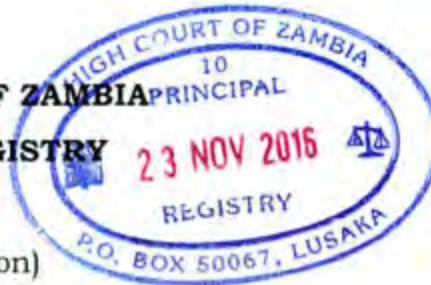


IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
 (Constitutional Jurisdiction)



2016/ HP/EP003

**IN THE MATTER OF : A PARLIAMENTARY ELECTION PETITION
 FOR MWEMBESHI CONSTITUENCY SITUATED
 IN THE SHIBUYUNJI DISTRICT OF THE
 LUSAKA PROVINCE OF THE REPUBLIC OF
 ZAMBIA**

AND

**IN THE MATTER OF : SECTION 79(1) (C) OF THE ELECTORAL ACT
 NO 12 OF 2006**

**IN THE MATTER OF : ARTICLE 51 OF THE CONSTITUTION OF
 ZAMBIA**

**IN THE MATTER OF : SECTION 88 OF THE ELECTORAL ACT NO 12
 OF 2006**

AND

**IN THE MATTER OF : SECTION 93 OF THE ELECTORAL ACT No 12
 OF 2006**

AND

**IN THE MATTER OF : SECTION 94 AND 95 OF THE ELECTORAL
 ACT No. 12 OF 2006**

B E T W E E N:

AUSTIN C. MILAMBO

PETITIONER

AND

MACHILA JAMBA

RESPONDENT

BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN OPEN COURT THIS 23rd DAY OF NOVEMBER, 2016.

For the Petitioner : *Mr. B.C. Mutale and Mr. E. Banda, BCM Legal Practitioners*

For the Respondent : *Mr. C.M. Besa and Mr. P. Chileshe, Besa Legal Practitioners*

J U D G M E N T

CASES REFERRED TO:

1. *Nsofu V The People* 1975 ZR 287
2. *Josephat Mlewa V Eric Wightman* 1995 – 1997 ZR 171
3. *Akashambatwa Mbikusita Lewanika, Hichuunga Evaristo Kambaila, Dean Namulya Mungomba, Sebastian Saizi Zulu, Jenifer Mwaba V Frederick Jacob Titus Chiluba* 1998 ZR 79
4. *Michael Mabenga V Sikota Wina and Others* SCZ No 15 of 2003
5. *L.A. Mumba V P.M.W Daka* Appeal No 58 of 2003
6. *C and S Investments Limited, Ace Car Hire Limited, and Sunday Maluba V The Attorney General* 2004 ZR 216
7. *Anderson Kambela Mazoka and Others V L.P. Mwanawasa and others* 2005 ZR 138
8. *Attorney General V Roy Clarke* 2008 Vol 1 ZR 38
9. *Stardy Mwale V Michael Katambo* 2011/HP/EP50
10. *Newton Malwa V Lucky Mulusa* Appeal Appeal No 125/2012
11. *Robert Taundi Chiseke V Richard Timba Simbula and Attorney General (Interested Party)* Appeal No 223 of 2012
12. *Reuben Mtolo Phiri V Lameck Mangani* SCZ No 2 of 2013
13. *Denis Nkoma V The People* Appeal No 32 of 2015

LEGISLATION AND OTHER WORKS REFERRED TO:

- 1. The Constitution of Zambia Act No 2 of 2016**
- 2. The Electoral Process Act No 35 of 2016**
- 3. Blacks Law Dictionary**

This is a petition filed by the Petitioner on 25th August 2016, challenging the election of Machila Jamba, the Respondent herein, as Member of Parliament for Mwembeshi constituency in the Shibuyunji District of the Lusaka Province of the Republic of Zambia, in the 11th August 2016 elections.

According to the petition, five candidates contested the Mwembeshi parliamentary seat namely, the Petitioner, Austin C. Milambo of the United Party for National Development (UPND), the Respondent Machila Jamba as an independent candidate, Pamela Chipongwe of the Patriotic Front (PF), Shansengo Henry of the Rainbow Party, and Mwangala Oliver of the Forum for Democracy and Development (FDD).

The gist of the petition is that the campaigns were characterized by corruption by the Respondent, contrary to Section 79 (1) (c) of the Electoral Act No 12 of 2006, and that the Respondent canvassed and solicited for votes at Nampundwe Polling Station, on the polling day, contrary to Section 88 of the Electoral Act, No 12 Of 2006. Further that at the time of the elections, the Respondent was not qualified to be elected pursuant to the provisions of Article 51 of the Constitution of Zambia.

According to the petition filed, the particulars of contravention of Section 79 (1) (c) of the Electoral Act No 12 of 2006 are that;

- i. *During the campaign period, the Respondent while holding rallies in the constituency promised the electorate that he was going to drill boreholes to ensure that the people had safe drinking water.*
- ii. *Between the 23rd and 31st July 2016, the Respondent sank three boreholes in the constituency and promised the people of the area that if they voted for him, he was going to sink more boreholes.*

The particulars relating to canvassing and soliciting in contravention of Section 88 of the Electoral Act, No 12 of 2006 are outlined in the petition as;

- i. *On the 11th August 2016, the polling day, the Respondent at Nampundwe polling station was flashing his symbol “**an axe**”, to the electorate that had gathered to vote.*
- ii. *The Respondent also solicited for votes from people who had gathered to vote at Nampundwe polling station on the actual polling day.*

With regard to the Respondent being disqualified from being elected in terms of Article 51 of the Constitution of Zambia the particulars allege that;

- i. *The Respondent was a member of the United Party for National Development (UPND), and only decided to contest the elections as an independent candidate after the UPND declined to adopt him as its candidate.*
- ii. *At the time the Respondent contested the elections as an independent candidate, he was still a member of the UPND, as he has never resigned from the party.*
- iii. *The Respondent in his campaigns told the people of the area that he was contesting the election as an independent candidate but was a member of the UPND and throughout his campaigns he used the UPND regalia, symbol and campaigned for the UPND presidential candidate and made the people to believe that the party president wanted him to be the member of parliament for the area and that the UPND did not approve that the Petitioner contests the election on the UPND ticket.*
- iv. *On 7th June 2016 the Petitioner reported the activities of the Respondent to the District Conflict Resolution Management Committee constituted by the Electoral Commission of Zambia.*
- v. *That the Respondent is still a member of the UPND, and as such he was disqualified from contesting the seat as an independent candidate.*

The petition shows the results for the Mwembeshi Parliamentary Elections as follows:

1. Machila Jamba, independent candidate – 9, 631 votes

2. Austin Milambo, UPND – 8, 432 votes
3. Chipongwe Pamela, PF – 1, 597 votes
4. Shansengo Henry, Rainbow Party – 359 votes
5. Mwangala Oliver, FDD – 82 votes

The Petitioner prays that the following reliefs be granted:

- 1. A declaration that the election was null and void ab initio*
- 2. A declaration that the Respondent was not duly elected*
- 3. Costs of and incidental to the Petition*
- 4. Such declaration and orders as the court may deem fit*

The affidavit verifying the election petition repeated the allegations in the petition, and as such there is no need for me to recount that evidence.

The Respondent filed an answer to the petition on 16th September 2016, wherein he denied the allegations in the petition. His answer in response to the allegation in paragraph 3 of the petition was that he was qualified to take part in the election, and that at no time did he or his agents engage in any corrupt activities, and neither did he canvass or solicit for votes at Nampundwe polling station.

With regard to the allegations that he had contravened Section 79 (1) of the Electoral Act No 12 of 2006, the Respondent in his answer stated in paragraph 3 that he admitted that during the rallies in the constituency, he had promised the electorate that he would sink

boreholes to ensure that they had safe and clean drinking water, which was within his right to do so, once he became Member of Parliament.

He however denied having sunk any boreholes in the constituency between 23rd and 31st July 2016 or at all. His defence in the said paragraph was that the boreholes were in fact sunk by UMCIL, a subsidiary of Trade Kings, as part of its corporate social responsibility, as it is carrying out mining activities in the area. The Respondent denied being a shareholder in the said company, or having any power or control over its affairs.

As regards the allegations that in terms of Article 51 of the Constitution he was not qualified to stand in the elections as an independent candidate, as he was a member of the UPND when he filed his nomination, the Respondent's response in paragraph 4 of the answer was that he was a member of the UPND until that party declined to adopt him as its parliamentary candidate for Mwembeshi, on account of the fact that he did not have a membership card.

He also states in the said paragraph that even if he was assumed to have been a member of the UPND, he was deemed to have resigned from that party, when he filed his nomination as an independent candidate on 31st May, 2016, which act served as sufficient notice of his resignation. That the date of his deemed resignation was in excess of two months before the general elections, which were held on 11th August, 2016.

His response to paragraph 3(iv) of the petition was that he denied still being a member of the UPND, when he contested the general election, as at the time the candidates were being adopted by the UPND, he could not be so adopted, as he did not have a membership card to show proof of membership.

The Respondent admitted that he did tell the electorate that he was standing as an independent candidate, but was campaigning for the UPND presidential candidate. He denied having told the electorate during his campaigns that he was still a UPND member, and he further denied having used the UPND symbol and regalia during his campaigns.

The Respondent in his answer admitted that the allegation that he was using the UPND party symbol and regalia was in fact dealt with by Conflict Management Committee, and was dismissed. That meeting had culminated in an MOU being signed to the effect that such complaint would not be the basis of any court petition in future.

The Respondent in response to the allegation that he solicited and canvassed for votes in contravention of Section 88 of the Electoral Act No 12 of 2006, stated in his answer that he denied the allegation, and that this allegation conflicted with paragraph 3(v) of the petition. He also denied the allegation in paragraph 3(ix) of the petition, stating that he was a registered voter at Nampundwe Polling Station, and that as a candidate he was within his rights to visit all the polling stations to check on the voting process, and

never did he solicit for votes as alleged, and that the police officers were stationed at all the polling stations to ensure law and order.

He admitted the results as tabulated in paragraph 3(x) of the petition, stating that they were a true reflection of the electorates' will, and were not as a result of any corrupt activities or in contravention of the Electoral Act.

At the hearing the Petitioner testified and called eight witnesses, while the Respondent also testified and called four witnesses.

In his testimony the Petitioner testified that he is a member of the UPND party and he was adopted by that party to contest the Parliamentary seat in Mwembeshi in the August 11, 2016 elections. It was his evidence that the process of adoption was transparent, as it started from the grassroots, then passed through the ward officials as well as the constituency, district, province and the national management.

PW1 told the court that apart from himself there were three other applicants, namely, the Respondent Jamba Machila, Alfred Mwendo Shaputu and Edward Kasoko. It was stated that the adoption was done on 29th May 2016, and he was given an adoption certificate in Chilanga, after being adopted.

With regard to the number of Parliamentary candidates that contested the seat, PW1 testified that he stood on the UPND ticket, while Respondent stood as an independent candidate, and the Patriotic Front fielded Pamela Chipongwe as its candidate, while the

Rainbow Party had Henry Shansengo as its candidate and the Forum for Democracy and Development (FDD) candidate was Oliver Mwangala.

The evidence of PW1 on the conduct of the campaigns in the constituency in the run up to the elections was that no violence was reported. However the UPND was faced with a problem after the adoption process in the party ended, as the Respondent did not settle well with that. The UPND leadership wanted to instill unity in the party, and so the Petitioner and Respondent were called to a round table meeting on 30th May 2016, a day before the filing of the nominations on 31st May 2016. That meeting concluded that there could be only one candidate for a given party at a given time, and therefore the Petitioner would remain as the only candidate for the UPND in Mwembeshi constituency. He stated that the Respondent agreed to this resolution.

Further in his testimony the Petitioner stated that he even offered an olive branch to the Respondent by asking him to be his campaign manager and he agreed, and that the two had embraced in the presence of management, and thereafter left. The next day the Petitioner filed his nomination papers and as he walked out of the nomination centre, he found a group of people dressed in UPND regalia raising the party symbol which is a hand.

Upon enquiry the Petitioner was told that the Respondent was filing in his nominations as an independent candidate. The Petitioner testified that from then on the Respondent started behaving as if he

had been adopted as a candidate by the UPND, and he used the party regalia as well the party's colours, red and yellow. The evidence of the Petitioner was that when the party could not stomach what was happening they reported to the District Conflict Management Committee managed by the Electoral Commission of Zambia (ECZ), which met them on 10th June 2016.

The Petitioner stated that the complaint raised pertained to the use of the UPND symbol, the President of the UPND, the UPND party colours and its campaign songs in the constituency. The meeting resolved in the presence of both the Petitioner and Respondent that each candidate standing would use their own distinct symbols, and their own party colours. However despite that resolution the Respondent continued using the UPND symbol and party regalia resulting in the voters in the constituency being confused as they thought that the UPND was fielding two candidates in the Parliamentary election, in that constituency.

Further to illustrate the confusion, the Petitioner testified that on 24th July 2016 there were two funerals in the constituency, one being for headman Mungwala and the other for the constituency chairman Abel Makala. He passed through the funeral house for headman Mungwala and to his shock he saw the Respondent with his people wearing berets that had the UPND symbol on the front, and t-shirts with the Respondent's portrait on them, and the UPND overall on the bottom. The burial took place on 24th July 2016.

With reference to pages 21, 22, 23, 27 and 28 of the Petitioner's bundle of documents, the Petitioner stated that these documents were the photographs that were taken of the Respondent's team at the said funeral. He testified that the photographs on pages 21 and 22 show the people dressed in the berets with the UPND symbol and the t-shirts with the Respondent's portrait on them, and there is a vehicle with the portrait of the UPND president, and the people are wearing the UPND work suit.

The photograph on page 23 shows a person wearing a red t-shirt but with the Respondent's portrait on it, and the Petitioner testified that this was despite the District Conflict Management Committee resolving that red was one of the colours for the UPND. He identified the documents on pages 29 and 30 as the agreement that was signed at the said meeting in June 2016.

