APPEAL NO. 18 OF 2007

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF AN ELECTION PETITION FOR MALOLE CONSTITUENCY PARLIAMENTARY ELECTION

BETWEEN:

MATILDA MUTALE — APPELLANT

AND

ATTORNEY GENERAL — 1ST RESPONDENT

EMMAUEL MUNAILE — 2ND RESPONDENT

CORAM: Sakala, C. J., Lewanika, D. C. J., Mumba, Chibesakunda and Silomba, J. J. S.

On 28th March and 25th July, 2007

For the Appellant: Mr. B. Mutale, S. C. of Ellis and company; assisted by Mr. R. M. Simeza of Simeza Sangwa and Associates.

For the 1st Respondent: Mr. S. Nkonde, S. C., Solicitor General; assisted by Mrs. R. Simuma, Assistant Senior State advocate and Mr. E. M. Kamwi, Legal Counsel, E. C. Z.

For the 2nd Respondent: Mr. M. Lisimba of Lisimba and Company.

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JUDGMENT

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SILOMBA, J. S. delivered the judgment of the Court.

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Cases referred to:-

1. Queen Vs. The Judge of the City London Court (1892) QB, 273 @ 290.
2. The Attorney General and Another Vs. Lewanika and Others (1993 – 1994) ZR @ 164.
3. The Attorney General Vs. Million Juma (1984) ZR1.
4. Mwambazi Vs. Morester Farms Limited (1977) ZR, 108.
5. The Attorney General Vs. William Chipango (1971), ZR 1

Legislation referred to:

Electoral Act No 12 of 2006

Authorities referred to:

1. Halsbury's Laws of England, 4th Edition, page 3, para. 1 and page 8 para. 7.
2. Odgers on Civil Court Actions, Practice and Precedents, 24th Edition at p. 27
3. Order 18A of the RSC, 1995 Edition
4. Order 18 / 0 / 2 of the RSC, 1999 Edition.

This appeal is against the Ruling of the High Court delivered on the 6th February, 2007. In the Ruling, the learned trial judge dismissed the election petition of the appellant on a preliminary point of law.

For convenience, the appellant shall be referred to as the petitioner, while the 1st and the 2nd respondents shall retain their positions as this is what they were in the court below.

The brief facts, common to both sides and which gave rise to the preliminary issues, were that the petitioner stood as a parliamentary candidate in the Malole Constituency in the Northern Province. Being dissatisfied with the election results, she instructed counsel to petition and a

petition was duly filed. After a few days, an amended petition was filed. According to the record, all this was done within 30 days in compliance with Section 96 of the Electoral Act No. 12 of 2006 (hereinafter to be referred to as "the Act").

The petition, among other things, sought to declare the election of the 2nd respondent null and void; declare the appellant as the duly elected Member of Parliament for Malole Constituency and, therefore, entitled to take her seat in the National Assembly and enjoy all the benefits due to that office.

The preliminary issues, as points of law, were disposed of through submissions by counsel representing the parties to the election petition. Mr. Lisimba, counsel for the 2nd respondent, submitted first because he had formally filed the 2nd respondent's notice to raise preliminary issues. According to the record, the formal notice was in response to the learned trial Judge's observations as to what status to accord the election petition that was not signed by the petitioner herself in compliance with the provisions of Section 96(3) of the Act.

The preliminary issues raised were in three parts. Without reproducing them, we shall, for the purposes of this appeal, take the first one, which was

not only vigorously argued before the lower court and this court but which is also the subject of appeal.

As recast by counsel for the 2nd respondent and argued by the parties, the issue was: **whether a petition filed into court and not signed by the petitioner herself can be said to be properly before the court and whether or not the court can entertain the petition or indeed allow an amendment.**

Mr. Lisimba contended before the learned trial Judge that it was a mandatory requirement that the petition is signed by the petitioner in person and not through her legal representative; that an adherence to the procedure provided by the Act was of the utmost importance.

Counsel contended that the omission by the petitioner, in not signing the petition herself, was so fatal that it rendered the petition dismissible in its current form for want of procedure; that any defect in the petition could only be corrected within 30 days, the period stipulated for bringing the petition to court.

