Petitioner is a homosexual.

RW4, went on to state that after the meeting at Khulikuli, they went to Magonde, in Kajilime ward which is part of Kambeteka polling district. They were scheduled to hold a rally there but that they did not hold it on account of their late arrival. The people they were supposed to address had left but a few of them returned after seeing them arrive and they merely exchanged greetings with them. Since this was her area, she proposed to the First

Respondent that they should tour the one by four class room block and two teachers' houses constructed from the CDF. The First Respondent inspected the school in the company of the community teachers.

During the tour of the school, the teachers at the community school requested the First Respondent to donate roofing sheets and cement to enable them complete construction of the school. The First Respondent in response undertook to continue with the project once he was re-elected. The teachers also requested for bicycles for their use and money from the CDF to cater for their welfare. She went on to deny that the First Respondent gave Headman Zinyoni K50,000.00 for purposes of his collecting a bicycle.

In cross examination RW4 testified that she was with the First Respondent at all material times at Khulikuli and that he did not distribute the offensive picture produced in the Petitioner's bundle of documents. She stated further that the offensive picture does not affect the Petitioner.

As regards the allegation of donation of bicycles, in denying the allegation, RW4 testified that they did not carry any bicycles in the First Respondent's vehicle nor did the vehicle have a roof carrier to place the bicycles on.

In re-examination, RW4 restated that the First Respondent did not distribute the offensive picture at the rally at Khulikuli.

RW5 was Robert Ganizani Mvuma a farmer at Lusuntha border post and an FDD candidate in the local government elections. He testified that on 20th July, 2011, the First Respondent and his group went to Lusuntha to present an ox cart to two women's clubs. These clubs were Tiganizepo and Lusuntha women's clubs. At the handover ceremony the First Respondent stated that he was presenting the ox cart on behalf of government as area member of parliament. He also requested the clubs to take proper care of the ox cart. Following the presentation, the First Respondent went back to the Boma and

collected a hammer mill which he presented to the women's clubs at Mpikamalaza.

RW5 testified further that he was in the company of the First Respondent when these presentations were being made. At Mpikamalaza the First Respondent informed the gathering that he was presenting the hammer mill on behalf of government. There were a number of Headmen present at the presentation and that Headman Egumbeni Kachindila gave a vote of thanks. He also stated that the initials GRZ are inscribed on the hammer mill.

RW5, proceeded to testify that on 5th January, 2011, he was in the company of the First Respondent when he went to Head man Egichikeni's area to present a hammer mill to four women's clubs. At the presentation the First Respondent informed the gathering that he had been sent by the government to present the hammer mill and he urged them to use it well. He denied that the First Respondent solicited for votes during the presentation.

In cross examination, RW5 stated that he was a member of FDD and part of the First Respondent's campaign team. Further that, he supported the First Respondent in his bid to recontest the Chasefu seat. He went on to deny that the presentation of the ox cart was made on 1st August, 2011 and insisted that it was on 20th July, 2011. Further that, the First Respondent was not re-elected on account of the hammer mills he presented.

In re-examination RW5, testified that the First Respondent won in forty eight out of the forty nine polling stations in Chasefu constituency.

RW6 was Scout Bakili Zulu a peasant farmer of Savya village in chief Kapichila. His testimony highlighted how the First Respondent presented an ox cart at Lusuntha and hammer mill at Mpikamalaza to women's clubs. It

also highlighted how the First Respondent told the persons gathered at the presentations that the ox cart and hammer mill were donated by government and he urged them to keep them well.

RW6 went on to testify that he travelled with the First Respondent to Kanyanga hospital to attend the ceremony for the opening of the new maternity ward. He stated that there were speeches given by various people at the ceremony but that the First Respondent did not make a speech. Further that, the First Respondent did not make any donations in the form of baby clothes.

As regards the rally at Khulikuli, he stated that he travelled with the First Respondent to attend it. At the rally, RW4 gave the first speech, then he spoke second and introduced the First Respondent who gave the last speech. He denied the allegation that malicious statements were made against the Petitioner or that the offensive picture in the Petitioner's bundle of documents was distributed.

RW6 went on to testify that in June or July, 2011, he was in the company of the First Respondent when he presented a hammer mill to women's clubs at Gomani village in Munyukwa's area. At the presentation the First Respondent told the gathering that the hammer mill was from government and that he had been sent as area member of parliament to present it. The First Respondent did not solicit for votes at the presentation and the campaigns had not yet started.