He stated that on page 27 is a portrait of the UPND president with a poster for the Respondent, as the parliamentary candidate. It was explained that the UPND used to place the presidential candidate's portrait alongside that of the parliamentary candidate and the councilor, on billboards for the campaigns. However the Respondent would remove the Petitioner's portrait and put his next to the presidential candidate's, and where he failed to remove the poster, he would place his over the Petitioner's. The photograph on page 28 of the Petitioner's bundle of documents shows this.

Further in his evidence the Petitioner stated that the Respondent in his campaigns went round telling the electorate that he was still a

UPND member, despite standing as an independent candidate, and that he was standing as an independent candidate as the president of the UPND, Hakainde Hichilema had told him to do so. This he said brought about confusion as people in the constituency wondered how the party could field two parliamentary candidates.

He stated that he was at pains to explain as the electorate in the constituency knew the Respondent as a UPND member and when he said he was a UPND member standing as an independent candidate, they took that as gospel truth.

The Petitioner's evidence was also that the Respondent told the electorate that he would use the UPND manifesto in his campaigns as it was the best in the country, and that he would work with Hakainde Hichilema, and they believed him.

With regard to the assertion that the Respondent was still a UPND member at the time, the Petitioner told the court that the membership of the Respondent was in the public domain, and he should have left the party publicly to avoid confusion.

Further in support of the allegation that the Respondent was still a UPND member, the Petitioner stated that the Respondent whilst in the company of his first campaign manager Charles Muyunda and his 2nd campaign manager Jailos Mwiabi appeared on a radio programme on 5th August, 2016 on Mazabuka Radio station which captures Chilanga, Mwembeshi and Nangoma constituencies.

During that radio programme which the Petitioner personally listened to from his car, he heard Charles Muyunda say they were full time UPND members and were campaigning for candidates standing on the UPND ticket, except for the member of parliament as he stole the adoption certificate from the Respondent. Jailos Mwiya added that they were not UPND rebels as even the blood that flows in them is UPND.

It was stated that callers phoned into that programme, and one who identified himself as Abraham asked the Respondent to stop hiding behind the UPND veil, and that he was confusing the voters. He was asked to stop using the UPND manifesto and name.

As evidence in support of the corruption allegations, the Petitioner's testimony was that boreholes were sunk in Nampundwe in the Mwembeshi constituency during the campaign period from 16th May 2016 and 18:00 hours on 10th August 2016, as announced by the Electoral Commission of Zambia.

He stated that the first borehole was paid for on 27th May 2016 and it was sunk on 8th June 2016 by Kariba Drilling and Exploration Company Limited. The Petitioner stated that there was a receipt evidencing the payment, and on that document the payee is Trade Kings Limited but it has the Respondent's phone number on it. He told the Court that the Respondent is a UPND member and they chat and exchange messages, so he personally knows his number. Additionally the person who had signed on the receipt on Trade Kings' behalf was the Respondent. The Petitioner explained that he

recognized the Respondent's signature as he has been doing things with him in the UPND. Further that at the District Conflict Management Committee meeting, the Respondent had signed the resolution, and the signature on that document is the same as that on the receipt. Thus there is a link between the Respondent and the first borehole.

The evidence of the Petitioner as regards the Respondent's source of income was that he is self – employed, running a land surveying firm. On the other three boreholes, the evidence given by the Petitioner was that they were sunk between 23rd July 2016 and 31st July 2016 in Nampundwe East. He testified that there is a company called Universal Mining and Chemical Industries Limited (UMCIL), a subsidiary of Trade Kings, which company acquired land in Nampundwe East displacing a number of the local residents there.

This resulted in a committee being formed in the community to see to it that Trade Kings through its' subsidiary UMCIL mitigates the loss by identifying the needs of the displaced community, whose catchment area is three villages, being Mululuma, Nkotami and Sichibangu. The Petitioner's evidence was that the first borehole was sunk outside the three villages' catchment area.

He took the court through the procedure of how projects to mitigate the loss are embarked on. To this effect he testified that when a need is identified, a request form is raised by the Committee, and then taken to Trade Kings through UMCIL, and the works executed. The Petitioner told the court that the Committee was formed before

he became Member of Parliament, when Edward Kasoko was the Member of Parliament.

The Petitioner also testified that the three boreholes sunk just before the elections did not follow the procedure outlined above as the Committee did not make any request to that effect. Further there was no sitting Councilor or Member of Parliament to help identify the needy areas, but haphazardly the three boreholes were sunk, within the twinkling of an eye.

His evidence was that the sinking of the boreholes induced the voting pattern in Nampundwe ward as shown by the records as Mwembeshi constituency has ten wards, and the Respondent won convincingly in Nampundwe ward, by a large margin.

In cross examination the Petitioner admitted that people in the constituency knew him as the Member of Parliament for UPND. He maintained that the Respondent had told the electorate in the area that the President of the UPND, Hakainde Hichilema had told him to stand as an independent candidate. He testified in cross examination that the Respondent's campaign symbol was an axe but that he used that and the UPND symbol of a hand.

The Petitioner agreed that a symbol identifies a candidate when voting, but stated that both the symbol and name in this case identified the candidate. His view was that the symbol to some extent helps a voter to elect a candidate. He conceded that if the Respondent used the UPND symbol he did not in any way help him

to have votes. The Respondent also conceded that there were no minutes of the District Conflict Management meeting.

Further in cross examination, the Petitioner maintained that the photograph at page 21 of the bundle of documents was taken at the funeral on 24th July 2016 by his driver Kenneth Mukuka, as he was in the car when the driver stepped out of the car to take them. He told the court that they had parked the car ten to fifteen metres from the funeral house.

He denied that the photograph could have been taken in 2014, as at that time the Respondent did not aspire to be a Member of Parliament. He also denied that the photograph was taken in May. While stating that he did not know when the photograph on page 23 was taken, the Petitioner maintained that it was taken during the campaign period.

With regard to the picture on page 27 of his bundle of documents, the Petitioner's testimony was that the Respondent's poster has the colours orange and blue, and that they could be not confused with the UPND colours. As regards the posters on page 28, the Petitioner stated that a person he could not specifically state sent it to him via Whats Up. He stated that the picture shows that his portrait was removed and the Respondents' placed on top of it.

He conceded that it was possible to put the posters in the manner they were appearing on page 27 on a table, and then photograph them. He denied attending any of the Respondent's rallies and

stated that he heard what he had said from the Respondent's agents and other people. He only heard him when he spoke on the radio programme saying that he would use the UPND manifesto and would work with HH.

The Petitioner's view was that it was wrong for an independent candidate to say that he would work with a certain president. As regards how a person is identified as a UPND member, the Petitioner testified that it was through membership cards and positions held in the party. He told the court that the Respondent was the Trustee for the UPND in Munali Constituency.

He also testified that he did not have the Respondent's membership card with him, and he did not keep the register of members, so he did not know if the UPND kept one. He denied that the Respondent did not have a membership card. The Petitioner conceded that there was a water problem in Mwembeshi constituency, and that a number of boreholes had been sunk in the area using the Constituency Development Fund (CDF), by the Council. It was his evidence that Members of Parliament do not sink boreholes using their resources, but lobby for development.

He maintained that he lost votes terribly in the areas where the four boreholes were sunk. That the Respondent won convincingly in two out of the ten wards. The Petitioner agreed that Trade Kings paid for the four boreholes that were sunk, and it was his testimony that he does not know if the Respondent sits on the Trade Kings board.

With regard to the receipt on page 19 of his bundle of documents, the Petitioner testified that the person whose phone number and signature appear on it had a hand in the sinking of the borehole.

The second witness was Jimmy Muntanga. His evidence was that he is the Secretary for the UPND party in Mwembeshi constituency. He also stated that he sat on the panel that interviewed the persons who had applied to be adopted as the parliamentary candidate in the August 2016 general elections. Those who had applied for nomination were named as Edward Kasoko, Machila Jamba the now Respondent, Mwenda Shaputu and the now Petitioner, Austin Chiyobeka Milambo.

PW2 told the court that as Secretary, he received the four applications and the applicants were interviewed by the Constituency Committee, and a report was submitted to the District Committee. From there the report was taken to the National Committee, where the Petitioner was adopted as the candidate to stand in the elections. The three other candidates agreed to support the Petitioner's candidature. However when the date for the filing of the parliamentary candidates came, PW2 saw the Respondent file his nominations as an independent candidate.

He stated that he did not receive communication to the effect that the Respondent had left the UPND to stand as an independent candidate. PW2 explained that as a Committee, they receive letters through himself as Secretary from persons wishing to leave the

party, stating so. That in this case the Respondent did not send a resignation letter.

In cross examination he testified that they have membership registers from the branch level going forward. He stated that he had not come to court with the register, and he told the court that card renewal for members is done annually. His evidence was that the Respondent's party card number was 542.

With regard to how persons become members of the UPND, PW2 in cross examination testified that some people apply to become members in writing, while others join at rallies, and they are accepted. PW2 also stated that during his tenure no members left the UPND for the PF.

In relation to the procedure adopted when one wishes to resign from the party, PW2's evidence was that senior members of the party must put their resignation in writing, while ordinary members can just leave. He named the party constitution as the document that stipulates this, but that he had not come with it.

PW2 told the court that the Respondent did not resign from the UPND when he filed his nomination as an independent candidate, and that PW2 had not seen his application to join as a member of the UPND in the constituency.

Benon Mweene Chintumbwa was the third witness. He is the Director of Programmes at Mazabuka Radio. It was his testimony that the radio station signed a contract with the Respondent to run

radio advertisements and programmes. That the said radio adverts were run towards the elections.

He further testified that the Respondent had appeared on a radio programme with Charles Muyunda who introduced himself as the Respondent's first campaign manager, and Jailos Muyabi who said that he was the second campaign manager. PW3 stated that his colleague Miyanda had recorded the radio programme which was aired on 5th August 2016 in Tonga language. This witness laid foundation to authenticate the recording stating that the recording equipment is one hundred percent reliable and that the recordings are stored on a laptop in the studio in adobe form, as required by the Independent Broadcasting Corporation.

Further that recordings in adobe cannot easily be manipulated. That the above procedure was followed when recording the Respondent's programme. The recording was marked as 'ID1' for identification, and produced as 'P1'.

This witness was not cross examined.

The fourth witness was Prashandh Sama the Operations Manager at Kariba Drilling and Exploration Company Limited. He told the Court that he had been working at the company for one and a half years. He named his duties as overseeing the operations of the company, sending workers to sites to do works, issuing quotations for the sinking of boreholes, and issuing receipts for any payments made.

Further in his testimony, PW4 testified that in order to ease communication with clients, they have their phone numbers on the quotations and receipts, and that the clients' numbers are also put on them, as standard procedure. On how records of the transactions are kept, it was his evidence that he keeps the quotations and receipt books. He identified receipt number 58 which was issued to Trade Kings in the amount of K14, 000.00 for the drilling of a borehole and a hand pump. It was marked 'ID2' and produced as 'P2'.

PW4 stated that the person who went to pay asked him to issue the receipt in the name of Trade Kings, and that this was on 27th May 2016. The person had signed the receipt and put his phone number on the said receipt. He also testified that the borehole was sunk ten to twelve kilometres from Mwembeshi bridge, after one turns left. His Project Manager and Drilling Operator went there.

This witness was also not cross examined.

Simon Evans Mayaba was PW5. He explained that he is the Secretary of Sanje Hill Community, which was formed by the people affected by the Iron Ore Mine being developed by Universal Mining and Chemical Industries Limited (UMCIL), in 2008. It was his testimony that a Memorandum of Understanding (MOU) was signed between UMCIL and Sanje Hill Community on 4th April 2008, in which the Sanje Hill Community was to spearhead the re-settlement action plan, where people were moved from the mining area to other areas by Trade Kings, and the impact of such re-

settlement is mitigated by identifying the needs in the settled areas and thereafter proposals being made to Trade Kings to implement the needs. He named the needs as water, access roads among others.

To support this evidence PW5 identified the document on pages 1-7 of the Petitioners Bundle of Documents, as the said MOU, and he also identified the special Power of Attorney on pages 8 -10 of the said bundle of documents, as giving him authority to represent the community in the re-settlement implementation.

With regard to the procedure adopted when making proposals for the implementation of the identified needs, PW5's evidence was that they raise project proposals naming the area of the project, the project name, the reason for the need, and the Project Secretary or Chairperson signs it. Once the projects are implemented, records are kept. He identified the documents on pages 13-16 of the Petitioner's bundle of documents, as some of the project proposals.

This witness told the Court that between May and 11th August 2016, no project proposals were raised, as the raising of such is done hand in hand with the Ward Councilor, and the area Member of Parliament. He stated that the two are consulted, as what is implemented are community projects, and the two are part of the MOU. It was further his evidence, that to his knowledge Trade Kings did not carry out any projects in the area during the campaign period, as the Committee did not approve any projects during the period.

He however stated that after August 2016 they had proposed the sinking of a borehole in Nkotami village, where two of the boreholes sunk by Trade Kings were not functioning. He identified the document on page 16 of the Petitioner's bundle of documents as the stated project proposal, stating that it was raised on 31st August 2016. He also referred to Clause B of the MOU testifying that the said paragraph makes reference to active partnership when resettling the Sanje Hill Community.

The witness in cross examination maintained that between May and August 2016, no projects were implemented under the MOU, as such projects are done hand in hand with the area Member of Parliament.

When referred to page 16 of the Petitioner's bundle of documents, PW5 stated that project approval is done at the community level, and that the Member of Parliament is involved after the Councilor goes through it. He stated that the Member of Parliament is part of the Committee, but does not sign any project proposal. PW5 further in cross examination testified that the Respondent as area Member of Parliament is supposed to be part of the project, and he was aware of the particular project that had been raised.

PW5 acknowledged that three boreholes were sunk outside the project, but that to his knowledge they were not sunk by Trade Kings. He further stated that as a Committee they had not sat down with Trade Kings to find out if they had sank the said boreholes.

It was also his testimony that Clause D (1) of the MOU bares UMCIL from carrying out any projects outside the MOU. PW5 stated that the borehole was sunk outside the MOU catchment area, but the other three were sunk within the catchment area. He could not tell who sank them.

