AKASHAMBATWA MBIKUSITA LEWANIKA, HICUUNGA EVARISTO KAMBAILA, DEAN NAMULYA MUNGOMBA, SEBASTIAN SAIZI ZULU, JENNIFER MWABA v FREDERICK JACOB TITUS CHILUBA (Constitutional Jurisdiction)

IN THE MATTER of an Application under Article 41(2) of the Constitution of Zambia and IN THE MATTER of the eligibility of a candidate in respect of Article 34(3) of the Constitution of Zambia and IN THE MATTER of regulation 1 5 made pursuant to the Electoral Act, 1991 and IN THE MATTER of the Presidential Election held in Zambia 'on the 18th day of November, 1996, S.C.Z. 8/EP/3/96, S.C.Z./SIEP/3196, S.C.Z./8/EP/4/96, S.C.Z./8/EP/4196 (1998) Z.R.49 (S.C.)

SUPREME COURT
NGULUBE,C.J., BWEUPE, D.C.J., SAKALA, CHIRWA AND LEWANIKA, JJ.S.10TH FEBRUARY, 1997 AND 7TH JANUARY,1998 AND ONTO 10TH NOVEMBER,1998. (S.C.Z. JUDGMENT NO. 14 OF 1998)

Flynote

(1) Constitutional law – Presidential election – Candidate – Qualifications – Citizenship – Constitutional requirements that presidential candidate and parents be Zambian citizens – Successful candidate taking office as president – Petition challenging election alleging disqualification – Citizenship of president challenged – Whether president satisfying citizenship requirements – Proof of parentage – standard of proof – Northern Rhodesia (Constitution) Order in council 1963, AI 1963/2088 – Zambia Independence Act 1964, s 2(1), Sch 2, ss 3, 16(3) – British Protectorates, Protected States and Protected Persons Order in Council 1949, s 9 – Constitution of Zambia Act 1991 (as amended), Sch, art 34(1), (3), (4).

(2) Constitutional Law – Presidential election – Election petition – Jurisdiction – Constitution vesting jurisdiction in 'full bench of the Supreme Court' – Meaning of full bench – Constitution of Zambia Act 1991, Sch, art 41 (2).

(3) Legal profession – Counsel – Right to appear – Requirements of professional independence – Conflict of interest – Cabinet minister holding practising certificate – Whether entitled to appear as counsel on behalf of individual litigant.

(4) Constitutional law – Presidential election – Election petition – Petition impacting on governance of nation and deployment of constitutional power and authority – Standard of proof required.

(5) Constitutional law – Presidential election – Allegations of electoral impropriety involving bribery and corruption, irregularities and flaws in the electoral system – whether public philanthropic activity at election time amounting to bribery – Whether election null and void – Electoral Act, s (18).

Headnote

The five petitioners challenged the election on 18 November 1996 of the respondent as President of Zambia on the ground that he was not qualified to be a candidate for election as president and be elected because neither he nor his parents were citizens of Zambia by birth or by decent as required by art 34(3) of Sch 2 to the Constitution of Zambia Act 1991 as amended in 1996. They pleaded that his identity and that of his parents had never been

ascertained, contended that he was the illegitimate son of one of the witnesses born from an illicit liaison with the mother while she was married to a Mozambican and that he was born in the then Belgium Congo (Zaire) in 1944 when his father, the witness was an alien. They also gave evidence touching upon the respondent's citizenship qualifications and of the possible nationalities of his father. There was no dispute that the respondent's mother 'belonged' to the British protectorate of Northern Rhodesia, within the meaning of s 16(3) of the 1963 Constitution, before it became the Independent state of Zambia on 24 October 1964, and would therefore, but for her prior death, have become a citizen of Zambia at independence by virtue of the 1964 Order and the 1963 Constitution. The petitioners also alleged electoral flaws in the electoral system, and asked for the avoidance of the election on the ground that it was rigged and not free and fair. Certain preliminary points arose, namely (i) what would be 'full bench of the Supreme Court' to hear the case as required by art 41 of the Constitution; (ii) the propriety of Cabinet ministers who were lawyers holding practising certificates appearing as counsel for the respondent, and (iii) the standard of proof required.