The record shows that Mr. Kamwi, counsel for the 1st respondent, did not submit before the learned trial Judge because he was constrained by the

application on account of what happened on their part during the elections. He, therefore, found it appropriate not to offer any position.

In response to the submissions by counsel for the 2nd respondent, Mr. Simeza, counsel for the petitioner, submitted before the learned trial Judge that the issue that had arisen related to or rested on a proper construction of Section 96(3) of the Act.

To that extent, counsel told the trial court that a petition was a pleading just like a statement of claim or defence. With reference to **Halsbury's Laws of England**, 4th Edition, counsel submitted that where a pleading is settled by counsel it must be signed by him or her. He, therefore, contended that the petition before the trial court, signed by the petitioner through her counsel, was properly signed as counsel did not have an existence or life independent of a client.

On the word "shall" in Section 96(3) and whether it was intended to make the provision mandatory or directory, Mr. Simeza told the trial court that although Parliament used the word "shall" in the section, no consequences were prescribed in cases of non-compliance. According to counsel, the requirement to comply was not mandatory but directory.

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Counsel cited the case of **The Attorney General Vs. Million Juma** (3) and submitted that notwithstanding the mandatory nature of the word "shall" in Article 27(1) of the Constitution of Zambia, the Supreme Court found that the provision requiring grounds of detention to be written in a language the detainee (**Million Juma**) understood was directory and failure to comply with it was a defect that could be remedied

In the alternative, counsel urged the trial court to order an amendment of the petition if the foregoing arguments of the petitioner were not persuasive enough. He relied on Section 102(3) of the Act, which allowed the court to exercise its civil jurisdiction as it may deem appropriate, particularly that the petitioner had disclosed triable issues in her pleadings.

With the forgoing submissions before him, the learned trial Judge first dealt with the issue of whether a petition was a pleading that could be signed by counsel as an agent of the petitioner. After examining the various authorities on the matter, including **Odgers on Civil Court Actions, Practice and Precedents,** 24th Edition and **Order 18A of the Rules of the Supreme Court, 1995 Edition**, the learned Judge came to the conclusion that a petition was not a pleading.

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On the signing of pleadings, the learned trial Judge observed that although the general position was that pleadings may be signed by counsel or his principal this was not the case where a statute makes specific provision as to who should sign the petition.

With reference to Section 96(3), the learned trial Judge agreed with counsel for the petitioner that the issue at hand rested on the construction of the statute. He said that where words used in a statute are plain and clear those words must be given effect. One of the cases he relied upon was the English case of **Queen Vs. The judge of the City of the London Court(1)** where Lord Esher had this to say: -

> **If the words of an Act are clear, you must follow them even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the legislature has committed an absurdity.**

In the light of the definition of "petitioner" in Section 2(1) of the Act, commonly known as the interpretation clause, the learned trial Judge was of the strong view that the use of the word "shall" in Section 96(3) meant that the requirement for a petition to be signed by the petitioner was in absolute terms and that the statute was unambiguous and mandatory.

The learned trial Judge rejected the argument that the use of the word "shall" in Section 96(3) was directory and not mandatory. As far as he was

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concerned, the case of **The Attorney General Vs. Million Juma(3)** had no relevance as it was decided in circumstances different from the present case.

In the final analysis, he ruled that the petition could not proceed because it did not comply with the provisions of Section 96(3) of the Act. He also ruled that there was no remedy because Section 96(3) admits only a petition that meets the requirement of the Act.

When we heard the appeal, the petitioner advanced four grounds of appeal. These are: -

1. That the learned trial Judge in the court below misdirected himself in construing Section 96(3) of the Electoral Act as requiring the petitioner to personally sign the petition;
2. That the learned trial Judge in the court below erred in law when he held that Section 96(3) of the Electoral Act is a mandatory provision;
3. That the learned trial judge in the court below grossly erred when he held that the petition in its current form is not in substantial conformity with Section 96(3) of the Electoral Act and that there are no circumstances which would warrant it being remedied; and
4. That the learned trial judge erred when he held that the petition cannot proceed as it does not comply with the provisions of the Act.