In cross examination he stated that he was with the First Respondent at all material times at Khulikuli and did not see him distribute the offensive picture at page 1 of the Petitioner's bundle of documents. He also confirmed that he was a member of FDD and supported what the party stood for. He went on to clarify that when he went to Kanyanga hospital with the First

Respondent, he merely escorted him following the invitation from the hospital. Further that he escorted the First Respondent in his capacity as member of FDD, when he went to present the hammermill.

The First Respondent proceeded to close his defence. After the close of the First Respondent's defence, the Second Respondent did not call any witnesses.

At the close of the hearing the parties filed submissions by 13th January, 2012 pursuant to my directive.

In the Petitioner's final submission, Mr. S. Simwanza began by restating the contents of the petition and the evidence of the witnesses. He went on to argue in respect of the offensive picture in the Petitioner's bundle of documents, that in politics a malicious statement made about a political leader affects his followers such as members of parliament and councillors. I was therefore urged to take judicial notice of this fact. As regards the dates when the hammermills were delivered, counsel argued that the Petitioner's witnesses had all confirmed that it was during the campaign period. I was, in this respect, urged to take judicial notice of the fact that many rural dwellers such as the Petitioner's witnesses are not literate and thus may not know the gregorian calendar. Hence their failure to recount the actual dates when the events complained of occurred. It was argued that they may however refer to time using periods before a major event such as an election. He also urged me take judicial notice of the fact that the First Respondent received high votes in areas where he distributed hammermills as opposed to those in which he did not.

Counsel went on to argue that Headman Munyukwa's membership to FDD as ward Trustee contravenes the Electoral Code of Conduct. It was argued that regulation 7(i) prevents Headmen and Chiefs from influencing their subjects

to vote for a particular candidate. He ended his submission by arguing that from the totality of the evidence, the Petitioner had proved his case to the required standard as set by the case of ***Mabenga -VS- Wina and another (1)***.

In his submission, the First Respondent began by analysing the pleadings filed by the Petitioner. It was argued that the Petitioner failed to provide further and better particulars in respect of some of the allegations which was a fatal omission rendering the allegation unproven. Further that, pursuant to the order of this Court dated 22nd December, 2011, paragraphs 5(iii) and 5(iv) of the petition were struck out for want of furnishing further and better particulars.

The First Respondent then proceeded to highlight the paragraphs that had no support of evidence as such not proven. He argued in this respect that paragraphs 5(ii)(a) and 5(ii)(c) of the petition which alleged that he distributed bicycles and donated hammer mills to Headmen Munyukwa (Lubelezi ward), Lusuntha (Smart Mtonga) (Chaboli ward) and Egichkeni and Kamzoole in Magodi ward should be dismissed as no evidence had been led. As regards the allegation that he donated an ox cart to Headman Lusuntha, the First Respondent argued that PW2 and RW5 who led evidence on this issue testified that the First Respondent presented the ox cart to women's clubs. He argued further that there was overwhelming evidence to show that the ox cart came from government and that he merely presented it to the women's clubs as area member of parliament. On the allegation that he donated wireless phones to Khuyu school and Munyukwa Basic School, it was argued that no evidence was led to prove the said allegation. This fact notwithstanding, he had given a satisfactory response in his answer which indicated that he donated the said phones to the two schools' PTAs. He argued, in this respect, that the donation was not in violation of the electoral laws on the ground that it was a philanthropic and charitable

action. In articulating the said argument, counsel drew my attention to the case of ***Lewanika and others -VS- Chiluba (2)*** and ***Halsbury's Laws of England 4th edition***.

The First Respondent then proceeded to highlight what he termed paragraphs in the petition that were contentious. He argued in this respect that paragraph 5(i) that alleged that he had spread false and malicious statements was not specific for want of further and better particulars. Further that, there was a conflict in the dates in that in the petition the dates indicated that the alleged statements were made between 1st August, 2011 and 20th September, 2011 whilst in the further and better particulars, the dates indicated were between 15th August and 20th September, 2011. It was also argued that the evidence of PW3 on this issue was questionable because he testified that the First Respondent gave him a picture of two men kissing but that he did not give a copy to a Mr. Munthali who he went to the meeting with. The First Respondent urged me to accept the evidence of RW4 and RW6 instead. He argued further that, in any event the said picture related to the then Presidential candidate Michael Sata and not the Petitioner.

