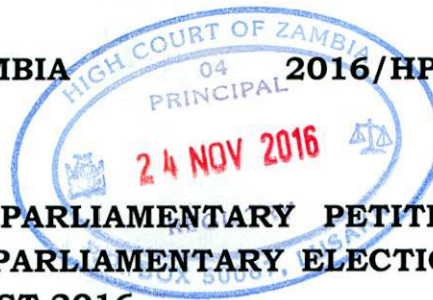


**IN THE HIGH COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Electoral Jurisdiction)**



2016/HP/EP0039

**IN THE MATTER OF: THE PARLIAMENTARY PETITION RELATING TO
THE PARLIAMENTARY ELECTIONS HELD ON 11TH
AUGUST 2016**

AND

**IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA, THE
CONSTITUTION OF ZAMBIA ACT, CHAPTER 1
VOLUME 1 OF THE LAWS OF ZAMBIA**

AND

**IN THE MATTER OF: ARTICLES 1,2,5,8,9,45,46,47,48,49,50,54,70,71,72
AND 73 OF THE CONSTITUTION OF ZAMBIA,
CONSTITUTION OF ZAMBIA ACT CHAPTER 1,
VOLUME 1 OF THE LAWS OF ZAMBIA**

AND

**IN THE MATTER OF: SECTIONS
29,37,38,51,52,55,58,59,60,66,68,69,70,71,72,75,
76,77,81,82,83,86,87 AND 89 OF THE ELECTORAL
PROCESS(ELECTORAL CODE OF CONDUCT)ACT
NO. 35 OF 2016**

AND

**IN THE MATTER OF: SECTIONS 96,97,98,99,100,106,107 AND 108 OF
THE ELETORAL PROCESS (ELECTORAL CODE OF
CONDUCT) ACT NO. 35 OF 2016**

AND

IN THE MATTER OF: THE ELECTORAL CODE OF CONDUCT 2016

BETWEEN:

CHARLOTTE SCOTT :

PETITIONER

AND

MARGARET MWANAKATWE

1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA
THE ATTORNEY GENERAL

2ND RESPONDENT

3RD RESPONDENT

CORAM: SIAVWAPA J

FOR THE PETITIONER:

**MR. KEITH MWEEMBA OF KEITH
MWEEMBA ADVOCATES**

**MR. M.H. HAIMBE OF MESSRS
MALAMBO & CO**

FOR THE 1ST RESPONDENT: MR. K. BWALYA OF MESSRS KBF PARTNERS

FOR THE 2ND RESPONDENT:

**MR. J. MULOONGO AND A KALIKITI
BOTH OF MSK ADVOCATES**

FOR THE 3RD RESPONDENT:

**MRS K. MUNDIA, MRS D. SHAMABOBO
AND MR. C. MULONDA ALL ASSISTANT
SENIOR STATE ADVOCATES**

J U D G M E N T

Cases referred to:

1. *Akashambatwa Mbikusita Lewanika v Fredrick Titus Jacob Chiluba* (1998) ZR 79
2. *Leonard Banda v Dora Siliya* SCZ Judgment No. 8/127 of 2012
3. *Michael Mabenga v Sikota Wina & 2 others* (2003) ZR 110
4. *Reuben Mtolo Phiri v Lameck Mangani* (2013) 1 ZR 30
5. *Steven Katuka & Law Association of Zambia v The Attorney-General & 64 others* CC Judgment No. 29 of 2016

Statutes referred to:

1. *Constitution of Zambia (Amendment) Act No. 2 of 2016*
2. *Electoral Process Act N. 35 of 2016*

By her amended Petition and affidavit in support of the Petition, Charlotte Scott's allegations in support of her prayer for the nullification of the election can be summarised as follows;

1. That the 1st Respondent used Government resources during campaign
2. That there was wide practice of bribery by the 1st Respondent
3. That the 1st Respondent's agents were seen openly campaigning on polling day
4. That acts of violence were perpetrated by the 1st Respondent's agents against her and her supporters
5. That the 1st Respondent used racial remarks against her during the campaign period
6. That her party's campaign materials were being pulled down by the 1st Respondent's agents
7. That the Zambia Police officers twice blocked her from campaigning in specific areas

It will however, be noted that no witness was called in support of allegation number six and as such, I will treat it as having been abandoned. In support of her allegations, the Petitioner called five witnesses while the 1st Respondent called six witnesses in rebuttal of the allegations against her. The other two Respondents did not call any witness. This election petition was filed pursuant to Article

73 (1) of the Constitution as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 which provides that;

“A person may file an election petition in the High Court to challenge the election of a Member of Parliament”

It is further anchored on section 97 (1) of the Electoral process Act No. 35 of 2016 (hereinafter called the Act) which provides as follows;

“An election of a candidate as a Member of Parliament, mayor, council chairperson or counsellor shall not be questioned except by an election petition presented under this part”

Sub-section 2 of the Act provides the avoidance of an election upon proof at the trial that a corrupt practice, illegal practice or other misconduct was committed in connection with the election by a candidate or with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent. It is a further requirement, in addition, that it be proved that the majority of voters in the subject constituency were or may have been prevented from electing the candidate in that constituency whom they preferred.

So, in order for a Petitioner to succeed, evidence must be presented during trial which satisfies the judge that not only was an electoral illegality committed but that the illegality prevented the majority of the voters in the subject constituency from voting for the candidate of their choice. The first duty placed upon a Petitioner is therefore,

to prove the commission of an illegality by or with the Respondent's knowledge and consent or that of the Respondent's agent.

The Petitioner's evidence in support of the six allegations was to the effect that she noted in the run-up to the election that the 1st Respondent was presenting herself to the electorate as a Government Minister in contravention of the Constitution. This, she said, created a perception in the minds of the electorate that the 1st Respondent was a Government Minister. In her testimony, the Petitioner, also referred to what she said was the 1st Respondent's continued association of her Ministerial position to the campaign on her Facebook page. She said that she was certain that was the 1st Respondent's face book page because it was titled "Honourable Mwanakatwe and it was being constantly up-dated with current activities the 1st Respondent was engaged in including her campaign programmes.

The second cause for concern was what she termed the 1st Respondent's generous giving of hand-outs, donations and projects within the constituency much to the Petitioner's disadvantage. In this regard, she cited two boreholes that were sunk in the State Lodge area within the constituency during the campaign period. She stated that the members of that community told her that they would vote for the 1st Respondent because of the boreholes which the 1st Respondent used as a platform for her campaign.

The third cause for concern was an event at the Word of Life Church in Bauleni, which is said to be the single largest community

within Lusaka Central constituency. According to the Petitioner, the 1st Respondent made a donation of hundred pockets of cement to the congregation towards the construction of its church building during the campaign period, which act she said, worked to the advantage of the 1st Respondent and to the disadvantage of the other candidates including her. She said that the projects were publicised to a wider audience when the 1st Respondent made a statement on a programme called RACE TO MANDA HILL which featured all the aspiring candidates for the Lusaka Central Constituency to the effect that projects could not wait until the elections were over. This debate was recorded at ZNBC and later broadcast on ZNBC television during the campaign period. The utterance, she said, struck a chord with the State Lodge boreholes which were sunk during the campaign period.

She contended that the 1st Respondent, who had introduced herself on the programme as the Minister of Commerce, had no business to do with the provision of water as that was the preserve of the Ministry of Local Government and Housing and the City Council.

The fourth concern she noted was that during the debate, the 1st Respondent made remarks to the effect that she was a Zambian born at the University Teaching Hospital where her umbilical cord was buried. Further that she understood the Zambian culture and as such the electorate wanted their own person ("umuntu wabo"). She perceived the utterances to have been intended to inform the viewers that the Petitioner was not a proper Zambian as her

umbilical cord was not buried in Zambia. In support of her evidence, the Petitioner submitted a DVD recording of the RACE TO MANDA HILL programme and a CD of the Facebook page for the first Respondent containing various postings. She said that the postings clearly depicted the 1st Respondent as Minister and also spoke to the projects in relation to the campaign. In the Petitioner's view, the high traffic of visitors (17000) on the page had a high likelihood of influence on the voters.

The fifth concern was the violence that the Petitioner and her team were subjected to in the city centre. She singled out two incidents in June when she and her team went to the main business centre to undertake some drive about and walk-about campaigns in the city centre. On this occasion her team was confronted by a group of about thirty PF regalia clad youths. The youths were in an aggressive mood as they shouted and gesticulated towards the team. Sensing danger, and in order to avoid physical confrontation, the Petitioner and her team abandoned the campaign and drove out of the city centre. A week later, another attempt was made to undertake a similar campaign activity in the city centre which ended up in the Petitioner's team being attacked by PF regalia clad youths. On this occasion, they had started the walk-about campaigns and distribution of the UPND campaign materials when the team came under attack. Two of the team's motor vehicles were damaged and pictures of the damaged vehicles are in the exhibited CD. Further, there was an attempt to stab a member of the team

with a screw driver and subsequently, the team was forced to abruptly abandon the campaign for safety.