Joel Kaabo, the Branch Chairperson for Chiabo Polling Station for the UPND was PW6. He testified that during the period May to 11th August 2016 he was in the village and that it was the campaign period. He stated that there were campaign meetings that were held during the period, and that at one of those said meetings on 19th July 2016, the Respondent asked the people what they wanted to be done, and the people had responded that they wanted water. That the Respondent told them that he would sort out the water problem, and that shortly after that the witness heard that boreholes had been sunk in Mululuma and Sichibangu areas. He told the Court that the community was happy as the Respondent had delivered, and they voted for him.

PW6 in cross examination stated that at the rally held on 19th July 2016 many people from three villages attended. He maintained that the Respondent told the people at the rally that he would look into the issue of the boreholes. He had no knowledge of who paid for the boreholes.

The seventh witness Hikabonga Kalinda testified that he belongs to the UPND party, and is a registered voter in Mwembeshi constituency. It was his evidence that in the run up to the 11th

August 2016 elections, he used to organize UPND meetings in the constituency, and represent the party at such meetings. He told the Court that on 10th June 2016 he was present at the District Conflict Management Committee meeting, which was chaired by the Council Secretary and the District Administrative Secretary.

He named the agenda of the meeting as being to discuss regalia, how to differentiate it, use of the UPND symbols and posters as well as those for other parties, use of campaign songs to be sung by the UPND, and the other parties thereby differentiating them. PW7 stated that the meeting resolved that any independent candidates should not use the UPND symbol, the UPND colours red and yellow, and the UPND campaign song sung by Nsabata.

He identified the document on pages 29-30 of the Petitioner's bundle of documents, as the resolution of the meeting that was reached, and that he had signed as a witness for the Complainant. It was PW7's evidence that despite the resolution, the other party continued using the UPND song, the UPND regalia and praising the UPND wherever they went.

By way of example PW7 referred to the burial of Headman Mungwala on 24th July 2016, stating that the Respondent had gone there with a vehicle carrying people dressed in regalia similar to that of the UPND, with the exception being only the t-shirt that had the Respondent's portrait on it. He testified that this brought about confusion as people gathered there did not know if they were UPND supporters or not. He also stated that the said youths dressed in

that regalia said they were UPND supporters, only that they did not support the Petitioner.

In cross examination PW7 testified that only one candidate was fielded by the UPND to contest as Member of Parliament in the constituency. He stated that the people that wore the UPND attire actually supported the independent candidate, but that no UPND supporters supported the Respondent, who was the independent candidate.

When referred to page 21 of the Petitioner's bundle of documents, PW7 stated that he did not know who owned the vehicle, and that he did not know anyone in the picture. It was his evidence that he knows Mwiinga who had contested the election for Councilor, but he would not agree that the vehicle belonged to the said Mwiinga, because of the attire that the people who disembarked from that vehicle were dressed in. PW7 further testified in cross examination that Mr Mwiinga campaigned for the Petitioner, and he denied that the people in the picture were UPND cadres wearing UPND regalia and the Respondent's t-shirts.

The eighth witness was Namachila Shanjala. He told the Court that on 3rd August 2016 between 21:00 hours and 22:00 hours, the Respondent and his people had passed around the village telling the people that there would be a meeting the next day at Lungwele grounds. The next day the witness went to buy fuel for his motorbike and found the Respondent holding a campaign rally. He decided to attend that meeting and found Mrs Mukamba speaking.

Thereafter the Respondent stood up to speak saying "*Zambia Forward*" using the UPND symbol. That the Respondent told the people that he was full time UPND, except that the Petitioner had stolen his certificate. The Respondent also told the people that the UPND President Hakainde Hichilema, had sent him to stand as an independent candidate.

PW8 testified that he also attended the second rally held by the Respondent at Lungwele grounds. At that meeting Affason Shapowe spoke first and he opened by stating the UPND slogan "*Zambia Forward*", and stating that they were UPND supporters. That the Respondent also stated the UPND slogan when he stood up to speak, and asked the people to vote for the UPND candidates for all the positions except Member of Parliament, as the Petitioner had stolen his certificate. He concluded that he was surprised that the UPND was fielding two candidates.

PW8 in cross examination stated that he had voted in the August 2016 elections, but he did not know the Respondent's symbol. He stated that he only knew the forward symbol, being the hand, and not the axe symbol. He further told the Court that he looked for the hand symbol on the ballot paper when he went to vote. He could not tell if Mrs Mukamba is a UPND member but stated that she was speaking about the UPND.

The testimony of PW8 was that he went alone to the rally but he recognized a number of people who were present there. He named some of the people as Headman Jolola, Headman Malyango and

Affasson Shapowe. PW8 stated that he did not know if Affasson Shapowe is a UPND member, but that he had talked about the UPND at the rally.

The last witness called by the Petitioner was Beston Imbila. His evidence was that between May and 11th August 2016 he was campaigning in Mwembeshi constituency for the UPND. He explained that the UPND had two candidates because the Respondent stood as an independent using the UPND symbol, and all other UPND campaign items. The other candidate was the Petitioner.

This witness told the Court that on 11th August 2016 he was monitoring the elections in three Wards namely Sala, Makombe and Nampundwe. At Nampundwe polling station he found the Respondent between 08:00 and 10:00 hours giving the people the symbol of an axe asking the people to vote on it. He reported this to a police officer Zulu who was there, and after the police officer spoke to the Respondent, the Respondent left the polling station.

In cross examination PW9 told the court that he is a member of the UPND, and that he campaigned for the Petitioner. He also told the Court that the Respondent was a UPND member who decided to stand as an independent candidate. However when campaigning the Respondent used the UPND symbol. It was only on the voting day that he asked the people to vote on the axe, adding that he only saw the axe symbol on the voting day.

It was further his evidence that he did not report the Respondent to a police station but to a police officer who was at the polling station, so he had did not have a police report. He did not know which police station, Zulu the police officer is based at, and whether there was any police report that was issued after he reported the matter. He stated that he was alone on a motor bike when he went to Nampundwe polling station.

The first witness for the Respondent, was the Respondent himself. He testified that he was approached by the UPND in 2015 and was asked to stand as their area Member of Parliament in Mwembeshi constituency. By May 2016, he was a household name in the constituency, and he was invited to make an application, to be nominated as Member of Parliament. He told the Chairperson then, the late Mr Makala that he had never paid any subscription to the party, and he did not have a membership card. He was just a follower of the party.

The Respondent testified that as he was a household name, and every political party wanted to poach him, the UPND said they would know what to do about his membership card, and how they would place him.

Therefore during the time that the Respondent filled in the application for adoption as the candidate for the party as Member of Parliament, the Chairperson told him to indicate that he was the Trustee for Munali Constituency, as he would liase with that constituency to give him that position. The Chairperson had also

told him to indicate the card number as 542 on the application form, and that he would give him that card number.

However the membership card was not brought and he was not taken to Munali constituency. When the time for nominations came on 13th May 2016, the Respondent, the Petitioner, Edward Kasoko and Mwendo Shaputu were the contenders. He stated that during the primary elections there were two hundred delegates, that is twenty from each of the ten wards in the constituency, and a secret ballot was conducted. The Respondent emerged winner in that election polling 114 votes, while the Petitioner was second with 60 votes, Mwenda Shaputu got 21 votes and the last person was Edward Kasoko with 4 votes.

It was stated that the Petitioner congratulated the Respondent calling him a real man. Then there were interviews that were conducted at the constituency level, where the Chairperson Edward Mundia asked the Respondent to show proof that he was a UPND member. As he did not have a card and could not produce it, the Chairperson told him that he could not be picked as the UPND candidate, but that they would proceed with his name up to the national management stage.

Further in his testimony the Respondent testified that when the time came between 13th and 31st May 2016 for adoption certificates authorizing persons to stand as candidates under the UPND in Chilanga to be given, the Respondent was not called to attend, as he was not their member. He just heard that the Petitioner was

given the adoption certificate for the party to stand as its' Member of Parliament for Mwembeshi constituency.

The next day Mrs Sylvia Masebo called him and asked him to Rhodespark to go and collect the adoption certificate. There he found Mr Sejani who informed him that they would meet the President of the party in the evening so that he could be given the adoption certificate. He stated that they went to the Party President's home that evening, and he was with Mr Sejani, the Party President's wife, Ms Masebo, the Petitioner and Mrs Maureen Mwanawasa, but the Party President did not come out to meet him. Mr Sejani then explained that as a party, the UPND was not obliged to explain why the Respondent had been left out of the adoptions, as he was not a member of the party. The Petitioner at that gathering had bragged that he was popular, and he would win as the Respondent was only popular in Nampundwe.

At that point the Respondent told the Petitioner that they would meet on the ground. The meeting pleaded with him to rescind his decision but he told them that he had spent a lot on the campaigns, and he needed to consult his family on whether he should stand. When he reached home he found six Rosa minibuses full of people from Mwembeshi who asked him not to retreat, and that he should file his candidature as an independent candidate. That is how he filed his nomination in Nampundwe on 31st May 2016, as an independent candidate.

The Respondent told the court that he did not need the authority of anyone for him to file his nomination as an independent candidate as he has never been a member of the UPND, but just a follower of the party. His testimony was that from 31st May 2016 he spent ten days re-organizing himself away from the constituency. He went to Livingstone as he had ordered 5000 red t-shirts, and needed to exchange them.

He made a sample t-shirt which he displayed in court. The t-shirt is red with his portrait on the left hand side, and a hoe on the right hand side. His name and the constituency appear on the bottom of the t-shirt. The Respondent explained that for trial purposes, his daughter was given a t-shirt to try on and she took photographs wearing the said t-shirt and posted it on Whats Up. That the photograph was taken in her bedroom in Foxdale, which has pink walls. He identified the picture on page 23 of the Petitioner's bundle of documents as the said photograph.

After that he was called to the District Conflict Management Committee meeting, as the UPND had lodged a complaint through the Petitioner that he was using the UPND regalia as well as its' symbol in his campaigns. At the meeting he told the Petitioner that he was a cry baby who rushes to his father even before being beaten, as he had never been to Mwembeshi to campaign. He testified that he could not have been campaigning as he had only two agents there, and no structures in the constituency. He stated

that people in the constituency just supported him as they liked him.

He confirmed that the meeting resolved that he uses the colour orange as an independent candidate. It was also resolved that he stops using the symbol of a hoe, as it is a UNIP symbol. Reference was made to page 27 of the Petitioner's bundle of documents, and the Respondent stated that the colours on his campaign document are orange, blue and white. He explained that he exchanged the red t-shirts with orange ones, with a lady on Nkwazi Road.

That after that meeting he hit the road to campaign and three musicians composed three songs for him, which kept Mwembeshi on the rocks. His t-shirts were a hot cake everywhere. The Respondent stated that three quarters of the people in Mwembeshi are illiterate and cannot read, as it is a rural community. They rely on symbols when voting. He further stated that Mwembeshi constituency has been in the hands of the UPND for the past fifteen years, therefore the symbol of the hand which it uses, is known even by three year old children.

It was stated that the Respondent in his campaigns had said that the hand business would end, and they would use an axe to cut the Petitioner, as a way of change.

With reference to pages 21 and 22 of the Petitioner's bundle of documents, the Respondent's evidence was that the people on those photographs are wearing his t-shirts, as they were hot cakes. That

in fact it was the UPND that were using his t-shirts as the Petitioner did not distribute any of his t-shirts to the UPND members. He stated that even the vehicle on page 21 of the Petitioner's bundle of documents belongs to the Councilor.

With regard to the allegation that he sank three boreholes during the campaign period, the Respondent denied this. He testified that he does not know them, and he did not sink any boreholes in Mwembeshi constituency during the period. With reference to page 19 of the Petitioner's bundle of documents, he stated that the borehole for that payment was sunk in Mwembeshi and not Mwembezi, the constituency. He told the Court that the constituency is called Mwembezi, while Mwembeshi is the earth satellite with a river called Mwembeshi.

His further evidence was that the ten kilometres from the junction where the borehole was sunk is Mpamba in Chilanga District, and that the people in Mpamba did not even know that he was standing as Member of Parliament for Mwembezi constituency. He added that Mwembeshi is twenty five kilometers from Mwembeshi bridge.

He ended his evidence by testifying that he polled about 9, 600 votes, while Petitioner got 8, 432 votes followed by Pamela Chipongwe who got 1, 512 votes, then Shansengu who had over 100 votes and last was Mwangala who obtained 82 votes.

In cross examination the Respondent maintained that he has never been a card carrying member of the UPND. He stated that the UPND

gave him a card number, which does not belong to him. He agreed that he filled in the application form for adoption as a Member of Parliament for the UPND, which states that he joined the party in 2010, is the Trustee for Munali Constituency and holds membership card number 542. Further that he declared in paragraph 13 of the form that he would abide by the rules of the selection process, and that if not adopted, he would remain a loyal party member.

His evidence was that he was induced to fill in the document in the manner that it appears by the late Mr Makala, though he had a choice to stand for election on any party's ticket. He maintained that he stayed away from the constituency for ten days after the nominations were filed and that during that period he collected the 5000 red t-shirts he had ordered in March, as he was assured that he would stand on the UPND ticket.

When referred to pages 29 and 30 of the Petitioner's bundle of documents, he agreed that what is reflected on that document as the resolutions of the District Conflict Management Committee meeting of 10th June 2016 is correct. He denied using the UPND regalia and symbol during his campaigns, stating that his symbol was an axe. He stated that the UPND symbol is a raised hand in front, but he denied that he used to raise his hand saying "*cut Milambo*", which was the same as raising the symbol of the hand.

The Respondent maintained that it was not his opinion that three quarters of the people in Mwembeshi are illiterate, as during the

campaigns the people would ask him what his symbol was, as they do not know how to read.

As regards the document on page 19 of the Petitioner's bundle of documents, the Respondent stated that Trade Kings paid for the borehole, and that he was just their agent in delivering the money for payment. He denied working for Trade Kings stating that he does consultancy work for them, as he is a consulting land surveyor. He also denied sitting on the Trade Kings Board, as well as being a shareholder in the company, testifying that he could therefore not decide where they sank the boreholes. He further denied paying for the other three boreholes on behalf of Trade Kings.