Held: Petition dismissed

(1) The respondent was already a Zambian citizen and was not disqualified from election as president. Whichever of the several biographies proposed to the court was adopted, before independence the respondent had been a British protected person 'belonging' to Northern Rhodesia, in terms of the Constitution of Northern Rhodesia 1963, having been born in Northern Rhodesia or whose parents were ordinarily resident there. In requiring a presidential candidate to be, inter alia, a Zambian Citizen aged 35 years or more, both of whose parents were citizens by birth or decent, art 34(3) of the Constitution of Zambia (as amended) had to be construed as referring to those who became Zambian citizens at independence or would, but for their prior deaths, have then become Zambian citizens. When Zambian citizenship was created at independence on 24 October 1964, the Zambian Independence Order 1964 s 3, had conferred such citizenships on every British protected person who had been born in the former Protectorate of Northern Rhodesia or, if born outside the protectorate, whose father became, or would but for his prior death, have become, a citizen by birth in the protectorate. It was unnecessary to determine where the respondents had been born, although the preponderance of evidence from official records indicated that he had been in Northern Rhodesia. There was no dispute that his mother had belonged to the to Northern Rhodesia and would have become a citizen at independence but her prior death. Since the various accounts presented to the court of his paternal parentage were irreconcilable, the petitioners had failed to establish to the necessary degree of convincing clarity that the respondent's father was an alien; there was no basis for foisting a father upon the respondent nor for finding against the one he had officially declared. In any event, even the finding most favourable to the petitioners, the father proposed for the respondent was a former British protected person belonging to Northern Rhodesia who had become a citizen of Zambia at independence (see pp 163–165, 170-171, post). *Motala v. A-G* [1993] 1 LRC 183 considered.

Per curiam. The parentage qualification for election as president introduced into the Constitution of Zambia 1991 by the amendment in 1996 pose a number of difficulties apparently without solution, eg whether the reference is to legitimate or biological parentage and whether adoptive parentage is included (see p 169, post).

(2) The requirement of a 'full bench of the Supreme Court', which by art 41(2) of the Constitution of Zambia 1991 was given jurisdiction to determine whether any provisions of the Constitution or any law relating to the election of the President had been complied with, was satisfied when the maximum available odd number of judges of the court were empanelled to hear the case (see p 144, post).

(3) Although it was undesirable for Cabinet Ministers to be in active practice at the bar it was not contrary to law for them to exercise the right of audience and to represent a litigant. Any advocate should decline to accept instructions when there were circumstances which would render it difficult for him or her to maintain the requisite professional independence or which would in some way impair or undermine his ability to promote the best interests of the

administration of justice. Ideally an advocate should not appear as such in his own cause as in any other situation of possible want of independence or conflict of interest or embarrassment generally. There was no conflict of interest in the present case. If anything, there might have been a case of common vested interests on both sides, having regard to the number of advocates, even on the petitioners' side, who were themselves senior members or leaders of some of the political parties on whose behalf the petition was brought (see p 144, post). *Re Lord Kinross* [1905] AC 468 comsidered.

(4) Parliamentary election petitions were required to be proved to a standard higher than on a mere balance of probability and therefore in this, where the petition had been brought under constitutional provisions and would impact upon the governance of the nation and deployment of constitutional power, no less a standard of proof was required. Furthermore the issues raised were required to be established to a fairly high degree of convincing clarity (see p 145, post).

(5) (i) As to the allegations of bribery and corruption: the government's established programme of selling council houses, which was taken advantage of by giving discounts in election year, did not amount to the corrupt practice of bribery under reg 51 of the Electoral (General) Regulations so as to be caught by the spirit of s 18 of the Electoral Act and, in any event, it was doubtful whether the house sales could have significantly affected the election result in a nationwide constituency; although treating was established, it had not been shown that it prevented the majority of voters from electing the candidate of their choice; the donation by the respondent and various ministers of public funds to public causes before, during and since the elections was not prohibited by the regulations (see p 173, post).