The sixth concern was that of the police blocking the Petitioner's team from conducting door to door campaigns in the North-mead and Rhodes Park areas in the month of July. In the North-mead incident, the team decided to pay a courtesy call on the officer-in-charge of the Police for the area before embarking on the activity. The officer-in-charge told them they could not do so without written notice. The Petitioner asked for a piece of paper on which she wrote the notice but it was rejected. In the Rhodes Park incident, the Petitioner and her team had started doing their door-to-door campaigns and the distribution of UPND fliers to the residents when several police vehicles with armed police officers arrived and ordered them to stop the activity on the ground that it was an illegal meeting.

The seventh and final concern was that of campaigns on the polling day. Her testimony was that on the 11th August 2016, the voting day, she undertook a tour of polling stations in the Constituency and arrived at the City Library Polling Station which is in the central business district about 10:30 hours. She averred that one of her agents had informed her that people were urging the voters on the queues and inside the polling stations to vote for the 1st Respondent and not a white person. She said that she heard similar remarks both outside and inside the polling station. She discussed the concern with one Electoral official at the station who she said

did not say anything but just raised his shoulders. Further, that when she came outside the polling station, there were chants of PF slogans from the queues in full view of a police officer. When she engaged the police officer on the issue, he just told her to leave.

It is therefore, her contention that in view of the seven allegations set out in her petition, the election in the Lusaka Central Constituency fell far below the standard set by the Constitution as amended and the Electoral Process Act.

In cross-examination, she said that she was a member of the PF while her husband, Dr Guy Scott, was a member after which she joined the UPND. She denied the suggestion that she was only known as Dr Scott's wife and that her education had not benefitted the people of Zambia. She also refuted the suggestion that it was the judgment of the Constitutional Court that made the continued stay of Ministers in office after Parliament was dissolved illegal. She said that she was aware of the President's statement on the status of the Ministers after the dissolution of Parliament but maintained that the 1st Respondent was not a Minister and that she therefore, lied when she introduced herself as Minister on RACE TO MANDA HILL.

When asked if it was wrong for the 1st Respondent to state that she was born at UTH, she said it was racial and discriminatory as the 1st Respondent knew that the Petitioner was not born in Zambia. She believes that the remarks created a negative perception of her by the viewers.

On the boreholes, she said that she would be surprised to hear that they were sunk in March because they were sunk in June. She acknowledged that the Government had engaged the Moslem community but that she was not aware that the Moslem community was involved in the sinking of boreholes across the country. She further expressed ignorance on why the 1st Respondent was involved in the borehole. As for the donation of hundred pockets of cement, she said that the same was done during the campaign period although she did not know the exact date it was made.

On the use of Government resources, she said that she did not know if the vehicle offered to the first Respondent for purchase by the Ministry of Works and Supply was the same one she was using during the campaign period. She however, said that the vehicle the 1st Respondent used on the date of the recording of the programme RACE TO MANDA HILL bore a GRZ registration mark and flew the Zambian flag. She further argued that mere payment of the purchase price did not vest ownership of the vehicle in the 1st Respondent as there was a process to be followed to change ownership. She also maintained that the 1st Respondent was not entitled to use a GRZ vehicle flying the Zambian flag because she was not a Minister at the time even without the judgment of the Constitutional Court.

On the aborted campaigns in the city centre, she said that she did not know the perpetrators but that the 1st Respondent was not one of them. She however, believed that the 1st Respondent was behind

the hostility that her team got in the city centre. She refuted suggestions that she was attacked by UPND cadres in PF regalia under the operation watermelon strategy which she said was not even in place at the time.

On the two campaign programmes that were stopped by police in North-mead and Rhodes Park areas she stated that it was not a requirement that the Petitioner should obtain police permission since it was in July during the campaign period.

On the Facebook page, she admitted that anybody above the age of eighteen could create a Facebook page and post another person's photos if they have access to them. She however, maintained that the Facebook pages she had exhibited in the CD were those of the 1st Respondent. She further said that if the page was run by another, then it was at the 1st Respondent's behest.

With regard to campaigns on the polling day, she said that she saw people whom she did not know campaigning at the Lusaka City library and urging the voters not to vote for a white person. She did not see the 1st Respondent and neither did she report the incident to the Conflict Management Committee. She however, informed an official from the Electoral Commission of Zambia as she was the only white candidate in the constituency.

She admitted that Ministers did not have boundaries in the execution of their duties. She denied knowledge of the alleged attack on the 1st Respondent's husband by a UPND cadre and the

allegation that most of the pre-election violence was perpetrated by UPND cadres. She acknowledged that some named former Ministers had lost in the immediate past elections and therefore, that being a Minister was not a guarantee for winning an election. She maintained that she did not need permission from the police to carry out her campaign activities within the constituency.

In re-examination she said that it was her view that the location of one's umbilical code was not a qualifying factor for election but that the 1st Respondent used it to draw the voters' attention to the Petitioner's inability to conform to the cultural norms of the voters.

She further maintained that the 1st Respondent was not a Minister because Ministers vacate office upon the dissolution of Parliament and that no statement to the contrary could overrule that position.

PW2, a UPND official testified that he was appointed by his party to monitor activities in the State Lodge area during the campaign period. He was also organising logistics and food for the UPND campaign teams as a result of which he used to frequent State Lodge area during the campaign period. He went on to state that on a date he did not recall but in June 2016, PF youths started clearing a bush along the road to State Lodge near State Lodge Primary School A. When he inquired what the land was going to be used for, he was informed that a borehole was going to be sunk. He said the group comprised youths in PF regalia, among them, Njovu from State Lodge. He also identified by touching two young men

namely, Zayelo and Musonda who were seated in the gallery as among the PF members who were clearing the area.

Following the clearing of the land, he saw, in the month of July, a drilling rig come to the area and the first borehole was drilled on 10th July 2016, a Sunday. The second borehole was drilled the following week on a Monday near the school. He added that the first borehole was drilled between two villages one of which is Kamvuyo within State Lodge area. He stated that he was present when the first borehole was drilled on a Sunday while he found the other borehole already drilled. Further, he said that Njovu also witnessed the drilling of the first borehole.

He further testified that once the two boreholes had been drilled, the 1st Respondent, during her campaign tours in the area, urged the people to vote for her because she had brought the boreholes. He said that although he did not physically attend the 1st Respondent's campaign meetings, he heard her through the public address system she was using which was very loud. He confirmed that the two boreholes were in use at the time.

In cross-examination, he said that he was still a member of the UPND and he wanted the Petitioner to win but in a clean way. He maintained that the boreholes were drilled in July while the clearing of the land started in June. When shown the letter from the Ministry of Health addressed to the 1st Respondent talking about water problems, he said that he did not know that the water project was to be undertaken by the Moslem Community. He said that it

would be a lie if the drilling company came to testify that the boreholes were sunk on different dates from the ones he had told the court. He further said that he knew the two men he had identified from the gallery as residents of Bauleni and members of the PF and that he had identified them because they were at the drilling sites.

He went on to say that he would not claim to know State Lodge Area very well but he knew that one borehole was sunk in Kaswende village while the other one was sunk between two villages.

In re-examination he said that he had identified the two men from the gallery because they were heavily involved in the campaign for the 1st Respondent and that he used to meet them in the field.

PW3, Victoria Chivende, testified that she was a member of the UPND who is registered as a voter at Takamalo School in Bauleni within Lusaka Central Constituency. This witness testified that on a date she could not recall but, in the month of June or July, 2016, she went to Saint Mathias Mulumba Catholic church in Bauleni to attend the 07:00 hours church service on a Sunday. At the end of the service, as she walked out of the church, she was attracted by what appeared to be a stampede as people pushed each other. When she got closer to the scene, she found that women were struggling to get pieces of chitenge which were meant for fundraising by the church.

When the pieces of chitenge ran out, the 1st Respondent assured the women that she would procure more for them. She said that the 1st Respondent was at the time standing outside the church near the entrance and close to the spot where the pieces of chitenge had been displayed. She also said that during the service, an announcement had been made that the chitenge pieces for fundraising were on sale outside the church at K80 per piece. She believed that there were about 200 pieces of chitenge because the crowd outside was large as the people who came for the 9:00 hours service had already gathered outside the church. She also said that most of the chitenge pieces were bought by the people who came for the second service and that it was the 1st Respondent who had paid for the chitenge pieces. This position was based on the 1st Respondent's assurance that she would buy more chitenge materials. As she walked away from the crowd, she heard some commotion and when she looked back, she saw women again jostling to get some chitenge pieces.