When referred to pages 5 and 6 of the Respondent's bundle of documents he stated that he obtained the documents from Trade Kings, as he is the area Member of Parliament. He also testified in cross examination that he became an agent of Trade Kings in 2010, but that he did not disclose so in the answer to the petition. On the delivery of money to sink the borehole to Kariba Drilling and Exploration Company, the Respondent testified that he had delivered the money for the payment as a consultant. He stated that the receipt was issued on 27th May 2016, which was during the campaign period. He agreed that the phone number on the receipt is his. He denied having sank the three boreholes after he had made promises to do so, to the people in the constituency.

He told the court that he does not sink boreholes in the constituency but does land surveys, as he runs a survey firm. The Respondent added that he had worked for Geoquest, Nampundwe Mines and the Ministry of Mines prior to setting up his firm. It was his evidence that UMCIL does not deal in land but is a mining company, and that he has no control over that company's social responsibility projects. He however could not tell if the mine is operational.

When referred to his application for adoption as the parliamentary candidate for the UPND, the Respondent stated that he did not know if the UPND called for adoptions outside the party membership. While agreeing that the Chairperson had taken the application form for him to fill in, the Respondent stated that he had personally paid the application fee. It was his evidence that he was coerced to stand, although no gun was pointed at him. He stated that the people just pleaded with him to stand.

It was further his evidence that he joined the UPND as a follower and not as a card carrying member. He agreed that on the application form he had indicated that he had contributed to the party, but just as a follower. He could not give a figure to state the amount of his contribution, but stated that he had contributed financially to the party during the Presidential by – election in 2015. He also stated that he had sponsored activities in Mwembezhi constituency, although he was not an active member.

His response to pages 21 and 22 of the Petitioner's bundle of documents was that he could not see the make of the vehicle in the picture, but he knew that it belongs to the area Councilor, and has the poster of the UPND presidential candidate Hakainde Hichilema on it. The persons standing by the vehicle are wearing the Respondent's campaign t-shirts and the UPND regalia.

He admitted that he appeared before Radio Mazabuka with his campaign managers, but that he had nothing to do with the UPND after the nominations, even in the face of the radio recording. On the funds he used for the campaigns, the Respondent told the Court that he funded his own campaigns, and he did not ask Trade Kings for any assistance.

The second witness for the Respondent was Eucrid Mwiinga the area Councilor for Nampundwe. He testified that between May and 11th August 2016 he was in the constituency campaigning for the UPND for himself as Councilor, Alfred Shaputu as the Council Chairperson, the Petitioner as the area Member of Parliament and Hakainde Hichilema as the Presidential Candidate. He stated that the Respondent as an independent candidate was an enemy to him.

With regard to the events of 24th July 2016, his testimony was that there were three funerals in the constituency, the first being in his ward Nampundwe, where the Ward Coordinator Mr Mufumbo had a funeral, the second being for the headman in Sala ward, and the last one for the UPND constituency Chairperson.

He stated that he attended the one in Nampundwe first before going to the one in Sala, and that he had used his white Nissan Datsun pick-up vehicle. He identified the vehicle in the photograph on page 21 of the Petitioner's bundle of documents as his vehicle. He explained that when he had reached the funeral house he had found that there was no water there, and he was asked to draw water, as he was the only person who went there with a van.

RW2 stated that the vehicle has the campaign poster for the Presidential candidate for the UPND on it. With regard to the other persons on the picture, he testified that the person trying to close the van is a UPND youth supporter, adding that the person had even helped him when he was filing in his nominations. He also identified the one dressed in a checked shirt as well as the one holding his waist as UPND supporters.

Further in his testimony RW2 told the Court that as a party they have no control over what their supporters wear. He testified that he did not buy any regalia for his supporters. He confirmed that the population in Mwembeshi is illiterate, as their education levels are low being a rural community. On how illiterate voters are assisted for purposes of voting, he testified that they are educated to look out for the candidate's symbol when they go to vote.

It was stated that RW2 did not attend the Respondent's rallies so he did not know his symbol. He did however see the campaign posters that were stuck in the constituency. The witness stated that when adopted he was introduced to the Ward Committee, which left the

party after that except one person, as they had defected from the UPND. RW2 told the Court that he is a die-hard UPND supporter, and that the party had suffered as the Respondent, an independent had won the parliamentary seat.

RW2 in cross examination denied that the Respondent is his blood relative. He maintained that he knew the three people he had identified on page 21 of the Petitioner's bundle of documents, as UPND supporters. He confirmed that two of the people in that picture are wearing the Respondent's campaign t-shirt.

RW2 maintained that the vehicle in the picture is his despite the number plate and make of the vehicle not being visible. It was his testimony that he was unaware that there was a complaint on the sinking of boreholes in the constituency during the campaign period.

Edward Mundia was RW3. He like RW2 testified that during the campaign period he was campaigning in the constituency. He also told the Court that he is the Vice Constituency Chairperson for the UPND in the constituency, and that he sat on the panel that interviewed the four persons who had applied to be adopted as Member of Parliament candidate for the UPND in the constituency.

He named the four as the Petitioner, Respondent, Edward Kasoko and Alfred Mwendo. RW3 stated that the Respondent failed to produce a party card but just gave a card number. Thus after the interviews were done the Committee, pursuant to the UPND rules

which require that one has to renew their membership for three years before they can apply to be adopted as a candidate in the national elections, the Respondent did not qualify for adoption.

He further testified that a second meeting was called which invited twenty people from each of the ten wards as delegates to vote for who to adopt as the parliamentary candidate, and the Respondent won that election. However the Petitioner was the person who was adopted as he met all the requirements that they wanted. He stated that the Respondent was not adopted as he did not have a party card. Despite this RW3 supported him when he filed his candidature as an independent, as that is the person that the people wanted. He stated that he did not want the Petitioner, as he had stayed away from the constituency after he won the election as Member of Parliament in 2011, as he lives in town.

He stated in cross examination that up to the time of the meeting, he was the Chairperson, and that he ceased to be a UPND member after that. When referred to the Respondent's application for adoption, RW3 stated that he did not fill in that application. He agreed that the document shows the Respondent's card number as 542, and that he is Trustee of the party in Munali Constituency.

The witness stated that he left the UPND when the Petitioner was adopted as the parliamentary candidate. He could not recall his party card number, even though he had been a member of the party from Mazoka's time. He further testified in cross examination that he did not consult the Munali Constituency top management over

the Respondent's membership. It was his evidence that previously they were given UPND regalia for campaigns, but not for the August 2011 elections.

He confirmed that the Respondent's symbol was an axe. He denied being the Respondent's agent or that during the campaigns they told the electorate that the Petitioner had stolen the Respondent's adoption certificate. He also stated that there were no campaigns at the Lutherin polling station where he voted from, though the Respondent had passed through there.

He denied that the Respondent had promised to sink boreholes for the community during the campaign rallies, but that he promised to build a hospital. He clarified that such promises to sink boreholes could have been made at rallies that he did not attend. RW3 told the court that he had not come with the UPND rules to court.

Charles Malambo was RW4. He explained that he is the headman of Cholola village. As headman he was not involved in the campaigns as it is not allowed. It was also his testimony that he knows PW8, as he is a visitor in the village. RW4's brother is married to PW8's mother, but that RW4's brother is not PW8's biological father.

It was stated that PW8 was involved in the campaigns for the UPND in the village, and as the village was the meeting place for campaigns, he as headman could not chase those who had gathered for such meetings. He would just be there when the meetings were held. RW4 told the court that he had observed that

the Respondent would start the meetings by saying "*One Zambia, One Nation*", then "*Cut Milambo, Cut Milambo*". That the Respondent would explain that his symbol was an axe, and ask the people to vote for him.

RW4 also confirmed that most of the electorate in his village are illiterate, as only a few have been to school, adding that the illiterate are guided to vote by the symbol of the candidate.

In cross examination he stated that he started voting in 1964, and he is therefore familiar with ballot papers. It was his explanation that a ballot paper has the candidate's name, picture and symbol, therefore a voter can choose to look for a picture or symbol or read all the candidate's details when voting. That where one cannot see the picture of a candidate, the polling agents assist or guide the voter. He testified that if he sees a candidate's face or picture on the ballot paper, then he would know that that is the person that he wants to vote for.

RW5 was Mwenya Nsama a Mining Engineer employed by UMCIL as a Mine Manager. It was his testimony that he joined UMCIL in 2014, and was tasked to re-settle people in the area. He had worked with the Safety Manager Andrew Tembo and Dr Julius Kaoma who liaised with the community. RW5 further testified that his major task was to operationalize the mine, though to date it is not yet operational. On the location of the mine, RW5 stated that it is about forty kilometres west of Lusaka along the Makeni Road, off the Makeni Mall Junction, and is neighbours with Kafue Sugar.

He testified that as they were re-settling one hundred and ten families, they entered into an MOU with the community, as per the terms of the small scale mining licence. He identified the document on pages 1-7 of the Petitioner's bundle of documents as part of the MOU that was signed with the community.

RW5 stated that he knows the Respondent, and that as far as he knows, the Respondent is not a signatory to the MOU that had been signed with the community. He added that as UMCIL they have no relationship with him, though he has a relationship with Trade Kings. He acknowledged that the Respondent does some consultancy works with Trade Kings.

He confirmed that during the campaign period three boreholes were sank in the area, and that prior to that five boreholes were sank. RW5 told the court that the boreholes were sank in the project affected areas namely Nkotami and Mululuma villages. It was his explanation that Mululuma Village is the bigger village, and that towards the end of 2013 or the beginning of 2014 headman Mululuma had passed away, and there was no headman until about six months prior to his testifying.

The new headman Mululuma had complained that of the five boreholes sunk, only a few were in his area, despite it being the biggest. Thus going by the agreement of February 2014, wherein the company had promised to provide water to the community, the company was reminded by headman Mululuma on 20th June 2016 of its promises. A meeting was held which was minuted, and it was

resolved that the boreholes be sunk. The Executive Technical Director Dr Kaoma had directed that Simba Drilling and Exploration be engaged to sink the boreholes, and that is how the three boreholes were sunk, though one was not functional, at the time the witness testified.

The documents on pages 5 and 6 of the Respondent's bundle of documents though not clear were identified as the tax invoices for the borehole payments. The witness in conclusion testified that he was not aware of works done by Kariba Drilling, when referred to the document on page 19 of the Petitioner's bundle of documents.

In cross examination RW5 stated that he was aware of part of the agreement between UMCIL and the community. He testified that the essence of the MOU was for the displaced community to bring up issues that needed to be addressed before UMCIL started operating in the area, as a way of mitigating the impact of the re-location.

He told the court that UMCIL concentrated its' corporate social responsibility on families near Sanje mine, with Nkotami and Mululuma villages being the areas affected by the mining activities. He stated further that the MOU provides that the company liaises with the community through its representatives in carrying out the projects identified. The community raises proposals after meetings are held to discuss the needs.

RW5 agreed that the documents on pages 11- 16 of the Petitioner's bundle of documents were presented for project implementation,

but stated that this was so when there was a liaison office. He stated that the liaison office was dissolved about eight to ten months before he testified. He added that in the absence of the liaison office the community brings its concerns to the company through the headman as the representative, and if such concerns are in line with the MOU or other promises made in meetings, write ups of requests are made.

He also stated that the Respondent as a consultant for Trade Kings rarely interacted with UMCIL, and it was his evidence that he was not aware that the Respondent was the contact person for the drilling of the borehole paid for by Trade Kings. As such he did not know the extent of the relationship between Trade Kings and the Respondent. RW5's testimony was that the community cited the areas for sinking of the boreholes, and that the company just agreed on the number of boreholes to be sunk. In conclusion RW5 stated that he had not brought the minutes of the meeting that sat to agree to sink the three boreholes during the election period, as he was called to testify in a hurry.

I have considered the evidence. Before I go into the issues raised with regard to the substance of the petition, I wish to make an observation on the provisions pursuant to which the petition was made, and which has been raised by the Respondent. The Petitioner relied on the Electoral Act No 12 of 2006, which act was repealed by the Electoral Process Act No 35 of 2016. The Electoral Process Act

No 35 of 2016 was assented to on 6th June, 2016, and is therefore the law applicable to this petition.

The reliance on the provisions of the Electoral Act No 12 of 2006 is not fatal to the petition, as where an Act is repealed, and replaced by another Act of Parliament, effectively transferring the powers that were conferred in the repealed law to the new law, the new law will be the source of power.

This was held so in the case of **C & S INVESTMENTS LIMITED, ACE CAR HIRE LIMITED, SUNDAY MALUBA V THE ATTORNEY GENERAL 2004 ZR 216**, where it was stated that *“if the effect of the repeal, is to resurrect the provisions in substantially the same form in another enactment, such new enactment would in our view, be a legitimate source of power”*.

Further in the case of **REUBEN MTOLO PHIRI V LAMECK MANGANI SCZ No 2 Of 2013** it was stated that; *“we have also looked at the Electoral (Code of Conduct) Regulations, 2006. Statutory Instrument No. 90 of 2006). Under these, the one that prohibits use of: “Government transport or facility for campaign purposes,” is Regulation 7 (1) K. So far, it appears that the learned trial Judge relied on Regulation 7 (1) (L) of Statutory Instrument No. 179 of 1996. We note that Statutory Instruments No. 179 of 1996 and No. 90 of 2006, were revoked. They have been replaced by Statutory Instrument No. 52 of 2011: The Electoral (Code of Conduct) Regulations 2011.*

These are the ones that applied to the 2011 Parliamentary elections. Under these, it is Regulation 21 (K) that prohibits a Parliamentary candidate from using: "Government or parastatal transportation or facilities for campaign purposes". However, we must state here that mere reference to a wrong regulation does not, on its own, affect the trial Court's verdict. No prejudice has been occasioned by the error. The wording of the revoked Regulation and the current one is the same".