The First Respondent went on to make arguments in respect of paragraph 5(ii)(a) which alleged that he had donated a bicycle to Headman Zinyoni of Kajilime ward. It was argued that PW4 who testified on this issue stated under cross examination that he did not see the First Respondent handover the bicycle to Headman Zinyoni.

In his concluding arguments the First Respondent drew my attention to Section 93(1) of the ***Electoral Act*** pursuant to which the petition was presented. He set out the grounds upon which an election of a candidate as a member of the National Assembly may be rendered void, and concluded

that non of the grounds had been proved by the Petitioner to warrant rendering his election to the National Assembly void.

In the Second Respondent's submissions, counsel for the Second Respondent Mr. N. Yalenga and Mr. P. Mulenga began by arguing that since the Petitioner had no case against the Second Respondent, this petition cannot be sustained. They argued that, for an election to be declared void, the petitioner must prove in respect of the Second Respondent that in the conduct of the elections there was non compliance with the provisions of the Act or that an officer of the Second Respondent breach his or her duty. The non compliance with the Act or the beach by an officer of the Second Respondent must be such that it affects the outcome of the elections. In articulating the foregoing argument counsel drew my attention to Section 93 of the **Electoral Act**. It was argued further that the pleadings and the evidence do not reveal any malpractice on the part of the Second Respondent or its officers. There is therefore no cause of action established against the Second Respondent.

I have considered the Petition and answers filed herein and the evidence tendered by the witnesses. I will begin the determination of this action by determining the claim against the Second Respondent because it is fairly straight forward. By paragraph 5 and the prayer under (ii) of the petition, the Petitioner has alleged that illegal practice was committed by the Returning Officer and other agents which affected the result of the elections. The Returning Officer and the agents are representatives of the Second Respondent and as such the allegations leveled against them are directed at the Second Respondent. These allegations have not been particularized or specified in the petition nor was evidence led to support or prove them. To the contrary, the Petitioner testified under cross examination that there were no electoral malpractices perpetrated by the Second Respondent. This, in my considered view, proves that from inception the Petitioner had no claim

against the Second Respondent and therefore no basis for instituting proceedings against it. I therefore agree with the submission by counsel for the Second Respondent that the Petitioner had no cause of action against the Second Respondent and I accordingly dismiss this action as it relates to the Second Respondent, with costs.

I now turn to determine the claim against the First Respondent. The Petitioner has set out the allegations against the First Respondent in the Petition under paragraph 5 which should be read with the further and better particulars of claim filed on 1st December, 2011. He has however, not stated in the petition whether the same are corrupt practices, illegal practices or indeed election offences. But he does state in his testimony that the actions of the First Respondent amount to bribery. This falls under section 79(i)(c) of the **Electoral Act** which states as follows;

“Any person who corruptly either directly or indirectly by oneself or any other person -

...

(c) Makes any gift, loan, offer, promise, procurement or agreement to or for any person in order to induced the person to procure or to endeavor to procure the return of any candidate at any election or the vote of any voter at any election;

...

shall be guilty of an offence of bribery.”

The allegations of bribery in the petition are those that allege that the First Respondent gave gifts to Headmen in the form of hammer mills, an oxcart and bicycles for purposes of inducing voters to vote for him.

The Petitioner also alleges that the First Respondent published malicious and false statements against him. This is contained in paragraph 5(i) of the

petition as read with paragraph 1 of the further and better particulars. This allegation falls under the provisions of Section 83(2) of the ***Electoral Act*** which states as follows;

“Any person who, before or during an election publishes any false statement of fact in relation to the personal character or conduct of a candidate in that election shall be guilty of an illegal practice, unless that person can show that that person had reasonable grounds for believing, and did believe, the statement to be true.”

(The underlining is the Court’s for emphasis only).

Having stated the law applicable to the major allegations advanced by the Petitioner, I now turn to determine the allegations.