She said that she got concerned with the 1st Respondent's conduct because she was not a member of that congregation and that she only saw her during the campaign period and that she had never helped the church prior to the campaign period.

In cross-examination, she said that she worked for the Petitioner as a maid. She went on to say that the church conducts two services the first being from 07: 00 hours to about 08: 45 hours while the second one commences at 09: 00 hours and that she did not see

the 1st Respondent in church during the first service. She expressed ignorance that the 1st Respondent had been invited to church by the then parish priest, father Chisanga. She further said that she did not know at what time the second service ends but that on that day she was not within the church premises at 11:00 hours as she had already left. She also said that she did not know that the 1st Respondent attended the second service and that she could not buy chitenge pieces before attending church service. She refuted the suggestion that the chitenge pieces were not yet on sale as they were just being unveiled by the priest. She further said that at the time she saw the women jostling for the chitenge pieces the priest had not yet come and the 1st Respondent was standing by the entrance to the church.

In re-examination, she said that she learnt about the chitenge pieces following an announcement in church at the end of the first service. When she went outside, she found women jostling for the chitenge pieces and after they had run out, she heard the 1st Respondent announce that if there were more chitenge pieces, she would buy them for the congregants. She said that she reported the incident to the Petitioner not as her employer but in the interest of her political party. She maintained that the incident happened before the celebration of the Saint Matthias Mulumba day and during the campaign period.

PW4, who is also a member of the UPND, testified that he was a resident of Bauleni who voted from Bauleni South. He said that the

1st Respondent did not win the election fairly because she used deception to the voters. He said that this was so because during campaigns, she used to say that Charlotte was white and she could not do anything. He claims to have heard her utter those words during a campaign meeting in Bauleni over a loud speaker while he was at his home, about five hundred metres from the rally site. He further said that he heard the 1st Respondent say that even the previous Member of Parliament was white and he had done nothing. He further claims that he heard words to the effect that Margaret was one of us as she was born at the University Teaching Hospital.

He said that he was concerned that the voters would believe that Charlotte would not do anything because she was white. He testified that the UPND campaign was injured because it was true that the previous Member of Parliament was white and Margaret worked hard to portray that he had not done anything. He further testified that the PF slogan of point at what you have done (sonta) injured the UPND campaign because Charlotte had nothing to point at and she is white.

In cross-examination, he said that he was in the campaign team for Charlotte and that the PF slogan of pointing at work done did not defeat the Petitioner's campaign but that it was oppressive. He said they countered it by telling the voters that whatever Margaret was pointing at was work done by the former Member of Parliament who was a white man. He rejected the assertion that the voters loved PF more than UPND.

In re-examination, he said that the voters in Lusaka Central lost interest in a white candidate due to the racial remarks to the effect that the former Member of Parliament was a white man. He reiterated that he had heard the 1st Respondent say that the former Member of Parliament was a white man, the UPND candidate was also white and wife to the former Member of Parliament and she would not do anything during her campaigns.

PW5 testified that on 4th July 2016, he was on a campaign trail in the town centre in a convoy of motor vehicles with the Petitioner. He was in a motor vehicle driven by Mr. Mupeta while the Petitioner was in another. Then two mini buses approached from the opposite direction with lights on. The buses stopped and a group of young men clad in PF regalia came out and approached the land cruiser he was in and grabbed a screw driver from a vender and tried to stab him but he missed. He immediately closed the windows of the land cruiser. At that, the young men went to the rear of the vehicle and smashed the rear wind screen using stones. At that point he advised the driver to drive away and he did so. He went to report the matter to town centre police station where he was advised to report the matter to Lusaka Central Police station. He added that PF members used to beat them whenever he and other UPND members attempted to campaign.

In cross-examination he said that he knew one of their attackers from town centre and he informed the Police about it. He confirmed that the 1st Respondent was not present when he and his team were

attacked in the town centre. He further said that the group that attacked them was the same one that used to campaign with the 1st Respondent. He said that to his knowledge no one had been picked up by the police in connection with the incident despite having reported the matter.

In re-examination, he said that the police had told him to report whenever he saw the person who had attacked him but that he is no longer found at his stand. He stated that having reported the incident, it was the duty of the police to arrest the suspects.

At the conclusion of PW5's testimony, Mr. Haimbe informed the court that they had dispensed with the attendance of the other witnesses who were not present. He accordingly closed the case for the Petitioner.

The 1st Respondent's witness was Elias Simukonda Panja, a pastor in the Word of Life Church Bauleni congregation. He testified that on 26th March, 2016, at a church building committee meeting at which fund raising for the church building was discussed, a member of the committee, Kanga Kalunga, suggested that a fund raising luncheon be organized to which different people should be invited. Kalunga also volunteered to invite, among others, the 1st Respondent. He then wrote an invitation letter to the 1st Respondent on 28th March 2016. The 1st Respondent, who was expected to attend the function on 8th April 2016, did not however, attend although Kalunga and his colleague had pledged hundred pockets of cement on behalf of the 1st Respondent.

The 1st Respondent instead went to attend church service on 17th April 2016 and left. The church however, sat and noted that if the pledge made on behalf of the 1st Respondent was not honoured quickly, it would be caught up in the campaign period and as such, the pledge was honoured on 8th May 2016 in form of cash in the amount of K6, 400 as a pocket of cement cost K64.00 at the time. He said that the donation was not given during the campaign period because the church members were conscious of the implications of receiving the donation during the campaign period.

In cross-examination, he said that it was his duty to collect money for the church whenever the church treasurer was not at church. He conceded that it was just his word that he received such money as there was no record before court to that effect. It was further his position that he always signed as Panja and that he was the pastor of the church while Bishop Milema was the overseer. When asked about Kalunga, he said that he was deceased.

He also said that the 1st Respondent was not a member of his church and that although other people were invited to the function, only the 1st Respondent was serving as Minister among the invited persons because she was known to Kalunga.

In re-examination, he re-iterated that as church pastor, he could receive money if the treasurer was not present.

RW2, Charles, Yeka Msiska, who is employed as District Medical Officer for Chongwe testified that he wrote the letter exhibited as 1

in the 1st Respondent's bundle of documents which letter is dated 24th March 2016 addressed to Hon. Margaret Mwanakatwe, as Minister of Commerce and Industry. He said the decision to write the letter was made following a provincial meeting convened to find a lasting solution to the water problems in some parts of Lusaka Province including Bauleni which had suffered outbreaks of cholera. A decision was made to sink boreholes at State Lodge in Bauleni area. The meeting further decided that a person that the committee had worked with before be found within the area and the 1st Respondent was identified as such a person as the committee had worked with her in Nachitete area when they started building a health centre and sunk a borehole. It was then resolved to write to the 1st Respondent to ask her to be part and parcel of the project.

It was also his testimony that his committee could not involve the then area Member of Parliament because the problem had been known for a long time. He said that there was no monetary contribution from the 1st Respondent and that the boreholes were drilled by the Moslem Welfare Society through a drilling company. It was further his testimony that the committee discovered that the 1st Respondent had a passion for communities that needed services. He also said that the boreholes were sunk between 26th and 29th May 2016 and that in fact the information he had was that the boreholes were sunk on 30th May 2016.

In cross-examination, he conceded that the letter has no official stamp and it is not copied to any Government official or the Member

of Parliament. He also acknowledged the cancellations on the letter which are not signed against. When challenged about his authority to write such a letter, he said that he had the authority from the Ministry of Health over the whole country although he could not state who gave him such authority. He however, conceded that he had no authority to undertake a project in another District without the authority of his immediate supervisor, the Provincial Medical Officer.

He further acknowledged that the Department of Water Affairs was the one with expertise in water issues but that he did not need to consult the officers from there. He also acknowledged that the 1st Respondent did not possess the requisite knowledge to identify areas suitable for boreholes but that he nonetheless asked her to look for such areas. He further admitted that the 1st Respondent was not a resident of the areas in which the boreholes were to be sunk and admitted that the 1st Respondent would feel associated with the project.

In re-examination he said that the Government had no role to play in the projects and as such there was no requirement to comply with tender procedures. He stated that the purpose for writing to the 1st Respondent was for her to help mobilize the communities in the area.

RW3, Mr. Mubasshir Melita, was the co-ordinator for the Moslem Social and Welfare Trust. He testified that the Moslem Social Welfare Trust was registered in 2008 and represents the Lusaka

Moslem Society and Jamila for the purposes of undertaking projects for the provision of clean and safe water and helping health institutions in Zambia.