In arguing the appeal, Mr. Mutale, the learned State Counsel, indicated to the court that he would submit on grounds one and three while Mr. Simeza was to argue grounds two and four. Both counsel relied on the petitioner's heads of argument. From the outset, we wish to observe that

there is great similarity between the submissions on appeal and those made in the lower court and that means that the risk of being repetitive may not be minimised.

After quoting Section 96(3) of the Act in part, the State Counsel contended in the heads of argument, with reference to ground one, that a proper examination of the section does not, in any way, suggest that an election petition can only be signed by the petitioner in person by applying her own hand to the document.

The State Counsel pointed out that such literal interpretation would certainly lead to an absurdity; that it would amount to reading words into the statute, which the legislature did not intend to.. He argued that counsel, as her agent, was in order to sign the petition on her behalf.

As far as the State Counsel was concerned, there is no mischief that Parliament intended to cure to justify such a drastic departure from the common law position where counsel is literally authorized to sign all pleadings on behalf of his client except affidavits. In this regard, he argued that Section 96(3) should not be given a narrow interpretation.

He pointed out that the purpose of Section 96(3) is not to invalidate an election petition, which is signed by the petitioner through counsel but to

ensure that the petition is, on its face, signed by the petitioner or by the person authorized by the petitioner. He further pointed out that the Act and its Rules do not say what should happen in the event that the petition is signed by counsel as agent of the petitioner.

In his oral submission, Mr. Mutale, S. C., briefly alluded to the background of the case and especially what happened before the preliminary issue was raised. In the main, he submitted, under ground one, that the learned trial Judge was wrong in adopting a literal interpretation as opposed to a more liberal interpretation as is the trend with courts today.

He submitted that the learned trial Judge placed reliance on an old English case of **Queen Vs. The Judge of the City of the London Court(1)** when the thinking had changed in the Commonwealth. According to the learned State Counsel, the trend now was for the courts to adopt a more liberal approach to achieve a purposive result. He cited the case of **The Attorney General and Another Vs. Lewanika and Four Others(2)** in aid of his position.

On ground three, the State Counsel contended, in the heads of argument, that the requirement of the petitioner's signature in Section 96(3) is a matter of form and procedure and not a matter of substance. According

to Mr. Mutale, the provision in Section 96(1) of the Act is clear and unambiguous and confirms that the requirement for signature is a matter of form and not substance.

He contended that the signing of petitions by lawyers alone or with their clients in Zambia is historical and dates back to the mid sixties; that all this time the petitions have been dealt with on merit; that this court is, therefore, duty bound to uphold consistency and certainty in the judicial process.

The State Counsel relied on the principle found in the case of **Mwambazi Vs. Morester Farms limited(4)** where we said that **"it is the practice in dealing with bonafide interlocutory applications for courts to allow triable issues to come to court despite the default of the parties; ..."**

In his oral arguments, Mr. Mutale, S. C., submitted that although the requirement for signature in Section 96(3) was couched in what seemed to be mandatory what came out was really form and procedure. He called on us to hear the petition on merit rather than throwing it out on a technicality.

On ground two, the contention of Mr. Simeza, with reference to the case of **The Attorney General Vs. Million Juma(3), was** that if the word

"shall" was held to be merely directory in the case, which was a constitutional case, where the liberty of an individual was at stake, the court could not now hold that the use of the word in Section 96(3) was mandatory.

He contended that if it was the intention of the legislature to make it mandatory for the petitioner to sign the petition under her own hand then no prejudice is occasioned to the respondents by the omission since they clearly understand the grounds upon which the petition is founded.

Mr. Simeza contended that the respondents have in fact already answered to the grounds raised in the petition and that since the answers are signed by their respective counsel, they (respondents) have waived their right to object to the petition.

Mr. Simeza further contended that where a statute requires that something shall be done in a particular manner or form without expressly declaring what shall be the consequence of non-compliance, such statutory requirement cannot be regarded as imperative or mandatory but merely directory. Mr. Simeza drew our attention to Sections 98(3) and 101(1), which respectively provide for consequences in case of failure to pay for security for costs and death of a petitioner while Section 96(3) does not.