The first allegation made by the petitioner is under paragraph 5(i) of the petition as read with paragraph 1 of the further and better particulars of claim. It is alleged that between 1st August and 20th September, 2011, the First Respondent and his agents, at a public rally at Kajilime spread malicious and false statements against the Petitioner. It was alleged that the statement alleged that the Petitioner is from pro-legalization of homosexuality, elderly persons would be killed and that war would break out in Zambia. In support of the said allegation PW3 testified that the First Respondent distributed pictures at Khulikuli School which depicted two men kissing. He stated further that this gave him the impression that he should not vote for the Petitioner and the then Presidential candidate Michael Sata.

The picture that is in issue which PW3 referred to, is the only document in the Petitioner’s bundle of documents. It depicts two men engaged in a kissing posture. On top of the image of the two men kissing is the statement “*This is Sata’s change*”, whilst at the bottom the question posed is; “*Is this*

the change you want?" On the reverse side of the picture, there is a statement in Nyanja which translated into English calls upon all to denounce marriage between persons of the same sex. The picture makes no mention of the Petitioner nor does the question or the statements thereon refer to him. I therefore find that the picture does not in any way refer to the personal character or conduct of the Petitioner to warrant its circulation to be an offence in accordance with section 83(2) of the **Electoral Act**. The said section requires the publication complained of to refer to the personal character or conduct of the candidate complaining not to the president of the party under whose auspices he contested. Having so found, I reject the argument by counsel for the Petitioner to the effect that allegations made against a Presidential candidate have an impact on his followers. Further, I also have difficulty accepting PW3's testimony that the First Respondent distributed the said picture either to him or anyone else at the said school. My doubt arises from the demeanour of PW3 which I found to be questionable. This is because he gave contradictory evidence as to the distribution of the picture. In the initial part of his testimony he stated that he could not remember if anyone else received the picture and then as the record will show, at the prompting of the Court, he stated that the First Respondent distributed the picture to other people at the rally. On the other hand the evidence of the First Respondent, RW4 and RW6 on this issue was not shaken under cross examination and their demeanors were unquestionable. They testified, in no uncertain terms that, the First Respondent did not distribute the offensive picture and that what he and RW4 had were pictures of themselves.

I also had difficulties accepting the evidence that the picture was circulated at all because the allegations in the Petition are that the First Respondent spread false statements as opposed to circulating malicious or false material in the form of a picture. The production of the picture was clearly an afterthought on the part of the Petitioner which had the effect of

contradicting the petition to the extent I have highlighted in the preceding sentence. The ill fate of this allegation is compounded further by the fact that no evidence was led to prove the other part of the allegation to the effect that elderly persons would be killed and war would break out in the country. There is also a contradiction between the dates when the said false and malicious statements are alleged to have been made. On the one hand, the petition states that it was between 1st August and 20th September, 2011, whilst the further and better particulars state that it was between 15th and 20th September, 2011. These contradictions, in my considered view, weaken the Petitioner's case further.

I therefore find that the Petitioner has failed to prove allegation 5(i) of the petition as read with paragraph 1 of the further and better particulars of claim and I accordingly dismiss it.

The next allegation is under paragraph 5(ii) and it relates to the bribery accusations. Allegation 5(ii)(a) of the said paragraph as reads with paragraph 2 of the further and better particulars of claim alleges that between 1st August, 2011 and 20th September, 2011 the First Respondent in the course of his campaign offered and distributed bicycles to Headman Munyukwa of Lubelezi ward, Headman Ziyoni in kajilime ward and Headmen Egichikeni and Kamzoole in Magodi ward. As the First Respondent quite rightly argued, there was no evidence led by the Petitioner to prove these allegations. This is despite the Petitioner stating in paragraph 2 of the further and better particulars of claim that he would call witnesses to testify. The only evidence that was led that bore the semblance of lending credence to the allegation was that of PW4. However, his evidence and demeanor were questionable because he was wavery in cross examination when responding to the question posed by the First Respondent, with respect to, whether or not he actually saw the First Respondent physically hand over the bicycle to the Head man. Therefore, the allegation under paragraph 5(ii)(a)

of the Petition as read with paragraph 2 of the further and better particulars also fails and I accordingly dismiss it.