He went on to state that in early May, RW2, Dr. Msiska, communicated to him that there was a need for a borehole in Zimbabwe compound within State Lodge area. His organization then approached the Lusaka District Commissioner to find out how they could be of assistance. He followed that by visiting the area and then mobilization of funds from donors followed. The borehole was then sunk on 28th May 2016. He said that after his visit to the area he made the decision to have two boreholes sunk instead of the one that was requested for. The second borehole was then sunk on 29th May 2016. He refuted as false the testimony that the boreholes were sunk on 8th and 18th June 2016. Although he admitted that the sites were cleared by the community, he denied knowing Zayelo and Musonda but confirmed that the sites were cleared in May. It was his testimony that he first met the 1st Respondent in September 2016.

In cross-examination, he said that he would not know if PF cadres were among the people that cleared the sites and that he would equally not know if the 1st Respondent took advantage of the boreholes in her campaigns. He said that a borehole can be operational within hours of its being sunk. He further said that he had not exhibited any documents to prove that the boreholes were sunk on 28th and 29th May 2016 and that he was not present when

the boreholes were sunk. As regards the contact by RW2, he said it was first in the early part of May on a date he did not recall and that he visited the site within a week.

In re-examination he said that the Moslem Society sunk two boreholes.

RW 4 testified that she attends service at Bauleni Catholic church and that every year there is a requirement to acquire new chitenge pieces for celebrations and that the chitenge pieces for 2016 were launched on 4th June 2016. She said that on the day she went to attend the 09: 00 hours service and arrived at the church at 08: 30 hours. She said that the 1st Respondent arrived at the church about 09: hours as a guest for father Chisanga. They waited for father Chisanga to arrive and when he did, she saw him enter the church with the 1st Respondent. She disputed claims that people were jostling for chitenge pieces. She however, said that there were women selling chitenge pieces who stopped when the service started. She also said that an announcement was made in church that the chitenge pieces were available outside. The congregants were urged to support the church and when they went outside after the service, the women who were in the 1st Respondent's entourage asked her to buy them some chitenge pieces. She responded by buying twenty pieces which she gave to her entourage after which they left. She said the chitenge pieces were to be worn on 26th June for the Saint Mathias Mulumba celebration. She also disclosed that

she was the vice chairman for the Lusaka Central Constituency in the PF.

She said that she knew PW3 who was a congregant of the same church as her. She said that the chitenge pieces at the church on that day were less than 200 as the distribution was being done in sections. She stated that she did not see the 1st Respondent buy chitenge pieces before the second service but that she saw her buy after the service.

In cross-examination, she said that she was at the church with the 1st Respondent and she did not see any jostling for chitenge pieces but maintained that she saw her buy chitenge pieces on the date in issue during the campaign period. She however, maintained that she only bought twenty chitenge pieces for which she paid K1, 400.00. She said that father Chisanga had not been dismissed but that he was transferred at the expiry of his term of office at Bauleni. She also admitted that she met the 1st Respondent at the church before 9: 00 hours. She said that there were no PF cadres in the 1st Respondent's entourage. She also confirmed that the sale of chitenge pieces commenced after the first service but maintained that they were less than 200.

PW5 was Mr. Mark Mushili, who introduced himself as the campaign manager for the 1st Respondent during the campaign period for the 2016 general elections. I however, wish to place on record that this is a witness who sat in most of the time while the first four witnesses were testifying for the 1st Respondent. I will

therefore, attach less weight to his testimony. This witness expressed ignorance about the allegations relating to the boreholes, the pieces of chitenge and the donation of hundred pockets of cement stating that he joined the campaign after the nominations had been completed. He said that the 1st Respondent did not at any time make racial remarks and sought to render credence to his claim by stating that the 1st Respondent had friends who were of Indian origin and were present in court and two of those were part of the campaign team. This witness further saw nothing wrong in the 1st Respondent's statement about the location of her umbilical cord.

He also denied ever receiving any report of violence from PF followers including the incidents in the city centre as the cadres had been strictly told not to engage in violence. He also denied the exertion of any influence on the police by his team to stop the Petitioner from campaigning.

In cross-examination he admitted being a board member of ZAMTEL, an entity of which the 1st Respondent's husband is the Chief Executive Officer. He expressed ignorance of one Chitambo Penjani being the campaign manager for the 1st Respondent. He claimed to have been in Lusaka campaigning twenty-four hours a day with the 1st Respondent during the campaign period. He said that he was with the 1st Respondent on 20th June 2016 but that he did not know what time he parted company with her. He expressed ignorance of the 1st Respondent appearing on ZNBC on that day on

the RACE TO MANDA HILL programme saying he was not with her for that programme and that he did not watch it. He further admitted that the 1st Respondent could have white friends but still be racial.

On the campaign schedules, he said that he and the 1st Respondent used to conduct up to six rallies per day and that they would always get permission from the police to hold political rallies. He further said that as campaign manager, he knew Lusaka Central Constituency well enough for that purpose but that he did not pay attention to the location of the boreholes.

In re-examination he said that during the campaign period, he did not receive any complaint concerning his constituency.

PW6 was Margaret Dudu Mwanakatwe, the 1st Respondent. She stated that she believed she continued to be a Minister following the dissolution of Parliament because the President, her appointing authority, told her and the others to continue in office until the Constitutional Court rendered its decision on the matter. It was her position that her continued stay in the office of Minister disadvantaged her as she had less time to campaign. She further said that because she was performing her ministerial duties, she was entitled to draw a salary.

As regards the use of a Government motor vehicle, she said that she was using it during the campaign because it had been offered to her

for sale and that she fully paid for it on 30th May 2016 and it became her personal vehicle.

With regard to her remarks on the RACE TO MANDA HILL, she said that when she said her umbilical cord was at UTH, she spoke in Chibemba to underscore the place of her birth as UTH. She added that the 1st Respondent would have equally stated her place of birth and that would not have been racial. She said she was at pains to figure out anything she did that would amount to racism as she was not a discriminatory person.

She went on to say that the fact that the people of Lusaka Central had voted for Dipak Patel and Guy Scott for a combined period of twenty-five years demonstrated that race was not a factor to them. She stated that the voters did not vote for the Petitioner because she did not endear herself well enough to them. She denied ever uttering any racial remarks during the campaign period. She said that it would be most hypocritical of her if she urged people not to vote for the 1st Respondent because she was white while she had white people in her campaign team.

Of her involvement in the Nachitete community, she said she and her husband own a ranch in the area and on which they employ up to six families some of whom live in Bauleni and used to access medical services from Bauleni and state lodge. That was what prompted her to get involved in the Nachitete project in the course of which she met Dr. Msiska. In January 2016, there was an outbreak of cholera in Bauleni as a result of which she got

interested and started visiting the communities with a view to supporting them. She disassociated her ministerial position from her involvement in the communities saying that she was not a minister when she went into Nachitete community and further that her ministerial status did not influence the voters because other candidates who held ministerial positions lost in the August 11th elections.

With regard to violence, she said that she was non violent and distanced herself from any acts of violence as alleged either by herself or her team members. She said that none of her campaign team members were from the city centre and that she did not experience any violence during her campaigns in the city centre. She said that on the 4th July 2016 when the Petitioner's campaign team was allegedly attacked in the city centre, she was in Ndola for the Trade fair welcoming the Mozambican President and the Republican President. She suggested that the people who attacked the Petitioner and her team in the city centre could have been UPND members wearing PF regalia under the water melon strategy.

With regard to the police action to stop the Petitioner's campaign in North-Mead and Rhodes Park area, she said that Ministers did not possess power to influence police action.

On the alleged cement donation to Word of Life Church in Bauleni, it was her testimony that she got involved with the church in January 2016 through Kalunga who had been introduced to her by one of her workers. Kalunga in turn invited her to his church and

informed pastor Panja about it. Kalunga died before she could attend church and she attended his burial. By then she had got connected to pastor Panja. After she received a letter she sent a representative to give a pledge of hundred pockets of cement. She however, could not attend the fund raising meeting on 8th April 2016 but managed to attend service at the church on 17th April 2016 and she made the donation on either 8th or 9th May 2016 in form of cash amounting to K6, 400.00. She said that at the time she had not been adopted as a candidate for the PF.

Of the boreholes, she said the same were sunk by the Moslem Welfare Trust on 28th and 29th May 2016 and not 10th and 18th July as testified by the Petitioner's witnesses. She further denied ever commissioning the said boreholes because her campaign promises were for the future.