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In his oral submission, we note that Mr. Simeza merely emphasised what is contained in the heads of argument. We also note that the fourth ground of appeal has been adequately covered in earlier submissions.

The Solicitor-General, in his response to the petitioner's submissions, relied on the heads of argument, which were reinforced by oral submissions. We note that in the heads of argument the Solicitor-General has compressed the four grounds of appeal into two parts; grounds one and two forming the first part and grounds three and four forming the second part.

On the first and second grounds of appeal, the Solicitor-General argued that the learned trial Judge properly directed himself when he held that Section 96(3) is mandatory and that the petitioner is required to personally sign the petition.

The Solicitor-General was in agreement with Mr. Mutale that the issue at hand is one of construction of the statute to establish whether or not the petitioner is required, under Section 96(3), to personally sign the petition. The Solicitor-General, like Mr. Mutale, cited the **Lewanika** case and contended that where the words of a statute are precise and unambiguous no more should be done than to give the words their natural and ordinary meaning.

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According to the Solicitor-General, the natural and ordinary meaning of the word "shall" in Section 96(3) is simply that the petitioner must personally sign the petition; that this position of the law is emphasised by the requirement that where there is more than one petitioner all the petitioners must sign the petition.

Regarding grounds three and four, the Solicitor-General contended that the learned trial Judge correctly interpreted the law and facts when he held that the petition was not in conformity with the Act and that it could, therefore, not proceed. It is common practice, according to the Solicitor-General, that when a statute declares that something "shall" be done the language is considered imperative or mandatory and that thing must be done.

The Solicitor-General argued that the effect of non-compliance, that is failure to personally sign the petition, is fatal; that the defect cannot be cured because, legally, the petition is null and void *ab initio*. He also argued that in certain rare circumstances, imperative provisions have been held directory, such as, in the **Million Juma** case; and that the present case does not fall in the exceptions as it is substantially different from the **Juma** case.

In his oral submissions, Mr. Nkonde, Solicitor General and State Counsel, conceded that there were disputes as to the number of votes cast in

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the Parliamentary elections for Malole constituency and that before the disputes were determined by the trial court preliminary points of law were raised. On the mischief Section 96(3) was targeted to cure, the learned Solicitor General submitted that the purpose of the Electoral Act was to avoid frivolous petitions, hence the requirement for the petitioners to sign them personally.

With regard to the petitioner's contention that the respondents signed the answers and affidavits through their counsel and thereby waived their right to challenge the petition, the learned Solicitor General submitted that the Act does not require the respondent to sign the answer personally. Besides, the Act does not require affidavits, he said.

Mr. Lisimba, on behalf of the 2nd respondent, responded orally and undertook to file the heads of argument later on the same day, which he did. The gist of Mr. Lisimba's arguments in his heads of argument, in relation to ground one, is that the requirement in Section 96(3) to file the petition within 30 days is so strict that no petition can be entertained after the expiry of that period.

Mr. Lisimba contended, under ground two, that the learned trial Judge correctly held that the use of the word "shall" in Section 96(3) was

mandatory. He further contended that provisions with respect to time are always obligatory unless the power of extending the time is given to the court.

He gave the example of the case of **The Attorney General Vs. Chipango(5)**, which was cited in the **Million Juma(3)** case on the obligatory provisions relating to time, as his authority. To this end, he contended that if 30 days in sub-section 3 of Section 96 of the Act is obligatory then the signing of the petition personally by the petitioner in the same sub-section cannot be directory.

Under ground three, Mr. Lisimba contended that the learned trial Judge correctly held that the petition was not in conformity with Section 96(3); and that there were no circumstances to warrant it being remedied.

It was contended that the case of **Mwambazi Vs. Morester Farms Ltd (4)** is distinquishable from the present case. Mr. Lisimba argued that in the former case, the courts are mandated to extend time within which to do an act (*see Order 42, rule 4(2), of the RSC*), while in the present case, there is no mandate to extend time to amend a petition after the expiration of 30 days.

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On ground four, Mr. Lisimba contended that the learned trial Judge properly directed himself when he held that the petition could not proceed for lack of compliance with the law. As far as he was concerned, the petition was null and void *ab initio* and could not be entertained by the trial court.