A cursory perusal of Section 79 (1) of the Electoral Act No 12 of 2006 relied on by the Petitioner in support of the allegations of corruption, shows that it is the same as Section 81(1) of the Electoral Process Act number 35 of 2016. Section 88 the Electoral Act No 12 of 2006 relied on in support of the allegations of canvassing and soliciting is the same as Section 89 (1) of the Electoral Act No 35 of 2016. Therefore the repealed provisions of the Electoral Act No 12 of 2006 relied on in this petition have been revived in the above sections of the Electoral Process Act, No 35 of 2016.

Article 73 (1) of the Constitution of Zambia Act No 2 of 2016 vests jurisdiction in the High Court to hear matters pertaining to the challenge of the election of a Member of Parliament. Further Section 96 (1) (c) of the Electoral Process Act No 35 of 2016 hereafter referred to as the Act states that the High Court may hear and

determine an election petition filed in relation to a Member of Parliament.

Section 97 of the Act provides for the instances in which an election of a Member of Parliament may be avoided when such is petitioned. It states that;

“(1) An election of a candidate as Member of Parliament, mayor, council chairperson or councilor shall not be questioned except by an election petition presented under this Part.

(2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councilor 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; or

(c) The candidate was at the time of the election a person not qualified or a person disqualified for election.

(3) Despite the provisions of sub section (2), where, upon the trial of an election petition, the High Court or a tribunal finds that a corrupt or illegal practice has been committed by, or with the knowledge and consent or approval of, any agent of the candidate whose election is the subject of such an election petition, and the High Court or a tribunal further finds that such candidate has proved that -

(a) A corrupt practice or illegal practice was not committed by the candidate personally or by that candidate's election agent, or with the knowledge and consent or approval of such candidate or that candidate's election agent;

- (b) Such candidate and that candidate's election agent took all reasonable means to prevent the commission of a corrupt practice or illegal practice at the election; and*
- (c) In all other respects, the election was free from any corrupt practice or illegal practice, declare that the election of the candidate was void.*
- (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".*

Going by the provision, there are three grounds on which an election petition may be voided, namely, firstly where corrupt practices have been proved, secondly where illegal practices are proved, and thirdly where other misconduct has been proved in line with the provision.

With regard to the standard of proof, the case of **AKASHAMBATWA MBIKUSITA LEWANIKI, HICUUNGA, EVARISTO KAMBAILA, DEAN NAMULYA MUNGOMBA, SEBASTIAN SAIZI ZULU, JENNIFER MWABA V. FREDERICK JACOB TITUS CHILUBA 1998 ZR 79** held that:

"Parliamentary election petitions are required to be proved on a standard higher than a mere balance of probability ... the issues raised were to be established to a fairly high degree of convincing clarity".

This standard of proof is higher than the balance of probabilities, which is the standard applicable to civil matters, and lower than the standard of reasonable doubt, which applies to criminal matters. The parties filed submissions which I have taken into account when deciding the allegations.

The first allegation in this petition is that the Respondent engaged in corrupt activities, contrary to Section 81 (1) of the Act. The allegations are that:

- i. During the campaign period, the Respondent while holding rallies in the constituency promised the electorate that he was going to drill boreholes to ensure that the people had safe drinking water.***
- ii. Between the 23rd and 31st July 2016, the Respondent sank three boreholes in the constituency and promised the people of the area that if they voted for him, he was going to sink more boreholes.***

Section 81(1) of the Electoral Process Act provides that;

“A person shall not either directly or indirectly, by oneself or with any other person corruptly –

- a) Give, lend, procure, offer, promise, or agree to give, lend, procure, or offer, any money to a voter or to any other person on behalf of a voter or for the benefit of a voter in order to induce that voter to vote or refrain from voting or corruptly do any such act as aforesaid on account of such voter having voted or refrained from voting at any election;***
- b) Give, lend or procure, offer, promise or agree to give lend. Procure, offer or promise, any money to a voter or for the benefit of a voter or to any other person or on behalf of that person on behalf of any voter or to or for any other person for acting or joining in any procession or demonstration before, during or after any election;***
- c) Make any gift, loan, offer, promise, procurement or agreement to or for the benefit of any person in order to induce 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;***
- d) upon or in consequence of any gift, loan, offer, promise, procurement or agreement, procure or engage, promise or endeavor to procure, the return of any candidate at any election or the vote of any voter at any election;***

- e) advance or pay or cause to be advanced or paid any money to or for the use of any other person with the intent that such money, or any part thereof shall be expended in bribery at any election, or knowingly pay or cause to be paid any money to any person in discharge or re-payment of any money wholly or partially expended in bribery at any election;*
- f) before or during any election, receive or contract for any money or loan for oneself or for any other person for voting or agreeing to vote or refraining or agreeing to refrain from voting at any election;*
- g) after any election, receive any other money on account of any person having voted or refrained from voting or having induced any other person to vote or refrain from voting at any election; or*
- h) convey or transfer or be concerned with the conveyance or transfer of any property, or pay or be concerned with the payment of any money, to any person for the purpose of enabling that person to be registered as a voter, thereby to influence that person's vote at any future election, or pay to or be concerned with the payment of any money on account of any voter for the purpose of inducing that person to vote or refrain from voting".*

The evidence in support of the allegation that the Respondent during his rallies, promised the electorate that he was going to sink boreholes to ensure that people had safe drinking water, was given by PW6. This witness testified that on 19th July 2016 there was a rally that was held, which was attended by people from three villages. That the Respondent had at that gathering told the electorate that boreholes would be sunk. PW6 also testified that shortly after that, boreholes were sunk in Mululuma and Sichibangu areas, and that the community was happy and voted for him.

The Respondent in his defence did not deny that he had told the electorate during the campaigns that he would provide clean water when elected, but denied that the boreholes were sunk after he had promised people in the area that he would do so. He acknowledged that he had made the payment for the borehole on page 19 of the Petitioner's bundle of documents on behalf of Trade Kings. He told the Court that the borehole was sunk in Mpamba which falls under Chilanga constituency, but that the area is twenty five kilometers from Mwembeshi bridge.

The Respondent's witness RW3, Edward Mundia denied that the Respondent had promised the electorate that he would sink the boreholes. When cross examined he conceded that this promise could have been made at rallies that he did not attend. The only witness for the Petitioner who testified in support of this allegation

was PW6. The evidence of this witness was unshaken in cross examination.

RW3 who sought to counter this evidence did concede that the promise to sink boreholes in the area, might have been made at rallies that he did not attend, an indication that he may not have attended the rally at which the statement was made. Further he contradicted the Respondent who in his testimony stated that he did make the promise to the electorate. Thus RW3 did not discredit PW6's evidence in any way. It is therefore my finding that PW6 was a credible witness, and the Respondent did in fact promise the sinking of boreholes in the constituency during the election period.

The evidence of the Petitioner is that following the promise, three boreholes were sunk. It is also not in dispute that the borehole that was paid for as evidenced on page 19 of the Petitioner's bundle of documents was sunk. PW4 testified that the payment was made on behalf of Trade Kings for the borehole, which he said was sunk about ten to twelve kilometers from Mwembeshi Bridge, when one turns left.

The Respondent did not dispute that he paid the money for the sinking of that borehole, but stated that he did so as an agent, as he does consultancy work for Trade Kings. He denied having had anything to do with the sinking of the other boreholes in the constituency during the campaign period, stating that Trade Kings had done so, and he only obtained the documents on pages 5 and 6

of the Respondent's bundle of documents, which are proof of the payment for the said boreholes, as Member of Parliament.

It has been seen from the evidence that RW5 who is the Mine Manager at UMCIL, testified that the three boreholes were sunk during the campaign period as they had held meetings with Headman Mululuma after he was appointed, as from the death of the previous headman Mululuma, there had been no headman, and that five boreholes had been sunk outside his area. That there were minutes for this meeting which had not been brought to Court.

PW5 Simon Evans Mayaba who is Secretary of the Sanje Hill Community on the other hand maintained that project proposals raised under the MOU are so raised by the Sanje Hill Community and not through other persons. The MOU which is on pages 1-7 of the Petitioner's bundle of documents is between UMCIL and the community of Nkotami and Mululuma Villages being Sanje Hill Community.

Under Clause A of that MOU the purpose of it is stated as; ***"to provide a road map to the implementation of the re-settlement action plan (RAP) and outline the context within which the two parties have agreed to DEVELOP AND EXPAND A FRAMEWORK OF CO-OPERATION in fostering mutually beneficial and supportive approaches leading to the successful re-settlement of the Sanje Hill Community"***.

This agreement was signed on 14th April 2008. Under Clause C (5), it states that compensatory endeavours will be outlined in separate case by case agreements made in writing by the representatives of the parties, and shall be independently authorized by the appropriate statutory authority.

Clause C (11.2) of the MOU names the representatives of Sanje Hill Community as Mr Emerson Chilindi being Chairperson, the Secretary as PW5, Headman Nkotami, Headman Mululuma, and the area Councilor Mubita.

The special Power of Attorney executed on 4th May 2016 by the Sanje Hill Community appoints Emmerson Chilindi, PW5, George Chilindi, Simunkambe Maxwell to among other things negotiate on behalf of Sanje Hill Community all its interests relating to the effects of displacement with UMCIL.

The question that therefore arises for determination is whether UMCIL was bound at all times to implement projects under the resettlement plan only through the Sanje Hill Community representatives, and not through any other persons?

I have made reference to the provisions of Clause C (5) of the MOU which states that any such projects are to be raised through the parties' representatives in writing and shall be independently authorized by the appropriate statutory authority. Going by this provision if the sinking of the three boreholes during the campaign period was done after UMCIL met Headman Mululuma alone,

without the other representatives, then the agreement arrived at was done outside what is contained in the MOU, as headman Mululuma is not the only representative of the Sanje Hill Community.

I do note that the MOU does not state what constitutes a quorum for a meeting of the parties, but the evidence of PW5 was that any such project proposals needed the input of the area Councilor and the Member of Parliament.

When RW5 was cross examined he stated that the documents on pages 13 – 16 of the Petitioner's bundle of documents were only raised when there was a Liaison Office in place. It was his testimony that the Liaison Office was dissolved eight months prior to his testifying. That in the absence of the Liaison Office projects for implementation were raised through the Headmen, and implemented if they were in line with the agreements made at earlier meetings.

The MOU does not make reference to a Liaison Office, but an appropriate statutory authority as the body to independently authorize the projects. PW5 who is the representative of Sanje Hill Community, and is active in the implementation of the MOU as Secretary, was not cross examined on the role if any that the Liaison Office played in the authorization process. If this was the statutory authority referred to in the MOU, as the authorization body, then PW5 should have been questioned on it, if the Respondent were to successfully raise the defence that when the

three boreholes were sunk, there was no Liaison Office to approve such projects, and that is why UMCIL had dealt directly with Headman Mululuma.

To raise the issue of the Liaison Office through RW5 when in fact it was never put to the Petitioner or PW5 when they testified, in my view is just an afterthought, because if that was truly the position, they would have been so questioned. The issue of it being an afterthought is compounded by the fact that PW5 referred to the document on page 16 of the Petitioner's bundle of documents, which is a project proposal form raised by him as Secretary of the Sanje Hill Community on 31st August 2016.

He was not cross examined on whether this project could not be considered on account of the fact that there was no Liaison Office in place, and only the headman could have made such a requisition. I therefore find that the three boreholes were sunk by Trade Kings outside the provisions of the MOU.

Be that as it may no evidence was adduced to show that UMCIL could not do any projects outside the provisions of the MOU, as is alleged, with regard to the sinking of the three boreholes during the election period. When one reads Clause C (9) of the MOU, they will find that the MOU was entered into in the spirit of cooperation between the parties, and Clause C (10) provides that the MOU will continue until such time that it will be revised or terminated when the Resettlement Action Plan (RAP) comes into effect.

In my view the MOU did not create a legally binding relationship between Sanje Hill Community and UMCIL, but a system of cooperating during the re-settlement programme. As such the MOU did not prevent UMCIL from carrying out projects outside the provisions of the MOU, though it was desirable in the spirit of cooperation.

The Petitioner alleges that the Respondent and Trade Kings colluded to sink the boreholes in order that the Respondent could be elected as the area Member of Parliament. A perusal of the evidence on record, shows that there is no direct evidence to that effect. The Petitioner drew this conclusion based on the fact that the Respondent has a close relationship with Trade Kings, and this is their argument in the submissions.

It has been seen that the Respondent in his defence denied any knowledge of the sinking of the three boreholes in Mululuma, stating that he only obtained the documents for the sinking of the said three boreholes that are on pages 5 and 6 of the Respondent's bundle of documents as he is the area Member of Parliament. In his answer he stated that the boreholes were sank by Trade Kings as part of its corporate social responsibility.

In the submissions the Petitioner argued that PW6 corroborated the Petitioner's allegation that the Respondent had promised the electorate that he would sink boreholes in the constituency, and this witness was credible as his evidence was not controverted at all by the Respondent. The evidence of RW5 was submitted as lacking

credibility as he established that the three boreholes were sunk without following the procedure set out in the MOU.

The Respondent in the submissions argued that the Petitioner had failed to provide proof that he had sunk the three boreholes. What is on record is that UMCIL sank the said boreholes, and that the Respondent had only been linked to them as during his rallies he had promised the electorate that if elected he would ensure that they had safe drinking water. The Respondent had also in the submissions acknowledged that the sinking of the boreholes was not done in line with the MOU, but stated that such breach could not be blamed on the Respondent. It was the Respondent's submission that Section 97 (1) of the Electoral Process Act does not come into play as there is no evidence linking the Respondent to the sinking of the boreholes. He was only being connected to the same as he is a consultant for Trade Kings.

With regard to the borehole sunk by Trade Kings as evidenced on page 19 of the Petitioner's bundle of documents, the Respondent in the submissions stated that he spearheaded the sinking of that borehole as a consultant of Trade Kings, and moreover that the borehole was sunk outside Mwembeshi constituency, which evidence was confirmed by PW5. Therefore it is irrelevant to this petition.