On the chitenge pieces at Saint Mathias Mulumba Catholic church, she said that she had worshiped there in the past and on the date in issue; she had been invited by father Chisanga to take part in the unveiling of the chitenge pieces to be used on the 26th June 2016 during the commemoration of the Saint Matthias Mulumba day. She accordingly went to the church on 12th June 2016 and arrived about 9:00 hours for the service which commences at 9:00 hours. She found some activities outside the church involving some chitenge pieces and rosaries. Father Chisanga was at hand to welcome her and her entourage. Father Chisanga was in the company of some leaders of the women's league at the church.

When the members who had attended the early service had come out of the church, she and the others who had come for the second service entered the church. Towards the end of the service, the chitenge was unveiled. At the end of the service, she was escorted outside and while outside, some women in her entourage requested her to buy them the chitenge pieces for the celebration on 26th June 2016. She bought twenty pieces of chitenge twelve of which she distributed to her team and kept eight.

She denied seeing or hearing any pandemonium before she entered the church and that she only bought chitenge pieces after the she had attended the 9:00 hours service. She denied assuring the women that she would buy them more chitenge pieces and that she only greeted the priest and the people who had come to meet her by the entrance to the church. She gave detail to the effect that the church had only bought three thousand five hundred metres of chitenge material and that only 35 x 2 metre pieces had been cut out by the church that day and the rest sent out to the sections. She bought twenty of the thirty-five pieces. She said that she got to know all the details because she was working closely with the Catholic Church.

As for the alleged campaigning on the polling day, she dismissed it as not possible because it is not allowed but that if at all his agents were campaigning, then she was not aware.

With regard to the Facebook pages, she disowned the people who had created the pages stating that there were at least ten face book

pages in her name none of which she handles. She said that in the polls, she got 29, 732 votes while her closest rival, the Petitioner, got 17, 934 votes leaving a difference of about 12, 000 votes. She prayed that she be declared duly elected.

In cross-examination she said that she owned several Facebook pages and that it was possible that she took a mobilization drive through the city centre on 10th June 2016. She however, said that she did not know that the event was captured and posted on Facebook because she does not visit her Facebook pages.

As for the purported list of adopted candidates for the PF announced on 26th May 2016, she said that she did not see it. She also said that it was not yet in the campaign period as her official campaign period started after successfully filing her nomination papers and that the period was three months from 30th May 2016. She confirmed that the campaign period was for three months and that 26th May 2016 was within the campaign period. She added that it was during the campaign period when the boreholes were sunk.

With regard to the flying of the National Flag on her vehicle, she said that she was not authorised to do so on a private motor vehicle. She added that the motor vehicle she used to go to mass media for the RACE TO MANDA HILL programme was GRZ from the pool and that it was during the campaign period after her nomination as a candidate for the Lusaka Central Constituency.

She rejected the suggestion that a directive by the President which was contrary to the Law was illegal. She further argued that it was not necessary for the President to write her a fresh letter of appointment following the dissolution of Parliament because her initial letter of appointment had not been withdrawn. She conceded that her initial appointment was before the Constitution was amended.

She also admitted that partial distribution of chitenge materials was done on 26th May 2016 during the campaign period. She admitted that she was holding herself out as a Minister at the time and the people perceived her as such. She said that she could not be held liable for the actions of people she had not appointed as her agents. She disagreed with the suggestion that based on the judgment of the Constitutional Court; the President's directive was unconstitutional. She however, admitted that a belief that one was holding office legally did not validate the belief if the office was held contrary to the law. She admitted enjoying all privileges associated with the office of Minister and that she had not refunded the treasury.

She admitted that the programme RACE TO MANDA HILL was a campaign programme recorded and aired during the campaign period. She conceded repeating her remarks on the location of her umbilical cord which she had made in her introductory remarks in the course of the debate but denied making the remarks in reference to the Petitioner. She said that the remark was to make

the point that she was Zambian but not that there was a difference between a candidate born in Zambia and one born outside Zambia.

With reference to her ministerial position, she said that she did not mean to inform the voters that they would benefit from her position as Minister. She however, admitted that she meant that as a Minister, she had done a lot of work for the needy in Zambia in general and Lusaka Central in particular. She further admitted campaigning in the State Lodge area where there was a challenge of water which she spoke about during her campaign. She said further that she was using a public address system during her campaigns and admitted that she used one during her campaign in State Lodge area.

In re-examination she said that several people run her Facebook pages independent of her. She maintained that she did not have a letter under the hand of the President to continue as Minister following the dissolution of Parliament but that she had communication via a cabinet memorandum. She also maintained that her status before 9th August 2016 was that of Minister.

This marks the close of the evidence I received in this case. The parties filed their written submissions as directed on 11th November, 2016.

In exception of the 3rd Respondent, all parties filed written submissions as agreed upon each reflecting their position on the petition. They also cited authorities they seek to rely upon most of

which are common to all the parties. I will consider the relevant parts of each submission in relation to the allegations they attach to. Having reviewed the evidence in general terms, I will now consider each allegation, the law and the facts in that regard and dispose of it accordingly.

I begin with the allegation relating to campaigns on the polling day by the 1st Respondent's agents. This allegation is said to have been witnessed by the Petitioner at the City Library polling station when she visited the station mid morning following a tip off from her agents. This allegation is to the effect that people on the queue and within the voting room were telling others not to vote for a white person but for the 1st Respondent.

In terms of section 97 (2) (a) of the Act, an election is void upon proof of; among others, an illegal practice or misconduct and section 89 (1) (e) of the Act prohibits canvassing for votes, soliciting the vote for any person, inducing any person not to vote for a particular candidate. It follows therefore, that campaigning for any candidate or soliciting votes for any candidate on polling day is illegal and proof thereof at an election petition makes the election of any candidate declared winner void. There is however, a rider to that which is the requirement that the illegal act must have been by the person declared winner or with his knowledge and consent or approval or of the declared winner's election agent or polling agent. Further, if the above is the case, the majority of the voters in the

constituency were, or may have been prevented from electing the candidate whom they preferred.

Only the 2nd Respondent submitted on this allegation to the effect that no evidence of such illegality was adduced by the Petitioner. I would have no difficulty in agreeing with the submission in that respect because; the Petitioner has not shown that the people who were engaging in the illegal activity were doing so with the knowledge or approval of the 1st Respondent or her agents. It is most likely that the people whom the Petitioner saw canvassing and urging the voters to vote for the 1st Respondent were her supporters and sympathizers. That alone, however, falls short of the requirement that the same must be agents and not mere supporters of the candidate. This is in light of the definition of election agent under section 2 of the Act as;

“Means a person appointed as an agent of a candidate for the purpose of an election and who is specified in the candidate’s nomination paper”

Further, polling agent is defined as;

“Means an agent appointed by a candidate in respect of a polling station”

In this allegation, the culprits are unidentified and they are not agents of the 1st Respondent in terms of the provisions of the Act cited above. The Supreme Court of Zambia had occasion to pronounce itself on the effect of that provision of the law which also occurred in the 1996 Electoral Act in the case of Akashambatwa

Mbikusita Lewanika and another V Fredrick Titus Jacob Chiluba
when it stated as follows;

“We are mindful of the provisions of the Electoral Act that a candidate is only answerable for those things which he had done or which are done by his election agent or with his consent. In this regard, we note that not everyone in one’s political party is one’s election agent. An election agent has to be specifically so appointed.”

This allegation has therefore, not been proved and it cannot succeed and I dismiss it accordingly.

The next allegation is that relating to the police blocking the Petitioner’s door to door campaigns in North mead and Rhodes Park areas during the campaign period. This particular allegation is not specifically provided for under part III of the Act which provides for electoral offences. There are however, provisions under the Code of Conduct which set out the duties of the Commission and the Zambia Police. In that regard, rule 3(10 (f) and (h) and rule 6 (c) provide that the Commission, where reasonable and practicable, shall ensure that a campaign rally or meeting which is legally organized by a political party is not disrupted or arbitrarily prohibited and that the Zambia Police Service shall;

“Refrain from disrupting any campaign, rally or meeting which is legally convened by any political party”

Further, Section 110 of the Act vests power to enforce the Code of Conduct in the Commission. There is however, no evidence that the two incidents were reported to the Commission. The enforcement of

the Code of Conduct by the Commission appears to be illusory as it lacks the capacity to police political activity. In terms of section 97 (2) (b), non-compliance with the provisions of the Act relating to the conduct of the election makes the election liable to being declared void.

The Petitioner has submitted that the actions of the Zambia Police contravened rules 3 (i) (h) and 6 of the Code thereby violating the principles laid down for the conduct of free and fair elections in terms of section 97 (1) (b) of the Act. From the evidence of the Petitioner, I would say that other than her failure to lodge a formal report with the Commission, I have no difficulty accepting her credibility and that she was truthful on the matter. I would equally have no difficulty in accepting that the conduct of the police was in violation of the Code and that the Commission has no capacity to execute the mandate it gave itself or, was it imposed upon it by the Legislature?