(ii) As to the allegations of irregularities, although there was some evidence of irregularities and malpractices there was no evidence that the respondent personally or his lawful election agent was privy to them. In any event, since the constituency was nationwide it was not established that the proven irregularities were such that nationally the majority of the voters ere or might have been prevented from electing the candidate of their choice or that such irregularities affected the election result to any significant extent (see p 182, post)

(iii) Although the flaws in relation to the electoral system, including the duplication of national registration cards, the fact that some people had two or more voters' cards, complaints about the registers, the polling districts, the sitting of the polling stations and the results, did not reflect well on those managing the electoral process; they did not by their very nature go to the general integrity of the system and did not necessarily suggest that the electoral system had been comprehensively massaged or predisposed in advance to grant an unfair or any advantage or disadvantage to any candidate. It followed that although the elections were not perfect and some aspect of them were quite flawed they had been conducted substantially in conformity with the law and practice governing elections (see p 191, post).

Per curiam. (i) 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 (see p. 175, post).

(ii) Elections are the sole lawful constitutional and legitimate method for the peaceful and legal acquisition of political power and the culmination of the exercise of some of the most basic fundamental rights. The various flaws in the electoral process which had been established should be addressed by the authorities (see p 191, post).

[Editors' notes: Articles 34(3) and 41 of the Constitution of Zambia Act 1991 (as amended) are set out at pp 145-146, respectively, post.
Section 16(3) of the 1963 Constitution, so far as material, is set out at pp 157-158, post.

Section 2(1) of the Zambia Independence Act 1964 is set out at p 158, post.
Section 18 of the Electoral Act 1991 is set out at pp 171-172, post.

Cases referred to in judgment

A-G v Clarkson [1990] 1 QB 156, UK CA
Akar v A-G of Sierra Leone [1969] 3 ALL ER 384, [1970] AC 853, [1969] 3 WLR 970, SL PC

Cape Brandy Syndicate v IRC [1921] 2 KB 403, UK CA
Capper v Baldwin [1965] 1 ALL ER 787, [1965] 2 QB 53, [1965] 2 WLR 610, UK DC
Kinross, Re Lord [1905] AC 468, UK HL (C of P)
Miyanda v Handahu [1994] SCZ Judgment No. 6, unreported
Motala v A-G [1993] 1 LRC 183, [1991] 4 ALL ER 683, [1992] 1 AC 281, UK HL; rvsg [1991] 2 ALL ER 312, UK CA
Ormond Investment Co. Ltd v Betts [1928] AC 143, [1928] ALL ER Rep 709, UK HL
Shamwana v People [1985]] LRC (Crim) 120, (1985) SR 41, Zam SC

Legislation referred to:

(1) Halsbury's Laws of England, 4th Ed. Vol.3, Paragraph 1143
(2) Constitution of Zambia, Article 34 (3) (a), (b) and (e)
(3) Electoral Act (1991) as amended by Act No.23 of 1996
(4) Northern Rhodesia Order-In-Council, 1911
(5) The Barotziland-North-Western Rhodesia Orders-In-Council of 1899, 1902 and 1909
(6) The North Eastern Rhodesia Orders-In-Council, 1900, 1907 & 1909 and Northern Rhodesia Gazettes of the period (e.g. 1923 and 1924)
(7) British South Africa Company's Northern Rhodesia Government Gazette number 209 of Friday 21st March, 1924
(8) Government Notices No. 153 of 1924; No. 89 of 1926, No. 107 of 1927 and No. 149 of 1928)
(9) Halsbury's Laws of England, 3rd Edition, Volume 5 from paragraph 1273
(10) Government Gazette 213 of 1962
(11) Government Notice No. 25 of 1964
(12) Zambia Independence Order, 1964, Section 6(1) and (2)
(13) The Constitution of Zambia (1964) Sections 3, 4, 5 and 6
(14) British Nationality Act,(1948), Section 32
(15) Halsbury's Laws of England 3rd Edition, Volume 1, in Note (i) at page 528
(16) Government Notice number 91 of 1934, Government Notices of Northern Rhodesia at page 109
(17) Affiliation and Maintenance of Children Act Cap 64 of the Laws of Zambia (1995) Edition
(18) Citizenship of Zambia Ordinance number 61 of 1964, Section 3 (Now section 11 of Cap 124 of the Laws of Zambia (1995) Edition
(19) Electoral Act, Cap 13 of the 1995 Laws of Zambia, Section 18
Electoral (General) Regulations