Therefore on the authorities of **MICHAEL MABENGA V SIKOTA WINA AND OTHERS SCZ No 15 of 2003** and **L. A. MUMBA V**

P.W.M. DAKA Appeal No 38 of 2003 the Petitioner had not proved the allegation on a fairly higher degree of convincing clarity.

The defence raised that the Respondent did not sink the boreholes, and that it is in fact Trade Kings that did so, was never rebutted by the Petitioner who bears the burden on a higher degree of convincing clarity to show that the sinking of the boreholes was in fact done with the intention of obtaining votes for the Respondent. I say so because the evidence that the Respondent does consultancy works for Trade Kings on its own is not sufficient proof.

The Petitioner failed to show that the Respondent actually provided the funds to sink the borehole paid for on page 19 of his bundle of documents. The evidence of his signature and phone number appearing on the receipt is insufficient proof, in view of the fact that the Respondent does consultancy work for Trade Kings.

Further the Petitioner did not adduce any evidence to show that indeed the Respondent induced Trade Kings to sink the said boreholes, or that Trade Kings sank the boreholes with the Respondent's full knowledge that such acts were meant to obtain votes for him. Additionally there is no evidence to show that Trade Kings was in fact the Respondent's agent, as the evidence that was led during the trial was that the Respondent's agents were Charles Muyunda and Jailos Mwiabi.

It is my finding that while the payment for the borehole evidenced on page 19 of the Petitioner's bundle of documents, was made by the Respondent, it is Trade Kings that in fact provided the funds to sink the borehole. Further the other three boreholes were paid for by Trade Kings and were sunk in Mululuma and Sichibangu areas, outside the provisions of the MOU that exists between UMCIL and Sanje Hill Community. I wish to note that there is nothing wrong in a parliamentary candidate promising the electorate during the campaigns that he will ensure that they will have safe and clean drinking water, as Members of Parliament are elected to bring development to constituencies.

However my view is that the sinking of the three boreholes outside the provisions of the MOU was badly timed in view of the fact that the said boreholes were sunk during the election period.

The question that however begs an answer, is based on the finding that Trade Kings did in fact sink the boreholes in the constituency during the campaign period, does this amount to corruption under Section 81 (1) (c) of the Electoral Process Act, as alleged by the Petitioner, and would be ground for voiding the election pursuant to Section 97 (2) (a) (ii) of the Act?

As already seen the evidence shows that the boreholes were sunk by Trade Kings, and there is no evidence to show that this was done with the Respondent's full knowledge, except for the one that he paid for. This borehole was submitted as being irrelevant to this

matter as it was sunk outside the constituency. The Petitioner did not on a fairly high degree of convincing clarity rebut this assertion, as in his submissions, he stated that the Respondent had merely tried to distance the borehole from the constituency, but did not demonstrate how this lacked merit.

The Respondent's assertion was that the said borehole was sunk in Mpamba, which falls in Chilanga constituency. As this allegation was not rebutted, I find that the borehole paid for as evidenced on page 19 of the Petitioner's bundle of documents does not fall within Mwembeshi constituency, and is irrelevant to this petition.

In the case of **ROBERT TAUNDI CHISEKE V RICHARD TIMBA SIMBULA, THE ATTORNEY-GENERAL INTERESTED PARTY APPEAL NO 223 of 2012** the Supreme Court recognized that there was a category of persons who committed illegal acts with the consent of the Appellant who could not be categorized as that person's agent going by the definition of an election agent under the Act, but for whose acts the Appellant should be liable.

They stated in that case that ***"what we said in the case of Lewanika vs. Chiluba was that a candidate will be answerable for acts that he had done or those done by his electoral agents or those done with his consent. And therefore, the appellant cannot escape the net"***.

Thus the question that arises is whether Trade Kings can be considered as that category of persons who committed corrupt or illegal acts in the name of sinking of the three boreholes during the election period, with the Respondent's knowledge, in order that the electorate would vote for the Respondent, and be ground for nullifying the election?

Like I have said already, the sinking of the three boreholes in Mululuma and Sichibangu by Trade Kings has been established as having being done without the Respondent's knowledge. It follows therefore that the acts of Trade Kings cannot be answered for by the Respondent as held in the **ROBERT TAUNDI CHISEKE** case.

In any event in the case of **REUBEN MTOLO PHIRI V LAMECK MANGANI SCZ No 2 of 2013** where one of the allegations raised by the Petitioner was that the Respondent had engaged in corruption, as he had sunk boreholes in the constituency during the campaign period, the Supreme Court on appeal in that case stated that;

“Philanthropic activities is the practice of helping the poor and those in need, especially by giving money and services: See Oxford Advanced Learner's Dictionary (7th Edition), page 1089. In Zambia, philanthropic activities include developmental projects, even when they had some influence on voters, did not constitute corruption or an illegal practice, and hence not petitionable:- See:- LEWANIKA & OTHERS V CHILUBA”.

The Court in the case further stated that;

“the Chiluba case was decided in 1998. Since this Court’s observations in that case, the electoral law, in relation to philanthropic activities, has not changed. Philanthropic activities were not petitionable in 1998, despite the wording of Regulation 7 (1) (L) of the Electoral (Code of Conduct) Regulations, 1996. They were not petitionable in 2011, despite the wording of Regulation 21 (1) (K) of Statutory Instrument No. 52 of 2011. In our view, the boreholes in this matter, being an ongoing developmental project, under the office of the District Commissioner, fell under philanthropic activities. Reference to them and use of them, by the Appellant, in his campaign, is not an illegal or corrupt practice under the Electoral Act 2006. Hence, it is not a petitionable ground”.

A perusal of the Electoral Act Regulations under the 2016 Act shows that even the current electoral law does not classify philanthropic activities as corruption. Therefore even if the evidence on record had revealed that the Respondent by himself, his agents or by any other person, with his knowledge sank the boreholes after he had promised the electorate that he would do so during the campaigns, such that he would have been caught up in the provisions of Section 97 (2) (a) (i) or (ii) of the Act, the act of sinking boreholes is not a ground for nullifying the election, as such activities are philanthropic activities, and not petitionable.

However in the **REUBEN MTOLO PHIRI V LAMECK MANGANI** case cited above, the Supreme Court stated that philanthropic activities that went beyond acceptable limits amounted to corruption.

Reference in that case was made to the case of **MUMBA V DAKA APPEAL NO. 36 OF 2003** and it was stated that, *"In the Mumba case, the re-opening of a clinic and delivery of an ambulance, drugs and staff there, about a day before election day, coupled with an address of a campaign meeting there by the Appellant, went beyond philanthropic activities. The Appellant's conduct was a pure breach of Regulation 7 (1) (L) of the Electoral (Code of Conduct) Regulations, 1996, and hence petitionable.*

In the Mumba case, the Appellant personally initiated and executed activities complained of. He did so, using Government transport and facilities. Having done so, he then used them to ask for votes. That is what distinguishes the Mumba case from this case".

The petition based on philanthropic activities in the **REUBEN MTOLO PHIRI** case was dismissed on that basis.

This rationale was also adopted in the case of **MABENGA V WINA AND OTHERS 2003 ZR 110**. Applying the rationale in the **REUBEN MTOLO PHIRI** and **MABENGA** cases, the philanthropic activities in this matter can only be considered as corrupt practices if they went beyond what is properly so called philanthropic

activities, and were initiated by the Respondent. I have already found that there is no evidence to that effect. Therefore the petition on that basis cannot stand.

Reference was made by the Petitioner in the submissions to the case of **JOSEPHAT MLEWA V ERIC WIGHTMAN 1995/1996 ZR 171** where the Supreme Court held that Section 18(2), now Section 97 of the Act sets out four clear grounds upon which the election of a Member of the National Assembly shall be held to be void, and that proof of one ground is enough for the Court to nullify an election.

The Respondent in the submissions while acknowledging the case stated that the case is not applicable in this matter.

The Petitioner in the submissions also made reference to the case of **NEWTON MALWA V LUCKY MULUSA APPEAL No 125/2012** which had referred to the case of **REUBEN MTOLO PHIRI V LAMECK MAGANI 135/2012** where the Supreme Court had stated that paragraphs 93(2) (a) and 93 (2) (c) of the Electoral Act No 12 of 2006 deal with corrupt or illegal practices committed during elections.

That the distinction between the two paragraphs is that under (a) the corruption or illegal activity is not attributed to the candidate in that election but to other persons who may engage in such corrupt or illegal practices. Paragraph (c) on the other hand is specific to a candidate engaging in corrupt or illegal activities themselves, or by or with the knowledge of the candidate or his agents.

A perusal of **JOSEPHAT MLEWA V ERIC WIGHTMAN 1996 SJ 1** case shows that the Supreme Court found that the paragraphs in Section 18 (2) of the Electoral Act of 1991, which are the same as those in Section 93 of the Electoral Act of 2006 upon which the **REUBEN MTOLO PHIRI** case was decided, and is similar to what is provided in Section 97 of the 2016 Act, are independent and separate grounds, and that proof of any ground can be a basis of nullifying an election. The difference is that the 2016 Act in Section 97 (2) (a) attributes the corrupt practice, illegal practice or other misconduct in the election of the Member of Parliament, Mayor, Council Chairperson or Councilor under Section 97 (2) (a) (i) to the candidate, while under Section 97 (2) (a) (ii) to the knowledge and consent or approval of that candidate or of that candidate's election or polling agent, and the majority of voters in a constituency, district or ward were or may or have prevented from electing the candidate in that constituency, district or ward whom they preferred.

The 2016 Act introduces the Mayor, Council Chairperson and Council as candidates whose election can be petitioned under Section 97 like the Member of Parliament, which was not the position previously. However in my view when considering whether the majority of voters may or were prevented from electing the candidate of their choice in the constituency, district or ward is dependent upon where the election of that person is covered.

For instance the Member of Parliament's election affects the constituency, while the Councilor's election affects the ward. Therefore with regard to the Member of Parliament, the majority of voters in the constituency must be affected by the corrupt practice, illegal practice or other misconduct in order for the election to be avoided.

In the **JOSEPHAT MLEWA V ERIC WIGHTMAN** case it was found that even where the wrong doer was not the Respondent or their electoral or polling agents, and the court was satisfied that the scale or type of wrong doing had adversely affected the election, the election could be nullified. This was pursuant to paragraph 18(2) (a) of the Electoral Act of 1991 which provided that;

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

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

(b) subject to the provisions of subsection (4), that there has been a non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court

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;

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

Section 93 (2) of the Electoral Act of 2006 has the same provision as the above quoted Section 18 (2) of the Electoral Act of 1991 but goes further to provide as follows;

“(3) Notwithstanding the provisions of subsection (2), where, upon the trial of an election petition, the High Court finds that any corrupt practice or illegal practice has been committed by, or with the knowledge and consent or approval of, any agent of the candidate whose election is the subject of such election petition, and the High Court further finds that such candidate has proved that—

(a) no corrupt practice or illegal practice was committed by the candidate personally or by that candidate's election agent, or with the knowledge and consent or approval of such candidate or that candidate's election agent;

(b) such candidate and that candidate's election agent took all reasonable means to prevent the commission of a corrupt practice or illegal practice at the election; and

(c) in all other respects the election was free from any corrupt practice or illegal practice on the part of the candidate or that candidate's election agent's;

the High Court shall not, by reason only of such corrupt practice or illegal practice, declare that election of the candidate void.

(5) No election shall 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 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".

The 2016 Act has taken away the provision that was found in Section 18 (2) (a) of the Electoral Act of 1991 and Section 93 (2) (a) of the Electoral Act of 2006 which was ground for nullifying an election where the corrupt practice, illegal practice or other misconduct was committed by persons other than the candidate or the candidate's election or polling agents, which did not require the candidate's or their agents knowledge or consent.

Therefore to that extent, where wrong doing not associated with the candidate or their polling or electoral agents is proved, the current law does not recognize such acts as grounds for nullifying the election. The cases of **JOSEPHAT MLEWA V ERIC WIGHTMAN** and **REUBEN MTOLO PHIRI V LAMECK MAGANI** do not apply to this matter based on that provision, as it is no longer law. It follows therefore that the petition relying on those cases with regard to that aspect of the law cannot stand.

The other allegation is that the Respondent canvassed and solicited the electorate at Nampundwe Polling station to vote for him. The particulars regarding this allegation are that;

- i. On the 11th August 2016, the polling day, the Respondent at Nampundwe polling station was flashing his symbol "an axe", to the electorate that had gathered to vote.*
- ii. The Respondent also solicited for votes from people who had gathered to vote at Nampundwe polling station on the actual polling day.*

Section 89 (1) (e) of the Electoral Act provides that;

A person shall not –

(e) on any polling day, at the entrance to or within a polling station, or in any other public place or in any private place within four hundred metres from the entrance to such polling station

- i. Canvass for votes;*
- ii. Solicit the vote of any person;*
- iii. Induce any person not to vote; or*
- iv. Induce any person not to vote for a particular candidate*

PW9 Beston Imbila testified that on the voting day he was monitoring the elections. At Nampundwe Polling Station he found the Respondent giving the symbol of an axe to the voters, and he had reported him to a police officer. That the police officer had approached the Respondent and after he talked to him, the Respondent had left. I note that this witness was not cross examined on whether indeed the Respondent was showing the electorate that had queued up to vote, his symbol of an axe, and his evidence is therefore credible, as it was not shaken in cross examination.

The Respondent in the submissions stated that the Petitioner had not adduced cogent evidence to support the allegation. It was submitted that PW9's testimony had not been corroborated, especially that this witness in cross examination testified that he only reported the matter to a police officer named Zulu, and never made any follow ups to ensure that such a serious offence was recorded at a police station, and subsequently prosecuted.

Reference was made to the case of ***DENIS NKOMA V THE PEOPLE Appeal No 52 of 2015*** where reference was made to the case of ***NSOFU V THE PEOPLE 1973 ZR 287*** which defined corroboration

as ***“independent evidence which tends to confirm that the witness is telling the truth when he or she says that the offence was committed, and that it is the accused who committed it. It is the evidence of the witness of which a conviction is based; the corroborative evidence serves to satisfy the court that it is safe to rely on that evidence”.***

It is trite law that the evidence of a single witness is sufficient to prove a fact which is in dispute, except where the law requires that the evidence of such a witness be corroborated. It is only in cases where the witness may have an interest to serve, or that for any other reason such as incapacity to observe or evidence of weak identification among other issues, that the testimony of such witness will require corroboration.