The catch is however, to be found in the last portion of paragraph (b) because there is a further requirement for the Petitioner to show that such non-compliance affected the result of the election. In my considered view, anything that prevents a candidate from campaigning or communicating with the electorate in a particular area affects the result of the election. The police in this case, prevented the Petitioner and her team from campaigning in two areas within Lusaka Central Constituency in violation of the Code. The action by the police, not only on one occasion but twice and in

different places, had the inevitable effect of instilling fear in the Petitioner and her campaign while the 1st Respondent and her campaign were at liberty to go to any place any time to campaign.

Unlike under paragraph (a) of section 97 (2) of the Act, Non-compliance with the provisions of the Act under paragraph (b) need not be by the candidate or that candidate's agent. All that is required is evidence of non-compliance by the relevant player, in this case, the Zambia Police. In dealing with this allegation, I have considered sub-section (4) of section 97 of the Act and find that it does not apply because the sub-section relates to an election officer's act or omission. The allegation in this case relates to the conduct by the Zambia Police. This allegation stands proved to the requisite standard as the Petitioner's evidence was not discredited in cross-examination and there is nothing to suggest that it was manifestly unreliable.

The next allegation is that of the two incidents of alleged violence against the Petitioner's campaign in the city centre by alleged PF supporters. The evidence of the Petitioner and her witnesses on this allegation was not discredited in cross-examination. There is also evidence of a damaged motor vehicle through exhibited pictures on the CD. There is however, no evidence that the violence was at the behest of the 1st Respondent or his agents or indeed with her knowledge, consent or that of her agent. As a matter of fact, it is common ground that the 1st Respondent was not part of the group that attacked the Petitioner's campaign on both occasions. It is

further a fact that the 1st Respondent was in fact out of town on the date of the second attack which was more serious than the first.

This allegation does not however, fall to be considered under subsection (2) (a) but (2) (b) of section 97 of the Act because it speaks to the general conduct of the election as to compliance or non-compliance with specific provisions of the Act.

The submission by the Petitioner on this allegation is that the violence perpetrated against the Petitioner and his campaign in the city centre was in violation of rule 15 (1) (a) of the Code. The submission on behalf of the 1st Respondent was that no arrests had been made and no medical report had been exhibited to prove the alleged violence.

The submissions by the 1st Respondent are off the mark as the evidence of PW5 was to the effect that they there was an attempt to stab him with a screw driver which was not successful. Further, both PW1 and PW5 testified that on both occasions, they were forced to abandon their campaigns because of the threat of an imminent attack from the youths. On the second occasion, one of the motor vehicles in the campaign team was damaged. As for the lack of an arrest, it is sufficient that the incident was reported to the police and failure to effect an arrest by the police cannot be blamed on the victim.

This clause comes under general offences created by the Code which attract criminal sanctions just like most of the provisions in

the Code. There is however, clause 4(2) (d) of the Code which states as follows;

“A member or supporter of a political party or a candidate shall not – disrupt another political party’s rally, meeting, march or demonstration or seek to obstruct another person from attending a political rally of another political party”

In my considered view, the above provision of the Code is meant to ensure a free and levelled playing field for all political parties. It follows therefore, that any act by supporters of a political party intended to prevent members of another political party from exercising their right to solicit for votes from the general public, offends against the spirit of section 97 (2) (b) of the Act. The candidate against whom the petition is brought is not required to be involved or indeed have knowledge of such actions by a political party. In fact, the sub-section is not concerned with who the actual perpetrator is but whether or not the election was conducted in accordance with the principles in the cited provisions of the Act.

The Acts of preventing the Petitioner and her campaign from conducting their intended campaign programmes in the city centre by PF regalia clad persons greatly affected the Petitioner’s ability to reach out to potential voters in that part of the constituency. The act created a hostile atmosphere against the Petitioner to the advantage of the 1st Respondent who confirmed that she undertook many campaign trips in the city centre unimpeded and without any hostility or threat of violence from anybody. I therefore, find that the none-compliance with the cited provisions of the Code without

doubt negated the conduct a free and fair election and affected the result of the election. The 1st Respondent has argued that the people who attacked the petitioner's campaign could have been UPND members implementing a strategy by the UPND called operation water melon. The Petitioner dismissed the suggestion and I would equally dismiss it for being absurd. The only reasonable inference to be drawn is that the aggressors were supporters of the PF as they sought to prevent the Petitioner from reaching to the voters in the city centre area. This allegation must equally succeed.

The next allegation relates to alleged racial remarks uttered by the 1st Respondent and her campaign against the Petitioner. The key evidence in support of this allegation is based on the 1st Respondent's utterances during a televised recording of a programme titled "RACE TO MANDA HILL".

This programme was a platform on which all aspiring candidates for the Lusaka Central Constituency were able to inform the electorate who they were, and why the voters should vote for them and not the other candidates. Of particular interest was a statement made by the 1st Respondent during her introductory remarks which she made in Chibemba language. The statement is generally translated as follows; "I am a Zambian born at the University Teaching Hospital where my umbilical cord was buried. I am one of you and I understand the Zambian culture." The 1st Respondent repeated this remark later in the programme after the Petitioner had spoken.

According to PW4, he heard the 1st Respondent telling the voters at a campaign rally in Bauleni not to vote for a white person because the former Member of Parliament, the Petitioner's husband, who is white, had done nothing and so the Petitioner who is also white would do nothing.

The Petitioner's submission on this allegation is that the statements by the 1st Respondent were intended to portray her as indigenous and paint the Petitioner as non-indigenous who was not born in Zambia devoid of understanding of the Zambian culture. It was further submitted that the utterances were discriminatory and therefore in contravention of clause 15 (1) (m) of the Code. For ease of reference the said clause states as follows;

“A person shall not – discriminate against any person on grounds of race, ethnicity, class, disability, gender, sex, religion or in any other manner in connection with an election or political activity”

The words alleged to be discriminatory and racial as attributed to the 1st Respondent on the televised programme, “RACE TO MANDA HILL,” are not in dispute. What is in dispute is whether or not she made similar remarks during one of her campaign meetings in Bauleni and whether or not the words had a racial connotation.

The 1st Respondent's submission is that the court should dismiss the allegation as there was no racial connotation in the words. It was submitted further that since there were other contestants, who did not complain, the court should ignore the allegation as it was intended to make the 1st Respondent look bad.

The issue to be determined, in my view, is not what the 1st Respondent intended to convey to the electorate by those words but what an ordinary person who watched the programme or who heard the said utterances would understand the words to imply. In the election of 11th August 2016, I take judicial notice of two facts that at political party level, only the PF and the UPND were real contenders at all the levels namely; Presidential, Parliamentary and Local Government. With regard to the Lusaka Central Constituency in particular, of all the candidates, only the Petitioner was white and non-indigenous Zambian who was the only one most likely not to understand Zambian culture.

Having watched the recorded programme on the DVD that was submitted, several times, no sinister motive would be imputed if the 1st Respondent had just made the remarks in her introductory remarks. It however, became very clear that the target of the remarks was the Petitioner when she repeated the words in a more passionate fashion and again in Chibemba language soon after the Petitioner had spoken. From the candidates that were on the programme, it is most likely that only the Petitioner may not be conversant with the Chibemba language and thereby, appealing directly to the electorate as against the Petitioner who fell short of the indigenous test as espoused by the 1st Respondent.

The 1st Respondent's posture in making that statement was that of a person intent on appealing to the voters' sense of indigenusness rather than to the attributes that qualify a candidate for office as

Member of Parliament. That is certainly offensive against clause 15 (1) (m) of the Code and in turn falling within the contemplation of section 97 (2) and (a) of the Act for which an election is liable to be avoided. The 1st Respondent has wondered why only the Petitioner, out of the five other candidates present has raised issue out of her remarks. That question in facts works against the 1st Respondent's intended defence because the most reasonable inference to be drawn from the other candidates' silence is that they fully understood that it did not affect them as any right thinking person would know that it was aimed at the Petitioner.

In light of what I have said above, it places the 1st Respondent in a position where she would have no difficulties in using similar language in her campaigns within the constituency as alleged by PW4. The evidence of PW4 is that he heard the 1st Respondent through the public address system while campaigning in Bauleni urging voters not to vote for a white candidate who would do nothing for them as the previous holder of the seat, who was white and her husband had failed to do anything.

The 1st Respondent admitted that she used different public address systems during her campaigns. In fact, it is a matter of common knowledge that public address systems are widely used by all political parties during campaigns. I am therefore, inclined to accept PW4's evidence that the 1st Respondent and or her agents did utter racially discriminatory remarks during a campaign rally in Bauleni.