The next allegation that falls for consideration is the one under paragraph 5(ii)(b) in the Petition. This paragraph is to be read with paragraph 3 of the further and better particulars of claim. It alleges that the First Respondent donated more than 100 baby kits to Kanyanga hospital in Lubelezi ward between 1st August, 2011 and 20th September, 2011, in the course of his campaign. In support of the said allegation the Petitioner led evidence of PW3 who testified that he and other village Headmen were invited to Kanyanga hospital to witness the opening of the maternity wing. He testified further that upon his arrival he noticed a heap of babies' clothes on the ground which the First Respondent donated. He went on to testify that the First Respondent urged the gathering to vote for him. In response, the First Respondent stated that he attended the official opening of the Kanyanga hospital maternity ward in his personal capacity as a person who had contributed to its construction through the CDF. This followed an invitation extended to him by the hospital staff. Further that he did not make a speech at the function or indeed donate any baby clothes. His evidence was confirmed by RW2 and RW6 who stated that the First Respondent merely attended as a guest and that he did not make a speech or donate any baby clothing.

I have already stated in the earlier part of this judgment that I questioned the demeanor of PW3. It was questionable even on this allegation. His evidence on the donation of the baby kits was not clear and unequivocal as he did not state that he actually saw the First Respondent physically make the donation. His evidence was merely that upon his arrival at the ceremony he noticed a heap of baby clothes on the ground donated by the First Respondent which Sister Jacquelin Vachet took charge of. On the other hand the First Respondent's evidence was clear as to the purpose of his being at

the function. This is the case with the evidence of RW2 and RW6 who testified, *inter alia*, that the First Respondent did not make any donation. I therefore find that the Petitioner has failed to prove this allegation and I accordingly dismiss it.

The next allegation is the one under paragraph 5(ii)(c) of the Petition as read with paragraph 4 of the further and better particulars. The allegation was that the First Respondent donated hammer mills to Headman Muyukwa in Lubelezi ward, Headman Lusuntha (Smart Mtonga) in Choboli ward, Headman Mutwalo in Susa ward and Headmen Egichikeni and Kamzoole in Magodi ward. The witnesses that testified on behalf of the Petitioner under this allegation were the Petitioner himself, PW2, PW5 and PW6. Apart from the Petitioner, the three witnesses testified that the donation of the hammer mills was made by the First Respondent to the women's clubs in the respective areas and not the Headmen as alleged in the petition and evidence of PW1. This evidence was in line with the testimony of First Respondent who stated further that he was making the donations on behalf of government in pursuit of its policy of empowering women. This was confirmed by document at page 1 of the First Respondent's bundle of documents which is a letter to the First Respondent from Office of President dated 29th December, 2011. Further, RW5 and RW6 testified that they were present during the presentation and that the presentation was made on behalf of government. This evidence by the First Respondent and the other witnesses negates the allegation of bribery. I have arrived at the foregoing finding because in my considered view, bribery as defined by Section 79(i)(c) of the **Electoral Act** amounts to making donations for personal gain i.e. luring of voters. The distribution of the hammer mills by the First Respondent to the women's clubs was in furtherance or pursuit of government's policy of empowering women. He was acting, and for the lack of a better word, as a messenger for government and was not on a personal mission. Further, the allegation on the donations to Headman Mutwalo and

Headman Kamzoole are also unmeritorious as no evidence was led on them. I hasten to add that the onus placed on the Petitioner to prove the allegation of bribery was in the manner it was endorsed in the Petition. That is to say that, the First Respondent did offer and distribute hammer mills and an ox cart to Head men for purposes of luring voters. The evidence of the Petitioner's witnesses was that the presentation was made by the First Respondent to women's clubs and not Headmen. The minute this evidence was led, the allegation failed. Further, the damage done to the Petitioner's case by the said evidence cannot be repaired by arguments advanced by counsel for the Petitioner to the effect that the First Respondent received more votes in areas where he donated hammer mills. The said argument lacks the support of evidence and cannot therefore be accepted. To the contrary in re-examination, RW5 stated that the First Respondent won in all but one of the forty nine polling stations in the constituency and not just in areas where the alleged donations were made. I therefore find no merit in the allegation and dismiss it.