The Respondent has not raised any issue pertaining to why PW9's evidence requires corroboration, apart from the fact that he is the only witness called in relation to the allegation. The fact that PW9 did not go to any police station to report the alleged soliciting of votes by the Respondent, is no reason to disbelieve him, as he did in fact report to the police officer who was manning the election process at the polling station. The attack of PW9's credibility on the basis of failure to go and report to a police station cannot stand. His evidence was unshaken in cross examination, and my view is that he was a credible witness. In fact the Respondent does not dispute the allegation.

Thus the Petitioner has proved that the Respondent did canvass and solicit for votes on the election - day at Nampundwe Polling station. However PW9 did not tell the Court how many people had gathered to vote that the Respondent gave the axe symbol to or indeed estimate such numbers, so that I can draw the inference that such act had the result of affecting the outcome of the election in the constituency. Nampundwe Polling station is only one of the polling stations in Nampundwe Ward, while Nampundwe Ward is only one of the wards out of the ten in the constituency.

There is no other evidence on record to show that the Respondent was seen at the other polling stations within the constituency showing people his symbol as a way of obtaining their vote, such that it can be said that this act influenced the voters to vote for him.

It is therefore my finding that while the Respondent did show the electorate his campaign symbol at Nampundwe polling station, this illegal act did not influence the overall outcome of the election, so that it can be said that the majority of the voters were prevented from electing the candidate of their choice in the constituency. This ground also fails.

The other allegation is that the Respondent was not qualified to be elected as an independent Member of Parliament pursuant to Article 51 of the Constitution of Zambia Act, 2016. The allegations against the Respondent on this ground are that;

- i. *The Respondent was a member of the United Party for National Development (UPND), and only decided to contest the elections as an independent candidate after the UPND declined to adopt him as its candidate.*
- ii. *At the time the Respondent contested the elections as an independent candidate, he was still a member of the UPND, as he has never resigned from the party.*
- iii. *The Respondent in his campaigns told the people of the area that he was contesting the election as an independent candidate but was a member of the UPND and throughout his campaigns he used the UPND regalia, symbol and campaigned for the UPND presidential candidate and made the people to believe that the party president wanted him to be the member of parliament for the area and that the UPND did not approve that the Petitioner contests the election on the UPND ticket.*
- iv. *On 7th June 2016 the Petitioner reported the activities of the Respondent to the District Conflict Resolution Management Committee constituted by the Electoral Commission of Zambia.*
- v. *That the Respondent is still a member of the UPND, and as such he was disqualified from contesting the seat as an independent candidate.*

Article 51 of the Constitution of Zambia Act No 1 of 2016 states that;

A person is eligible for election as an independent candidate for the National Assembly seat if the person –

- a) Is not a member of a political party and has not been a member of a political party for at least two months immediately before the date of the election; and***
- b) Meets the qualifications specified in Article 70 for election as a Member of Parliament.***

The qualifications for one to eligible to be elected as Member of Parliament as stipulated in Article 70 (1) of the Constitution are that a person;

- a) is a citizen***
- b) is at least twenty one years old***
- c) is a registered voter***
- d) has obtained, as a minimum academic qualification, a grade twelve certificate or its' equivalent; and***
- e) declares that person's assets and liabilities as prescribed***

It is alleged that the Respondent was a UPND cadre who only decided to stand as an independent candidate when he was not adopted to stand on that party's ticket. The Petitioner's testimony was that the Respondent, had like himself applied to be adopted as

the parliamentary candidate for Mwembeshi constituency on the UPND ticket, in the 11th August 2016 general elections.

He told the Court that he was the person who was adopted and was given the adoption certificate. The two were talked to by the party management, and it was agreed that only the Petitioner could stand as the parliamentary candidate in the election. However the Respondent had filed his nomination as an independent candidate, a day later.

The Respondent did not dispute that he had applied to be adopted under the UPND, but stated that he did so in response to calls by the electorate in the constituency, and that the late constituency Chairperson Mr Makala had pleaded with him to stand as the UPND candidate.

The question to be answered is whether the Respondent was a UPND member when he had applied to be nominated as a candidate under that party? As seen the Petitioner relied on the application form filled in by the Respondent in which he stated that he had joined the UPND in 2010, and was the Trustee for Munali Constituency. That his party membership card number was 542. This document is on page 17 of the Petitioner's bundle of documents. The Respondent did not dispute that he filled in the particulars as they appear on the document, stating that the late Mr Makala had asked him to do so, as he was popular, and that the late Mr Makala had promised to get him a card, and take him to Munali constituency, but did not do so.

That is why the Respondent when interviewed for adoption could not be given the adoption certificate, as he failed to produce his membership card, despite having beaten the Petitioner when delegates from the Wards voted for the candidate to be adopted. To rebut the evidence on page 17 of the Petitioner's bundle of documents, the Respondent called as his witness RW3, who was the constituency Vice Chairperson at the time. This witness told the Court that he was part of the interview panel that had interviewed the persons that had applied to be adopted as the parliamentary candidate in Mwembeshi constituency.

He explained that the Respondent had failed to produce his party card as evidence of his membership to the party, and on that basis despite having emerged winner in the Ward elections, he was not adopted. RW3 also testified that the rules in the UPND are that if one wishes to be adopted as a candidate in the elections, they should have paid their membership fee to the party for three years.

The Petitioner bears the burden of proving the membership of the Respondent to the UPND on a higher degree of convincing clarity, when he filed his nomination as an independent candidate. Apart from the document on page 17 of the Petitioner's bundle of documents, and the evidence given by the Petitioner himself, PW2 Jimmy Muntanga testified that he is the UPND Secretary for the constituency. He like RW3 sat on the panel that interviewed both the Petitioner and Respondent for adoption, as the party's parliamentary candidate. His evidence was that the Petitioner is the

person who was adopted as the party's candidate, but unlike RW3 he did not take the Court through the election process that was conducted after delegates from the ten wards were called to vote for the candidate.

PW2 in cross examination stated that a register of members is kept at the branch level, though he had not come to Court with any. The Petitioner in the submissions maintained that the application form filled in by the Respondent in order for him to be adopted as the parliamentary candidate in the constituency under the UPND, is evidence that he is a member of the UPND.

It was their submission that the evidence by the Respondent that he was coerced to fill in the application form cannot stand as the witnesses he called in support of that position were not helpful. The Petitioner also submitted that the Respondent had in his evidence in chief referred to Sylvia Masebo calling him to collect the adoption certificate, and how other senior UPND members in the names of Mr Ackson Sejani, Maureen Mwanawasa and Mrs Hichilema had stepped in intervene on his behalf. This they argued is evidence that the Respondent was a member of the UPND.

RW3 who testified on the election at the ward level was not cross examined on his evidence that the Respondent emerged winner in the ward election, and his evidence gave more details on how the process was conducted, and how the candidate was finally adopted. I find that he was a more credible witness. While RW3 was cross examined on the card number the Respondent filled on the form,

and whether he had consulted Munali constituency on the Respondent's membership, PW2 is the witness who should have established the aspect of the Respondent's membership to the party.

I say so because PW2 is the Secretary of the party in the constituency, and he should have conducted due diligence to establish the Respondent's membership to the party. He did not even make any enquiries with Munali constituency to verify if indeed the Respondent was its Trustee. Furthermore the Petitioner bears the burden of proving how one becomes a member of the party. PW2 when cross examined testified that some people apply for membership to the party, while others join the party during rallies. As to how members resign from the party he stated that senior party members put their resignation in writing, and the other members just leave.

None of the Petitioner's witnesses led any evidence to establish the criteria that needs to be met, in order for a person to be considered as a member of the UPND. Political Parties are associations which are governed by rules, and it is expected that there must be qualifications that must be met for one to be considered as a member. From the evidence of the Respondent and RW3 it is clear that possession of a membership card is evidence of membership to the UPND. Further RW3 testified that for one to be eligible to stand on that party's ticket in the national elections, they need to have

paid their membership fees for three years. The Petitioner did not rebut this evidence.

The Respondent did tell the Court that after Ms Masebo took him to the party president's house over the adoption certificate, Mr Hichilema did not come out to meet him. He also submitted that Mr Sejani had at that occasion told him that as a party they were not obliged to explain why he had not been adopted, as he was not a member of the party. He had further testified that he was not even called to witness the handing out of the adoption certificates, as he was not a member of the party. The Petitioner did not challenge this evidence in any way.

What the evidence points to, is the fact that senior officials in the UPND tried to influence his adoption by the party, but that this did not succeed, as he did not meet the conditions for one to be adopted, primarily because he had no party card, and could not be considered a member.

Blacks Law Dictionary 8th Edition by Bryan a. Garner defines a member as ***“one of the individuals of whom an organization or a deliberate assembly consists, and who enjoys the full rights of participating in the organization including the rights of making, debating and voting of motions, except to the extent that the organization reserves those rights to certain classes of membership”***.

A supporter is defined in the Oxford English Dictionary as ***“someone who supports a particular idea or group of persons”***.

From the above definitions it is clear that a member is one who enjoys full rights of participating in the organization, while a supporter is a person who is not a member of an organization, but supports that organization's ideas.

Having a membership card is one of the criteria used to establish membership in the UPND. In the absence of meeting the requirements for one to be a member, then they would be considered a supporter of the party. The Respondent does not have a UPND party card. He cannot therefore be considered as a member of that party, and because of that he could not be adopted as the party's candidate.

Therefore in terms of the August 2016 elections he attempted to usurp the UPND party regulations by standing on that party's ticket as a parliamentary candidate, when he was not a member of that party. Not being a member of the UPND, the provisions of Article 51 of the Constitution did not apply to the Respondent, and he could therefore stand as an independent candidate in the parliamentary election.

Even assuming that he had been a member of the party, he filed his nomination as an independent candidate on 31st May 2016, a fact which has not been rebutted by the Petitioner. The parliamentary elections were held on 11th August 2016. The filing was done clearly

two months before the elections. As to whether the Respondent could be regarded as not having resigned from the party, no clear procedure of how a member resigns from the UPND was stated. PW2 told the Court that for senior members like the Respondent, his resignation had to be in writing, while ordinary members could just leave.

Having said that there is no evidence to establish that the Respondent was indeed a senior member of the party, he could just leave the party, and I agree with the submission that by filing as an independent candidate, the Respondent could have been deemed to have resigned from the party, if he had been a member. The ground that the Respondent was a UPND member when he filed as an independent candidate fails, as it has not been proved on a fairly high degree of convincing clarity.

The next allegation regarding the contravention of Article 51 of the Constitution is that the Respondent had not resigned from the UPND when he filed his nomination as an independent candidate. I have already stated that the Respondent was not a member of the party. He could not have resigned from the party when he had never been one.

It follows therefore that this allegation cannot stand and it is accordingly dismissed.

The last allegation in relation to the Respondent being a UPND member is that during the campaigns the Respondent told the

electorate in the constituency that he was contesting the election as an independent candidate but was a member of the UPND, and that through-out the campaigns, the Respondent had used UPND regalia and symbol, and had campaigned for the UPND presidential candidate, and had made the people believe that the UPND president wanted him to be the Member of Parliament for the area. Further that the UPND did not approve that the Petitioner contests the election on the UPND ticket.

The Petitioner in the submissions relied on the case of **ANDERSON KAMBELA MAZOKA AND OTHERS V LEVY PATRICK MWANAWASA AND OTHERS 2005 ZR 138** where the Supreme Court held that *“where a party does not object to evidence on unpleaded matters immediately it is adduced, the court is not precluded from considering that evidence”*, and urged me to nullify the election of the Respondent as Member of Parliament on the grounds of the other electoral offences and improper conduct on the Respondent’s part.

A perusal of the petition shows that the Petitioner did not plead character assassination by the Respondent by alleging that he told the electorate during the campaigns that the Petitioner was a thief who had stolen his adoption certificate or that the Respondent defaced his campaign posters.

The Respondent indeed did not object to the evidence led on the unpleaded allegations as the Petitioner did not allege other electoral misconduct by the Respondent in his pleadings. The Respondent in

fact cross examined the Petitioner's witnesses on the unpleaded allegations, and in the defence, led evidence to counter those allegations.

I do agree with the holding in the **ANDERSON KAMBELA MAZOKA AND OTHERS V LEVY PATRICK MWANAWASA AND OTHERS 2005 ZR 138** case cited above and note that in fact that decision was reaffirmed in the case of **ATTORNEY GENERAL V ROY CLARKE 2008 Vol. 1 Z.R. 38** when the Supreme Court held that *"a party cannot rely on unpleaded matters except where evidence on the unpleaded matter has been adduced in evidence without objections from the opposing party"*.

As such I am not precluded from considering that evidence.

Regulation 15 (c) of the Electoral Code of Conduct under the Act, prohibits the making of false, defamatory or inflammatory allegations concerning any person or political party in connection with the outcome of an election, while Regulation 15 (f) penalizes the plagiarizing of symbols, colours or acronyms of candidates or other political parties.

Regulation 15 (g) of the said Code of Conduct on the other hand prohibits the defacing, removal, or destruction of any campaign materials of any person or political party or publications of the Commission. These acts may amount to other misconduct as provided in Section 97 of the Electoral Act, and may be ground for avoiding an election, if proved as provided under that Section.

The Petitioner in the submissions stated that PW7 and PW8 had testified that at various rallies, the Respondent had told the electorate that he was UPND, and was seen using that party's regalia and symbol. Further PW4 the Station Manager at Radio Mazabuka produced the recording of the programme in Tonga language, for 5th August 2016, where the Respondent and his agents had bragged that they were UPND members.

It was the Petitioner's submission that the Respondent and his supporters and or agents had engaged in a character assassination campaign against him by alleging that he had stolen the Petitioner's adoption certificate. It was argued that Mwembeshi is a rural community, where the electorate is bound to believe the allegations.