In his oral submissions, Mr. Lisimba repeated, to a large extent, what is contained in the heads of argument. With reference to the definition of "petitioner" in Section 2(1) of the Electoral Act, he submitted that it was the petitioner who presented the petition in the court below and should have, therefore, signed the petition.

We have duly considered the grounds of appeal and the submissions made by the parties before us in support of and in opposition to the grounds of appeal. We have also duly considered the proceedings in the court below, including the submissions made by counsel before the learned trial Judge and the judgment of that court. Notwithstanding the foregoing, we wish to register our appreciation for the submissions made and the authorities cited to us.

We note, at the outset, that there is great similarity in the manner the grounds of appeal are framed and argued. That being the case, the view we

take is that all the grounds of appeal shall be disposed of together in order to avoid being repetitive.

At this preliminary stage, we wish to agree with the finding of the learned trial Judge that a petition is not a pleading. This finding is well supported by authorities. In particular, Order 18 of the RSC, 1999 edition, adequately deals with the issue of pleadings. In the explanatory notes under **editorial introduction**, in which Order 18/0/2 of the RSC is covered, the learned authors state that the term "pleading" does not include a petition.

We also want, at this preliminary stage, to deal with the contention by the petitioner that there is no mischief that Parliament intended to cure to justify the drastic departure from the common law position where counsel is literally authorized to sign all pleadings on behalf of a client.

First of all, we are dealing with a petition and not a pleading. Under Section 102(1) of the Act, it is provided that an election petition shall be tried and determined within 180 days from the date of presentation in the High Court. Under the proviso to the same subsection, it is stated that an election petition shall be dismissed if it is not tried and determined within 180 days due to failure by the petitioner to prosecute the petition.

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The message from Section 102(1) is that an election petition is an urgent and serious business that calls for the personal attention and commitment of the petitioner. In these circumstances, we are persuaded to agree with the learned Solicitor-General that Parliament, by enacting Section 96(3), intended to discourage frivolous petitions.

A scrutiny of the grounds of appeal and the submissions made before us shows that the issues in this appeal are not many. As counsel representing the parties rightly conceded, the issue is one of construction of a statute. From the submissions in the court below and on appeal, the section at the center of controversy is Section 96(3) of the Act, which is couched in the following words: -

> **96(3): Every election petition shall be signed by the petitioner or by all the petitioners if more than one, and shall be presented not later than thirty days after the date on which the result of the election to which it relates is duly declared (underlining ours).**

We have been called upon to decide whether or not it is mandatory or directory for the petitioner to sign the petition personally under her hand. For us to ascertain the true meaning of the words as used in sub-section (3) of Section 96 we are required to construe the relevant Act of Parliament, ie, the Electoral Act No. 12 of 2006.

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As was pointed out in the case of **The Attorney General and Another Vs. Lewanika and Four Others(2)**, the fundamental rule of construction of Acts of Parliament is that they must be construed according to the words expressed in the Acts themselves.

The petitioner, through counsel, contends that the use of the word "shall" in sub-section (3) of Section 96 does not suggest that it is mandatory for an election petition to be signed by the petitioner in person by applying her own hand to the document. She contends that such a literal interpretation would certainly lead to an absurdity and would amount to reading words into the statute that the legislature did not intend to.

Further, that where a statute requires something to be done in a particular manner without declaring the consequence of non-compliance such statutory requirement cannot be regarded as imperative or mandatory but merely directory.

On the other hand, the 1st respondent submitted, through the learned Solicitor General, that where the words of a statute are precise and unambiguous no more should be done than to give the words their natural and ordinary meaning.

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He submitted that the natural and ordinary meaning of the words in Section 96(3) was that the petitioner must personally sign the petition and that this position of the law is made clearer by the requirement, in the same sub-section, that where there are more than one petitioner all the petitioners must sign the petition.

The position of the 2nd respondent is that the use of the word "shall" in Section 96(3) is mandatory. In this regard, both respondents are agreed that the effect of failure to sign the petition personally is fatal in that the defect cannot be cured after the time allowed for filing the petition has expired.