If PW4's testimony in that regard needed corroboration, that would be found in the televised broadcast. This allegation stands proved.

It must be promptly pointed out that there is nothing in the evidence that paints the 1st Respondent as a racist. What happened during the election was for political expedience and her utterances in that regard were a political miscalculation on her part.

The next allegation is that of bribery or vote buying as defined under section 81 of the Act. Under this allegation, there are three incidents cited namely, the buying of chitenge pieces by the 1st Respondents at Saint Mathias Mulumba church in Bauleni, a cash donation of K6, 400.00 by the 1st Respondent to the Word of Life Church at Bauleni and the sinking of two boreholes in State Lodge area with the alleged involvement of the 1st Respondent.

The first two acts are not denied by the 1st Respondent but she has said that she only bought twenty pieces of chitenge twelve of which she gave to members of her entourage and kept the rest for herself. As for the cash donation she said that she made the donation about 8th or 9th May 2016 upon receiving an invitation to attend church service by Pastor Panja who had been introduced to her by Kalunga. As for the boreholes, she denied sinking them saying they were sunk by the Moslem Welfare Trust.

The submission on the purchase of chitenge pieces was that the same was in contravention of section 81(1) (c) and rule 15 (1) (c) of the Act because it was done in full view of the general public. The

case of Reuben Mtolo Phiri v Lameck Mangani was cited for authority. In rebuttal, the 1st Respondent submitted that PW3's testimony stating that the 1st Respondent could not have been on the church premises buying chitenge pieces for unknown people. It was further submitted that it was not possible for the 1st Respondent to have engaged the church members before being formally welcomed by the Priest.

The submission by the Petitioner on the donation to the Word of Life Church was that although the actual date of the donation was not clear, the donation related to a project which continued way into the campaign period and that it amounted to corruption and illegal practice. In rebuttal submissions, the 1st Respondent stated that the donation was given outside the campaign period before the 1st Respondent was unveiled as a candidate.

On the donation of boreholes to State Lodge area, it was submitted that by admitting that she used the water problems during her campaigns in State Lodge area and by also referring to the subject on the RACE TO MANDA HILL programme, the 1st Respondent confirmed PW2's testimony that she had donated at least one borehole to the area in exchange for votes. The case of Michael Mabenga v Sikota Wina & 2 others was cited for authority. The rebuttal submission by the 1st Respondent was simply that the Petitioner had failed to show that the 1st Respondent was involved in the drilling of the boreholes as the 1st Respondent had clearly shown that the same were drilled by the Muslim community.

On the totality of the evidence on the three incidents of alleged bribery and vote buying, it is only the drilling of the boreholes in which there has been no clear demonstration of what role the 1st Respondent played. The only link she has to the boreholes is the letter from RW2, Dr Charles Msiska dated 24th March 2016. That letter specifically asked the 1st Respondent to help in identifying two sites on which boreholes would be sunk in State Lodge area and Bauleni compound. According to PW2, PF youths cleared the sites towards the end of June 2016 and the first borehole was sunk on 10th July, 2016 a Sunday while the second was sunk on Monday of the following week. This witness was speaking as an eye witness to the clearing of the sites and the sinking of one borehole.

On the other hand, RW2 and RW3, both of who said that the boreholes were sunk on or about 28th and 29th May 2016 did not witness the sinking of the boreholes. Further, no borehole completion report was exhibited by the 1st Respondent to rebut conclusively the evidence of PW2 as to the actual dates the boreholes were sunk.

What is curious about the sinking of the boreholes from the 1st Respondent's perspective is that while the letter written by RW2 is dated 24th March 2016, according to RW3, RW2 only contacted him on the cholera outbreak in the State Lodge area and the need to sink a borehole in early May 2016 which is about one month later. Why would RW2 wait that long when cholera is an emergency situation? The sinking of the boreholes at the end of May to contain

cholera which broke-out in January in an election year raises questions as to the hidden motive.

Given the facts stated above, my inclination is to accept the evidence of PW2 who witnessed the sinking of one of the two boreholes. Even assuming that he was mistaken as to the dates the boreholes were sunk and the 1st Respondent's witnesses were right that the dates the boreholes were sunk were the 28th and 29th May 2016, that would still be within the official campaign period as set by the Electoral Commission of Zambia.

The letter written to the 1st Respondent by RW2, speaks to the involvement and the interest that the 1st Respondent had in the project of sinking boreholes in State Lodge area. The fact that the letter was written about two months before the sinking took place does not take the 1st Respondent out of the picture. The fact that she had not yet been officially nominated as a candidate did not diminish her interest as she was hoping to be adopted by her party and officially nominated upon presentation of her papers to the Electoral Commission of Zambia on the nomination day.

What is however, clear from the evidence is that the 1st Respondent did not donate the boreholes but her friends helped her to have the bores sunk and she took full advantage of the sinking of the boreholes so close to the election-day in her campaign to endear herself to the voters. Evidently, by using the boreholes to enhance her chances of being elected, she confirmed her involvement in the project as shown by the letter from Dr Msiska, RW2. Further, the

involvement of two youths who were identified by PW2 in the clearance of the sites confirms that the 1st Respondent had helped in identifying the sites as requested by Dr Msiska and went further to mobilize the PF youths to clear the sites. This, to all intents and purposes, falls within the contemplation of section 97 (2) (a) (ii) of the Act.

Lack of water in Bauleni was a very big issue during the August 11 election as seen from the comments from the people who were interviewed on the RACE TO MANDA HILL programme. In that recording, all the people who spoke cited water as one of the critical issues that needed to be resolved in Bauleni by whoever would be voted for as Member of Parliament. Indeed the 1st Respondent spoke passionately about the need to resolve the water problem and the following excerpts from the 1st Respondent's debate on RACE TO MANDA HILL attest to that:

1. We need to sort out water and that we must do speedily.....
2. We cannot continue having problems of water reticulation in State Lodge.....
3. I have already started working.....(emphasis mine)

In one of her postings on her Facebook page dated 10th June 2016, the 1st Respondent states as follows:

“We shall be soon commissioning boreholes which have just been completed”

In cross-examination, RW2 admitted that the 1st Respondent would be justified to feel connected to the sinking of the boreholes. This is the reason she was not ashamed to use the boreholes in her campaigns as she was personally involved even though she did not finance the donation. This is open corruption which clearly prevented the majority of the voters in the constituency from electing the candidate whom they preferred. This corrupt act was committed by the 1st Respondent's friends with her full knowledge and consent and as such, sub-section (3) of section 97 does not apply.

In the case of Leonard Banda v Dora Siliya SCZ Judgment No. 127 of 2012, at page 35, the Supreme Court of Zambia had this to say;

“A distinction must be drawn between paragraph (a) and paragraph (c). Under paragraph (a), it does not matter who the wrong doer is. The election will be nullified if there is wrongdoing of the type and scale which satisfies the court that the electorate were or could have been prevented from electing the candidate whom they preferred.”

It must be pointed out that although the case referred to was decided under section 93 (2) of the Electoral Act of 2006, and that section 97 (2) of the Electoral Act No. 35 of 2016 under which this petition was brought is substantially different from the former, the similarity is that paragraph (a) (ii) of the current provision leaves it open to anybody to commit a malpractice and so long as the candidate or his election agent is aware and approves of it, the election shall be nullified.

On the cash donation to Word of life church, as earlier stated, there is no dispute at all and Pastor Panja, the leader of the Bauleni congregation, admits receiving the cash. There is footage of a recording in which the 1st Respondent was at a church service and she was introduced and called to greet the congregation by a PF member. The church structure was a make shift and it fits the description of the Word of Life church to which she gave a donation at the time.

Since the only point in contention on this donation is about the timing, to the effect that at the time, the 1st Respondent had not been adopted as candidate and it was outside the campaign period, my task is to determine whether illegal practices committed outside the official campaign period can affect the election. On reading of section 97 (2) (a) and (b), the corrupt practice, illegality, misconduct or non-compliance should be in connection with or in relation to the conduct of elections. It follows that the Petitioner must prove that the act relates to the election which is the subject of the petition.

In his testimony, RW1, pastor Panja, made it clear that he asked the 1st Respondent to honour the pledge quickly to avoid it falling into the election period. The event at the church, as depicted in the video footage, must have taken place on 8th May 2016 when the 1st Respondent donated the cash. This is so for four reasons, first, the calendar shows that 8th May was a Sunday. Second, there was jubilation by both the congregants and the 1st Respondent. Third, the 1st Respondent was introduced to the congregants by a PF

member and not the pastor and finally, her earlier attendance on 17th April 2016 did not seem to have caused any excitement at all because she did not honour the pledge then and according to RW1, the 1st Respondent just worshipped with them. With the foregone, I can only come to the conclusion that the donation was made with the election in mind as a way of inducing the congregants to remember her when the time came. To this end, the act satisfies the requirements of section 97 (2) (a) of the Act. In any event, 8th May 2016, was just a few days before dissolution of Parliament which would kick start the official campaign period. The 1st Respondent was not a member of the congregation and as such, only one thing could have been on her mind: elections.