The next allegation that falls for consideration is at paragraph 5(ii)(d) of the Petition as read with paragraph 5 of the further and better particulars. It alleges that the First Respondent donated an ox-cart to Headman Lusuntha (Smart Mtonga) of Choboli ward, between 1st August and 20th September, 2011. In support of the said allegation PW2 testified that the First Respondent did not hand over the ox cart to the Headman but rather women's clubs. The said evidence clearly contradicts the allegation and is in line with the testimony of the First Respondent and RW5 on the issue. Further, the First Respondent stated that the ox cart was given to him by the Ministry of Community Development and Social Services on 9th June, 2011, for purposes of delivery to his constituency. In support of the said testimony he referred me to document at page 4 of his bundle of documents. This demonstrates that the First Respondent was merely delivering the ox cart to his constituency on behalf of government. In view of the said evidence, I find that the allegation lacks merit and I accordingly dismiss it.

The next allegation that falls for consideration is the one under paragraph 5(ii)(e) of the petition. It alleges that the First Respondent donated wireless phones in Lubelezi, Khuyu and many other wards. There was no evidence led on this allegation by the Petitioner as such it is unsubstantiated. For this reason I will not consider the reply given by the First Respondent in his answer and evidence to the allegation because there is no obligation placed upon him by the law to disprove the allegation. I accordingly find no merit in the allegation and dismiss it.

The last allegations are under paragraphs 5(iii) and (iv) of the petition. The former alleges that on nomination day the First Respondent and his agents supplied false information to the Second Respondent causing a candidate by the name of Alinet Chavula to contest as Christine Zimba. Whilst the latter, alleges that on or about 20th September, 2011, the First Respondent and his agents through the then ruling party, MMD, did engage in ferrying of the electorate to the polling station and distributed food to the electorate. The Petitioner alleged that the said acts were meant to lure voters to vote for the First Respondent.

In the further and better particulars, under paragraphs 7 and 8, the Petitioner stated that he would call witnesses from the areas where the alleged acts took place to testify. He did not call such witnesses and neither did he himself lead evidence in his testimony on the said allegations. The allegations are therefore with no support of evidence nor proven and I accordingly dismiss them.

Arising from what I have stated in the preceding paragraphs, I find that the Petitioner's claim in its entirety lacks merit. In arriving at the foregoing findings I am alive to the fact that the onus rests on the Petitioner to prove his claim and the standard of proof that he shoulders for purposes of proving

his claim. The case of **Lewanika and others -VS- Chiluba (2)** at page 80 states in this respect as follows;

“Parliamentary election Petitions are required to be proven to a standard higher than on a mere balance of probabilities.”

In a later case of **L.A. Mumba -VS- P.W.M. Daka (3)** the Supreme Court restated the standard thus;

“We hasten to say that on the basis of the overwhelming evidence before the learned trial judge the required standard of proof he had in mind and which the Respondent had to satisfy was that falling between the civil standard of on a balance of probabilities and the criminal standard of proof of beyond reasonable doubt.”

It is clear from the foregoing authorities that the standard of proof required in election petitions is above the ordinary balance of probabilities applicable in other civil matters. The evidence led by the Petitioner as demonstrated in my findings, falls far short of the said standard.

I am also alive to the provisions of Section 93(2) of the **Electoral Act** which set out the grounds upon which the election of a candidate may be rendered void. The section states in this respect as follows;

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

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

(b) ...

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

(d) ...”

(The underlining is the Court's for emphasis only).

The crucial portion of this section is the one I have underlined which is to the effect that the election of a candidate will be nullified if his conducts or acts resulted in the majority of voters being prevented from voting for a candidate of their choice. My expectation from the Petitioner in this respect, was that he would lead evidence that would show an analysis of the number of persons in the areas where the alleged corrupt and or illegal practices by the First Respondent took place. This analysis would then be weighed against the margin or difference between the votes polled by the First Respondent and those of the Petitioner, in an effort to show that the First Respondent received the majority of his votes in the areas where the acts took place. This would lead to the logical conclusion that the requirements of Section 93(2)(a) of the **Electoral Act** had been satisfied. The Petitioner however, led no such evidence, which leave me to conclude that the First Respondent had a landslide victory, given the number of votes he polled. Further, there is no basis upon which I can invoke the provisions of Section 93(2) of the **Electoral Act**.

By way of conclusion, the Petitioner's claim fails and I accordingly dismiss it with costs. The same are to be agreed in default, taxed.

Leave to appeal is granted.

J35

Delivered on the 20th day of January, 2012.

Nigel K. Mutuna
HIGH COURT JUDGE