We have said in this judgment that a petition is not a pleading. On the other hand, we know that a pleading, such as, a statement of claim or defence, is signed by counsel if he has been instrumental in preparing it. Coming to the issue before us, the question we would like to pose and answer is: What is a petition?

According to the learned authors of **Odgers on Civil Court Actions, Practice and Precedents**, 24th Edition, a book the learned trial Judge made reference to, it is stated at page 27 that a petition is **"a rare form of bringing proceedings ... and is used in cases where it is required by a particular statute or rule ..."**.

Further, under Order 5, rule 5, of the RSC, 1999 edition, it is provided that **"proceedings may be begun by originating motion or petition if, but only if, by these rules or by or under any Act the proceedings in question are required or authorized to be so begun."**

From the foregoing exposition of the law, we can say that a petition is a rare mode of commencing an action in this jurisdiction and its application is specially provided or authorized by an Act of Parliament. And as the learned trial Judge rightly observed, it is that particular statute that gives authority to commence an action by petition that should give guidance on the type or form of petition to be filed with the court.

In construing whether it is mandatory or directory for the petitioner to sign the petition personally, we had occasion to visit the case of **The Attorney General and Another Vs. Lewanika and Four Others(2),** which both the petitioner and the 1st respondent referred us to. In that case we said:-

> **"If the words of the statute are precise and unambiguous, then no more can be necessary than to expand on those words in their ordinary and natural sense. Whenever a strict interpretation of a statute gives rise to an absurdity and unjust situation, the judges can and should use their good sense to remedy it by reading words in it, if necessary, so as to do what Parliament would have done had they had the situation in mind."**

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In the context of Section 96(3), the view we hold is that the words used therein do not carry any technical meaning to require further elaboration as to the true intention of the legislature. As far as we can ascertain, the words in Section 96(3) are clear, plain and unambiguous. Given their literal interpretation, they clearly demonstrate that it is mandatory for the petitioner to sign the petition personally.

There are two statutory aids to interpretation that we found useful in arriving at the foregoing conclusion. The first one is to be found in Section 2(1) and the second one is in Section 96(3) itself. Under Section 2(1), the Act defines petitioner, in relation to an election petition, **as any person ... who signs and presents an election petition under section *ninety-six*** ... The definition of petitioner is, in our considered view, quite plain and straightforward and cannot be taken any further.

Coming to Section 96(3), it is provided that the petitioner, as defined, is obliged to sign the petition and where there are more than one petitioner all the petitioners are obliged to sign the petition before presenting it to the court not later than thirty days after the date on which the result of the election was declared.

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If there are any doubts regarding whether a single petitioner is obliged to sign the petition personally, those doubts are completely eliminated in case of a joint petition. This is so because in a joint petition all the signatures of the petitioners are supposed to be reflected in the petition. As such, a single signature of counsel cannot represent the signatures of all the petitioners.

Having come to the conclusion that it is mandatory for the petitioner to sign the petition personally, we find that Section 96(3) is at par with Sections 98(3) and 101(1) of the same Act as the consequence of filing a petition that is not signed by the petitioner makes the petition misconceived.

We also heard spirited arguments regarding the case of **The Attorney General Vs. Million Juma(3)**, a constitutional case, and its application to the present case. These arguments are summarised in this judgment and in the judgment of the trial court. In the view we take of the arguments, we have refrained from delving into the case because the grounds for its irrelevance to the case at hand were adequately dealt with by the trial court.

In summary, our position is that the appeal has no merit. We reiterate our finding that Section 96(3), as read with Section 2(1), makes it mandatory for the petitioner to sign the petition personally under her or his hand before

presenting it to the High Court for trial and determination. As this was a novel appeal case on a matter of public interest, we shall make no order for costs. Each party to bear it own costs.

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E. L. Sakala,
CHIEF JUSTICE.

.....
D.M. Lewanika,
DEPUTY CHIEF JUSTICE.

.....
F.N.M. Mumba,
SUPREME COURT JUDGE.

.....
L.P. Chibesakunda,
SUPREME COURT JUDGE.

.....
S. S. Silomba,
SUPREME COURT JUDGE.