Reference was made to Section 83 (2) of the Electoral Act of 2006 which provides that;

"83. (1) Any person who, before or during an election, publishes a false statement of the illness, death or withdrawal from election of a candidate at that election for the purpose of promoting or procuring the election of another candidate, knowing that statement to be false or not believing it to be true, shall be guilty of an illegal practice.

(2) 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”.

Further reliance was placed on the case of **STARDY MWALE V MICHAEL KATAMBO 2011/HP/EP50** where the election of the Respondent was nullified on the ground that he had uttered words against the Petitioner and his Presidential candidate Michael Sata that if they were voted into office, they would bring war in Lamba land and that the seven guns declared by Michael Sata would be used.

The Respondent however in the submissions stated that the evidence of PW8 was not corroborated and therefore falls short of the standard of proof in election petitions. The Respondent also argued that the case of **STARDY MWALE V MICHAEL KATAMBO 2011/HP/EP50** relied on by the Petitioner is distinguishable from this case as the allegation in this matter is that the Respondent called the Petitioner a thief who had stolen his adoption certificate, while in the **STARDY MWALE** case an impression of insecurity was created in the minds of the people on the grounds that the Presidential candidate Michael Sata was said to have declared seven guns.

The Respondent argued that the Petitioner was the immediate past Member of Parliament and was well known to the people in the constituency, and that therefore such statements were mere political rhetoric and do not fall within Section 84 (1) of the Act. It was further argued in the submissions that the said statement was

made at only one rally, and no evidence was led to show how such a statement had impacted on the people that had attended that rally. In the absence of such evidence, the standard required of proving the allegations on a fairly high degree of convincing clarity had not been met.

Section 83 (2) of the repealed Electoral Act of 2006 has been enacted in Section 84 of the Electoral Process Act No 35 of 2016 and it provides as follows;

“Any person who, before or during an election, publishes a false statement of the illness, death or withdrawal from election of a candidate at that election for the purpose of promoting or procuring the election of another candidate, knowing that statement to be false or not believing it to be true.

(2) A person who contravenes subsection (1) commits an illegal practice, unless that person had reasonable grounds for believing, and did believe the statement to be true”.

Thus any false allegation pertaining to a candidate is not provided for in the new enactment, and does not amount to an illegal practice of publishing a false statement in respect of a candidate. However as seen above, this amounts to other misconduct, as such publication offends Regulation 15 (c) of the Code of Conduct.

The Petitioner himself testified that he did not witness the Respondent make the allegations that he was a thief who had stolen

his adoption certificate, but relied on the recorded programme on Radio Mazabuka as proof that the Respondent told the electorate that he was still a UPND member, even though he was standing as an independent candidate. Further that he would use the UPND manifesto as it was the best in the country.

While the radio programme recording was tendered in evidence, no efforts were made by PW3 to publish its' contents, so that they could be translated from Tonga language into English, in order for the Court to have been made aware of its contents. Be that as it may, the Respondent does not dispute the contents of the recording to the effect that during that recording, he and his agents told the electorate that they were UPND members and were using that party's manifesto in their campaigns, as he did not cross examine PW3 on it.

The Petitioner's direct evidence of this allegation is that he heard the Respondent say this during a live programme on Radio Mazabuka, a programme he said he had listened to from his vehicle. It was his evidence that during that programme the Respondent who was in the company of his two campaign managers, Charles Muyunda and Jailos Mwiabi stated that they were full time UPND members who were campaigning for the UPND Councilor and President apart from the Member of Parliament, as he had stolen his adoption certificate.

This evidence was not rebutted in cross examination. Thus the Respondent's argument that PW8's evidence that the Respondent

had stated that the Petitioner was a thief who had stolen his adoption certificate, had not been corroborated, lacks merit for the basis for requiring the evidence of that witness to be corroborated has not been stated. In fact if anything the recording of the programme where the words were stated, was not disputed, which is corroboration of PW8's evidence.

It is trite that campaigns are mounted to sell a candidate, and the argument by the Respondent that the Petitioner was well known in the constituency being the immediate past Member of Parliament, therefore the words that he is a thief was mere political rhetoric cannot stand. By arguing like this the Respondent admits that he did make such statements.

Communities view thieves as dishonest and not creditworthy people, who are not worth putting in positions of trust, such as Member of Parliament. Therefore to say that the Petitioner was a thief without basis, offended the Code of Conduct.

PW8 testified that the Respondent during the two rallies held on 4th August 2016 said that he was a UPND member, and that he was supporting the UPND presidential candidate. This witness told the court that the Respondent at both rallies had begun to speak by chanting the UPND slogan "*Zambia Forward*". This particular evidence was not challenged in cross examination. RW4 Charles Malambo who is the headman for Cholola village was called as a witness to discredit PW8.

RW4 only stated that PW8 is his brother's step son. Apart from stating this, RW4 did not demonstrate why PW8 should be considered as an unreliable witness, and thereby discredit his evidence. RW4 stated that the Respondent used his symbol of an axe during that rally. He also testified that the Respondent began the rally by shouting "*One Zambia One Nation*". Thus there are two conflicting statements on what slogan was used at the rally, and this can only be resolved by deciding which story is more credible than the other. There is nothing about the demeanour of both the witness PW8 and RW4 that would render either of them less creditworthy than the other.

However in light of the radio programme evidence adduced that the Respondent and his campaign managers are on record as having stated that they were UPND members, who were campaigning using the UPND slogan and symbol, which evidence has not been discredited in any way, and is therefore credible, my finding is that PW8's evidence is more likely to be true, than RW4's.

As such it is true that the Respondent did call the Petitioner a thief who had stolen his adoption certificate. The statement amounts to being false for it is not true that the Petitioner stole the Respondent's adoption certificate, as the evidence on record shows that the adoption process followed a series of procedures.

The Respondent is on record, going by the evidence of PW8 to have said this at a rally that he attended. The number of registered voters or even an estimated number that attended the rally was not

stated, and neither was the portion of the constituency where the rally was held, so that I can draw inferences of how the electorate can be said to have been affected by those statements, and thereby did not vote for a candidate of their choice.

Further there is no evidence to show how many voters were privy to what the Respondent said on the radio programme that was aired on 5th August 2016, on Radio Mazabuka. The Petitioner testified that the radio coverage of that station captures Chilanga, the whole of Mwembeshi and Nangoma constituency. Only Mwembeshi falls under the constituency where the Respondent was elected. For the petition to succeed on this ground it must be shown that the statements made effected the majority of voters in the constituency.

It is not known how many people in Mwembeshi actually listened to the programme, as the evidence on record is that it is a rural constituency, so it not known how many people there have radios so that it can be said that they listened to the programme, and it affected their choice of the candidate. The Petitioner has not adduced sufficient evidence to show that the said false statements were made on a large scale in the constituency in order for that allegation to meet the threshold required to nullify the election. The petition on this ground also fails.

The Petitioner also alleges that the Respondent used the UPND symbol, regalia and slogan during his campaigns. In support of the allegation of use of the UPND regalia, the Petitioner had referred to the photographs on pages 21, 22, 23, 27 and 28 of his bundle of

documents. It was his evidence that the photograph on page 21 shows the person wearing a UPND beret, while the t-shirt worn is orange with the Respondent's portrait on it, and the trousers are red, which is the UPND colour. The same outfit is worn by the others in the picture, except for the beret. Page 22 shows the same thing, while on page 23 the girl in the picture is wearing a red t-shirt with the Respondent's portrait on it.

Page 27 shows the campaign poster for the UPND presidential candidate, the Respondent's campaign poster as an independent candidate and a partially torn poster for the Petitioner. Page 28 shows the Respondent's campaign poster next to that of the UPND presidential candidate.

The Petitioner told the Court that the Respondent would tear his posters and put his there, but did not adduce any evidence to establish that the Respondent was found tearing his posters, or that any of agents or supporters were found doing so. This evidence is speculative, as there was no proof of it.

The Petitioner also testified that as a result of the Respondent using the UPND regalia he had reported him to the District Conflict Management Committee, and a meeting was held to discuss the same. He referred to page 29 of the Petitioner's bundle of documents which is the mediation agreement form that was signed after the meeting on 10th June 2016.

the extent of his relationship if any with the Respondent, was not put to him. In short no basis for discrediting the witness was established.

The Respondent in his defence testified that he had ordered 5000 red t-shirts in anticipation that he would be adopted to stand on the UPND ticket. When this did not materialize he had exchanged the red t-shirts with orange ones, which t-shirts are seen on pages 21 and 22 of the Petitioner's bundle of documents. He explained that the girl wearing the red t-shirt with his portrait on it, is his daughter who had tried on one of the t-shirts as a trial, and photographed herself in her bedroom, and put the photograph on her Whats Up page. This defence was not rebutted by the Petitioner.

As such it is my finding that the red t-shirts were not distributed by the Respondent during his campaigns, as even the photographs on pages 21 and 22 of the Petitioner's bundle of documents show the persons therein wearing orange t-shirts with the Respondent's portrait on it. No photograph shows the Respondent's portrait on a red t-shirt being worn, so that it can be concluded that in fact the Respondent used UPND colours on his t-shirts during his campaigns, after the District Conflict Management meeting was held. The evidence of DW2 is that the youths on the photographs were in fact UPND cadres who had gone to the funeral with him, and had not been taken there by the Respondent.

I do agree that candidates or their parties have no control over what their cadres wear. It was therefore incumbent upon the

Petitioner to adduce evidence to show that the Respondent deliberately asked his supporters to wear his t-shirts and the rest of the UPND regalia, thereby confusing the electorate as to which party he was standing on, to amount to a contravention of Regulation 15 (f) of the Electoral Process Code of Conduct. There is in fact no evidence to that effect, as DW2 stated that the youths in the picture just assisted with the drawing of the water, and it has not been proved that the Respondent had gone there with a team dressed like that.

On page 27 and 28 of the Petitioner's bundle of documents the Respondent's distinct colour on the posters are orange with blue, while the main colour on the UPND posters is red. The Respondent therefore did not plagiarize the UPND colours.

The Respondent is on record as having stated during a radio programme on radio Mazabuka that he was a UPND member standing as an independent candidate, which evidence I have already stated was not challenged in any way.

The Respondent as testified by PW8 and PW9, during the campaigns used the UPND symbol and slogan. PW9 stated that he only saw the Respondent's axe symbol on the day of voting. The Respondent's symbol of an axe was not disputed, and is in fact shown on his campaign posters on pages 27 and 28 of the Petitioner's bundle of documents. Thus if during the campaigns he had used the UPND symbol of a hand and had asked the electorate to vote for him, it would naturally follow that the voters would look

out for the symbol of a hand on the ballot paper, when voting for the parliamentary candidate, and would have voted for the Petitioner who had used the UPND symbol of the hand.

However the Respondent won the parliamentary seat, using the symbol of an axe. Therefore I can only infer that the electorate in that constituency, who as heard from the witnesses who testified, are generally illiterate as it is a rural constituency, did not only look out for the symbol of the candidate, but also the picture of the candidate in order to vote for the candidate of their choice. In short the use of the UPND symbol of the hand by the Respondent during the campaigns ordinarily did not disadvantage the Petitioner in any way, as the voting using the UPND symbol would have worked to gain votes for him.

However to the extent that the Respondent stated that he was a UPND member who had been asked to stand as an independent candidate, he did induce the electorate to vote for him on that basis, and the evidence shows that he used the UPND slogan and symbol. This contravened Regulation 15 (f) as the Respondent plagiarized the UPND symbol and slogan for his campaigns. As to whether such acts did affect the outcome of the election in that such propaganda was widespread, has not been established. I have already said that the statements and the use of the UPND slogan and symbol is attributed to only two rallies that PW8 attended and was attended by a number of people that has not been ascertained.

Further even the number of persons who listened to the radio programme has equally not been established. In short the Petitioner has not proved on a fairly high degree of convincing clarity that the masquerading by the Respondent of being sent by the UPND president to stand as an independent candidate affected the majority of the voters, and consequently they did not vote for a candidate of their choice, and it fails.

I must however state that there is nothing wrong in an independent candidate supporting a party president of any party. What is wrong is to use the president of that political party for campaigning for ones' election under false pretences.

It was also submitted that the Respondent and his supporters defaced the Petitioner's posters and reference was made to pages 27 and 28 of the Petitioner's bundle of documents as evidence to that effect.

The Respondent submitted that the Petitioner's evidence with regard to the said allegation was unreliable, as he did not know the persons that took the pictures on pages 27 and 28 of his bundle of documents, and he could not state that the Respondent, or his agents were responsible for the acts.

The Petitioner when cross examined on this allegation testified that he did not personally witness the Respondent or his agents deface his campaign posters. It was his evidence that UPND supporters who were on the ground in the constituency sent him the

information on his phone. When cross examined on whether it was not possible that the posters as portrayed on pages 27 and 28 of the Petitioner's bundle of documents could have just been put on a surface, say a table then photographed and sent to him, he stated that he could not tell.

The Petitioner did not call any of the said UPND members who sent him that information as witnesses, so there is no direct evidence establishing the allegation or how widespread it was in the constituency. There is insufficient proof of the allegation, and the allegation has not been proved. On the whole the evidence establishes that the Respondent, while not being a member of the UPND did portray himself as such, and stated that he had been asked by the UPND president to stand as an independent candidate. He also named the Petitioner as a thief who had stolen his adoption certificate.

The Respondent did state that he would use the UPND manifesto as it was the best. However no evidence was led to show actual use of the manifesto in his campaigns. The evidence does however show that the Respondent used the UPND symbol and slogan in his campaigns, and by doing so he did breach the provisions of regulations 15 (c) and (f) of the code of conduct, which amounts to other misconduct. However the said acts have not been proved to have been committed on a wide scale so that it can be said that the majority of voters were prevented from electing a candidate of their choice in the constituency. On that basis I find that the

Respondent, Machila Jamba was duly elected as Member of Parliament for Mwembeshi constituency, and I accordingly declare. This action having been taken out in the public interest, I order that each party bears their own costs.

Leave to appeal is granted.

DATED THE 23rd DAY OF NOVEMBER, 2016

S. Kaunda

S. KAUNDA NEWA
JUDGE