For the Petitioners: Mr. M Chona SC. of Mahachi Chambers,
Mr. E.J.Shamwana SC. of Shamwana and Co,
Mr. D. M. Lisulo SC. of Lisulo and Co,
Prof. Mvunga of Mvunga and Associates,
Mrs. N. Mutti of Lukona Chambers,
Mr. S. Sikota of Central Chambers
Mr. Lungu of Andrea Masiye and Co,
Mrs. M. Zaloumis of Dove Chambers, and
Mr. S. Sitwala of Light House Chambers.
For the respondent: Mr V. Malambo and Mr E. Silwamba of Malambo and Co.

Judgment

NGULUBE,C.J.: delivered the judgment of the court.

Delay in rendering this judgment is regretted but was occasioned in part by the length and complexity of the case and by the heavy work load and schedule of other cases which the members of the court had to contend with. There were over a hundred witnesses; the transcript of the record runs into well over three thousand pages; there was a vast quantity of documentary exhibits and it was necessary to analyze all this evidence. The court was mindful also of the constitutional importance of a case of this kind and magnitude and the need which is self-evident for thorough reflection and consideration of the law and the facts. The hearing of the case occupied the greater part of the period between 10th Feburary and 7th January , 1998. During the course of such hearing, we were called upon to render and did deliver several rulings on a variety of issues. We also received detailed submissions for which we are indebted to counsel on both sides. It should also be noted, as a novel point, that this was the first time ever when this court which is essentially an appellate court had to sit as a trial court of first and last instance under the very special jurisdiction given by the constitution for the trial of presidential election petitions. Quite early in the proceedings, we had to construe what would be the "full bench of the Supreme Court" to hear the case as required by Article 41 of the Constitution when it became apparent that there were practical difficulties and the distinct possibility of the trial never taking off. The requirement was found to be fulfilled by construing it to mean the maximum available odd number of the judges of the court that could be mustered to hear the case. Both sides agreed and the trial commenced.

One of the preliminary points raised on which we said we would give our reasons in the judgment concerned the propriety of the Cabinet Ministers who are lawyers holding practising certificates appearing as counsel for the respondent. Objection was taken that it was morally, ethically, professionally and otherwise improper for the Cabinet Ministers to appear as counsel for the respondent, among other reasons, the because in the process they had to neglect their full time ministerial responsibilities. The gravamen of the submission was that members of the bar who are members of the executive and also of the legislative branches should not appear on behalf of an individual though they can appear for the State. One reason for this was the possibility of a conflict of interest and another was the need to enhance the separation of powers. Commenting on certain precedents and instances in this country where Ministers who were practising advocates actually appeared at the bar in their character quo advocates - (such as was the case in Shamwana and Others v The People (1985 Z.R. 41 where the Minister of Legal Affairs was a member of the prosecution team in his character as Attomey-General) - counsel for the petitioners .submitted that it was now time to initiate a correct and more acceptable legal culture which would disallow this sort of thing. The case of In re: LORD KINROSS (1905)A.C. 468 was cited in support. This was a case in which the House of Lords (Committee for Privileges) held that a barrister who is also a peer may argue as counsel on an appeal at the bar of the House of Lords, but may not appear as counsel to argue before committees of the house, or before the house when sitting under the presidency of the Lord High Steward on a criminal case. In our considered opinion, this case is infact authority to support the general proposition alluded to in our brief ruling at the time that any advocate whatsoever must decline to accept instructions when there are circumstances which would render it difficult for him/her to maintain the requisite professional independence or which would in some way impair or undermine the advocate's ability to promote the best interests of the administration of justice. Ideally, an advocate should not appear as such in his own cause as in any other situation of possible want of independence or conflict of interests or embarrassment generally: See Halsbury's Laws of England, 4th Ed., Vol. 3 paragraph 1143 et seq. We did not see any conflict of interest in this matter. If anything, there may have been a case of vested common interests on both sides, judging from the number-of advocates even on the petitioners' side who are themselves senior members or leaders of some of the political parties on whose behalf the petition was brought. It is not contrary to law for practitioners with current practising certificates who also happen to be Ministers to have audience and to represent a litigant. It is certainly undesirable for Ministers to be in active private practice at the bar but the matter can not be put higher than that.