The last incident is that of the chitenge pieces and whereas the purchase by the 1st Respondent within the church premises is not in dispute, the number of pieces purchased is disputed. While PW3 suggests that there was about 200 pieces purchased by the 1st Respondent, the 1st Respondent admits buying only 20 at the request of members of her entourage after she had attended the service which started at 9:00 hours. The 1st Respondent and RW4 dismissed PW3's testimony that the 1st Respondent had told a crowd of women that were scrambling for chitenge pieces outside the church entrance before the second service started that they should not worry as she would buy them some more.

Among the reasons given was that the 1st Respondent could not have engaged the crowd before her host, the parish priest, officially

received her. That reasoning flies in the teeth of the witnesses because there is nothing stopping her from doing so and more so that she is a politician.

In so far as the selling of chitenge pieces before the second service started, RW4 confirmed this fact thereby corroborating PW3's testimony that when she went outside after the first service, she saw commotion as women jostled to take a piece each. There is nothing to suggest that PW3 lied when she said that she heard the 1st Respondent assuring the women that she would buy some more for them. Further to that, it would appear from the evidence that RW4 arrived after the event because she testified that she just saw the 1st Respondent entering the church with the parish priest father Chisanga.

What is of critical importance, in this matter is that the 1st Respondent did buy some chitenge pieces which she distributed in full view of the congregants outside the church. The actual number she bought is not ascertainable and the motive can only be deduced from the act of distributing in full view of the congregants. This was meant to be a public donation and not a private one with nothing to do with philanthropy. It is also worthy of noting that the event took place on 4th June 2016, deep into the campaign season and in a densely populated part of the constituency. This was clearly an act of inducement proscribed by the Act. It was an illegality that was committed by the 1st Respondent and falls squarely under section 97 (2) (a) (1) of the Act.

In conclusion on the three incidents of bribery, inducement and corrupt practice, I note from the evidence that the 1st Respondent, who is not ordinarily a resident of Bauleni or State Lodge area, as the record shows that her residential address is Plot No. 4 Lukasu Road in Rhodes Park, heightened her presence in that part of the Constituency from the month of March 2016. Further, the three incidents took place between the months of April and July 2016. This was election season and the 1st Respondent was in full swing endearing herself to the residents of Bauleni and State Lodge areas. This allegation equally stands proved on all the three incidents. In the case of Akashambatwa Mbikusita Lewanika v Chiluba, the Supreme Court of Zambia had the following to say:

“During election period there should be a closed season for any activity suggestive of vote-buying, including any public and official charitable activity involving public funds and not related to emergencies or any life-saving or life-threatening situations.”

The final allegation is that of using government resources and holding out as a Minister despite the judgment of the Constitutional Court that the Ministers were in office illegally after dissolution of Parliament. The one incident that the Petitioner cites in support of the allegation was on the day of the recording of the RACE TO MANDA HILL programme at the Mass Media Complex when the 1st Respondent used a motor vehicle bearing a GRZ registration mark and flying the Zambia National Flag as a symbol of her ministerial status.

Further to that, the Petitioner cited the way the 1st Respondent introduced herself on the said programme as the Minister of Commerce, Trade and Industry. The Petitioner contends that that status gave the 1st Respondent undue advantage in her campaign and that she continued using government resources throughout the campaign.

It is not in dispute that following the dissolution of Parliament, Cabinet Ministers, Deputy Ministers and Provincial Ministers remained in office because the President directed them to so remain until the Constitutional Court rendered its decision on the matter that had been commenced by Stephen Katuka in his capacity as UPND Secretary General and others. In that action, the Constitutional Court was called upon to render an interpretation of the various provisions of the Constitution of Zambia Act No. 2 of 2016 on the status of Ministers after the dissolution of Parliament. In particular Articles 72 (1), 116 (2) and 117 (2) were contentious on the subject.

The use of government transportation, or facilities for campaigns is prohibited under clause 15 (1) (k) of the Code in exception of the President and the vice. This provision is sufficient to render an election void if proved and it is not in dispute that the recording of the programme RACE TO MANDA HILL is a campaign activity. It follows therefore that it was illegal for the 1st Respondent to use government transportation to render herself to the studio in pursuit of a campaign programme. It was even worse that she flew the

Zambian Flag meaning that she purported to go on that campaign platform as a Government Minister. This prohibition applies whether or not the person is legitimately a government official or not. The prohibition is against use of government transportation or facilities for campaign purposes.

As regards the effect of the Judgment of the Constitutional Court on the status of Ministers after the dissolution of Parliament, the Court held that their continued stay in office was null and void implying that they remained in office illegally after Parliament was dissolved. In that case, the Constitutional Court had the following to say at page 69 of its Judgment;

“In the absence of such express provision, the Ministers ought not to have continued in office following the dissolution of Parliament on 11th May 2016.”

It follows from the above statement that for the whole period from 12th May to the date of the Judgment, the 1st Respondent was not a Minister by operation of the Law in particular, Article 72 (1) of the Constitution of Zambia (Amendment) Act No. 2 . However, it is a fact that the masque of Minister she continued to wear during the election period, gave her greater leverage as a candidate over her competitors. In that regard, she was able to enjoy massive coverage by the public media in the name of performing ministerial functions and that illegality may have prevented the majority voters from electing the candidate whom they preferred. At page 83 of its Judgment, the Constitutional had this to say;

“To put it in it proper context, the Ministers cannot be said to be discharging the functions of their offices to entitle them to any payments as appointments to the said offices ceased upon the dissolution of Parliament on 11th May 2016.”

Again, in light of the Judgment of the Constitutional Court, the 1st Respondent was not entitled to the emoluments of a Minister which, without doubt, she benefited from during the election period as well as the status.

All this leads to an indisputable fact that the 1st Respondent did use Government transport and facilities during the campaign period as already demonstrated by her use of a government vehicle and inevitably government fuel and a government driver to attend to a campaign programme RACE TO MANDA HILL. This was in violation of Clause 15 (K) of the Code.

In the case of Michael Mabenga v Sikota Wina and 2 others the Supreme Court of Zambia upheld the nullification by the High Court of the Appellant's election for among others, use of government transport during campaigns which was contrary to Regulation 7 (1) (i) of the Electoral Code of Conduct 1996.

That being the case, it follows that the 1st Respondent's holding out as Minister of Commerce, Trade and Industry during the election period was illegal yet influential to the voters. The import is that the 1st Respondent used an illegal status to influence the voters. She rode on an illusion that she was a Minister when in fact not to

entice voters to vote for her to the disadvantage of the other candidates and in particular, the Petitioner.

As for the argument that a ministerial position did not guarantee winning an election in view of other similarly positioned candidates who nonetheless lost, the position of the law is that an election falls to be nullified on proof of any of the factors set out under section 97 (2) of the Act regardless of who the Petitioner is. It is further to be noted that voter demographics are not the same in every constituency. So it is not unusual for one Minister to lose in one constituency and another to win in the other. This allegation is also proved.

In conclusion, there is sufficient evidence that the 1st Respondent's campaign was not just promise-based but tainted with acts of bribery, corruption and inducement to the electorate contrary to the principles of holding a free and fair election. In the earlier cited case of Michael Mabenga v Sikota Wina and others, the Supreme Court held that;

“Satisfactory proof of any one corrupt or illegal or misconduct in an election petition is sufficient to nullify an election”

The standard of proof was also set by the same case to be higher than the mere balance of probability and I am satisfied that the evidence presented by the Petitioner meets that threshold on each of the proved allegations. There is no better proof than that of an eye witness. There is also no law that the evidence of one witness is

not sufficient to prove a fact in issue. In my assessment, the Petitioner's witnesses were credible on the facts they stated and I therefore, accepted their evidence as truthful.

In the result, I declare the election to which this Petition relates void pursuant to section 99 (a) of the Electoral Process Act No. 35 of 2016 on five of the six allegations that were argued by the Petitioner. Consequent to that, I declare that Margaret Dudu Mwanakatwe, the 1st Respondent, was not duly elected as Member of Parliament for the Lusaka Central Constituency.

**DELIVERED AT LUSAKA THIS 24TH DAY OF NOVEMBER 2016
IN OPEN COURT**



**J.M. SIAVWAPA
JUDGE**