By their petitions which were consolidated, the petitioners advanced a number of prayers arising from the several allegations and averments in the petition. The prayers were in the following terms:

"1. That it may be determined and declared that the provisions of Article 34 (3) (a), (b) and (e) in respect of the Respondent have not been satisfied and accordingly that the Respondent did not qualify to contest the election and to be elected President of the Republic of Zambia and that his election way void.

2. That it may be determined and declared that the Respondent has falsely sworn as to the citizenship of his parents and is in contravention of Section 9 of the Electoral Act 1991 as amended by Act No. 23 of 1996.

3. That it may be determined and declared that the Electoral Commission neglected its statutory duty to superintend the election process thereby allowing a fraudalent

exercise favouring the Respondent.

4. That it may be determined and declared that the election process was not free and fair and that the election was rigged and therefore nulland void.

5. That the Petitioners may have such further or other (relief) as may be just."

The petitioners challenge the election of the respondent as President of Zambia. By their prayers, the petitioners have raised issues concerning the respondent's qualifications under the Constitution in respect of his own citizenship and that of his parents. They have questioned the electoral process and the way it was handled by the Electoral Commission and they have asked for the avoidance of the election for the reason that it was rigged and not free and fair. The prayers arose out of a number of allegations pleaded in the petition and with which we will be dealing.

As part of the preliminary remarks which we make in this matter, we wish to assert that it can not be seriously disputed that parlimentary elections petition have generally long required to be proved to a standard higher than on a mere balance of probability. It follows, therefore,. that in this case where the petition has been brought under constitutional provisions and would impact upon the governance of the nation and the deployment of the constitutional power and authority, no less a standard of proof is required. It follows also the issues raise are required to be established to a fairly high degree of convincing clarity. In a moment we will be examining the evidence and making our finds with this yard stick in mind. The preliminary observations would not be complete if we did not set out, at the very outset, the relevant provisions of the constitution with which we are here concerned. The constitutional provisions in the question include the controversial parentage amendments of 1996 so that article 34(1), (3) and (4) read:

"34. (1) The election of the President shall be direct by universal adult suffrage and by secret ballot and shall be conducted in accordance With this Article and as may be prescribed by or under an Act of parliament.

(3) A person shall be qualified to be a candidate for election as President if:

(a) he is a Zambian citizen;
(b) both his parents are Zambians by birth or descent;
(c) he has attained the age of thirty-five years;
(d) he is a member of, or is sponsored by, a political party;
(e) he is qualified to he elected as a member of the National Assembly; and
(f) has been domiciled in Zambia for a period of at least twenty years.

(4) A candidate for election as President (hereinafter referred to as a Presidential candidate) shall deliver his nomination papers to the Returning Officer in such manner, on such day, at such time and at such place as may be prescribed by or under an Act of Parliament."

Article 41(2) reads:

"41.(2) Any question which may arise as to whether:

(a) any provision of this Constitution or any law relating to election of a President has been complied with;

(b) any person has been validly elected as President under Article 34; shall be referred to and determined by the full bench of the.Supreme Court "

The other law referred to in these Articles is the Electoral Act and we will be alluding to it from time to time.

THE RESPONDENT'S QUALIFICATIONS

We now turn to that part of the case which concerned the respondent's qualifications.

The issues which arose included who the respondent was; where he was born; who are or were his parents; what is his citizenship and what is or was the citizenship of his parents? We heard evidence from basically three categories of witness, namely the petitioners themselves, the category of relatives or alleged relatives and acquaintances, and the others who included officials and writers. It was the petitioners position by their pleading that the identity of the respondent and the identity of his parents has been and still is a subject of contradictory public records, public controversy and public concern and has never been ascertained. Since the petitioners had to establish an affirmative case and not simply to confirm the controversy, their final submission was that we should find that the respondent was the illegitimate son of the witness PW3 Luka Chabala Kafupi who it was claimed had an illicit liaison with the mother while she was married allegedly to a Mozambican Jim Zharare Nkhonde; that we should find that the respondent was born at Chibambo Mission Hospital in the then Belgian Congo; and that the biological father alleged was at the time an alien as he himself claimed. The petitioners proceeded on the premise that PW3 is a Zairean (now Congolese) but who also claims to be a Zambian. They also proceeded on the footing that the parents of a presidential candidate referred to in the constitution are the biological and not necessarily the legal parents. It will thus be necessary to deal with all these aspects.

The petitioners gave evidence touching upon the citizenship qualifications of the respondent and the possible nationalities of his parents as PWs I(Zulu), 2(Lewanika),8 (Kambaila), 6(Mrs Phiri) and 16(Mungomba). To this list can be added the petitioner PW35(Dr. Chongwe) though not a petitioner of record. The petitioners simply made the allegation of want of qualification and obviously had no personal knowledge or direct evidence to give. They depended on the other witnesses of fact. Without a doubt, the petitioners were genuinely and truly aggrieved by the amendments of 1996 which introduced a requirement that even the parents of a candidate must be Zambian citizens by birth or by descent, pointing out that the amendments had managed to knock out in advance of impending elections the former president of the country and proposed candidate for a major opposition party which could not even field its deputy leader because another amendment barred traditional chiefs from active politics.

The next group of witnesses was that of relatives or alleged relatives and acquaintances.

These were PWs 3(Kafupi), 4(Ngosa), 5(Musangu), 7 (Chilekwa), 13 (Kasuba),14(William Banda), 28(Kakonde), 29(Musonda) 32(Anna Chilekwa), 33 (Lengwe), 34(Musendeka), 5I(Chikonde), 59(Kenani), 80(Chaziya), 83(Sikazwe) and 102(Mumba). For reasons of economy and practicality since their evidence is on record, we give only a digest containing the essentials of their evidence as follows:- PW3, Mr Kafupi, said that the respondent under the name of Titus Mpundu is his illegitimate son conceived of an adulterous affair between him and the mother in 1943. He said the respondent was born in 1944 at Chibambo in Zaire by caesarean section and all this he was told by the mother. He saw the baby at five months old and next saw him at thirty-six years in 1980 in the house of one mother-of -Kapaya (a maternal relative of the respondent) at Musangu village in the presence of one the late Bismark Chonaula who queried why the young ones should "promote" him - i.e. acknowledge and recognise him - when the elders had not. The respondent is alleged to have said in Swahili a remark to the effect that a lion when stranded could even eat grass, a reference to PW3's attempt to be accepted so late in the day.

PW3 was seventy-eight years old when he testified, which meant he was born in about 1919. He said his own parents had settled in Zambia although he did not specify whether .this was during the last or at the turn of this century. He said he was both a Zambian and a Zairean because, although his parents had settled in Zambia and he had been conceived in Zambia at Musangu villlage, he was born at a place in Zaire where his then pregnant mother was visiting a sick relation. He has a green national registration card which is reserved for Zambian nationals.

As will be seen later in this judgment, PW3 was born at a time when the former British protectorate of Northern Rhodesia (as Zambia was called before independence) was divided into North Western Rhodesia and North Eastern Rhodesia. Together with Barotseland, the territory was then being governed by an Administrator of Northern Rhodesia from the British South Africa Company on behalf of a High Commissioner based at Cape Town. This was before that company handed over the administration of Northern Rhodesia to the British Crown on 1st April,1924, under the Northern Rhodesia Order in Council, 1924.

The next witness in this line was PW4, Mr Thomas Ngosa who gave his evidence with much undisguised bitterness against the respondent whom he claimed to be some sort of second cousin. He deposed that he knew the respondent as Titus Mpundu Chabala; that the

respondent's mother lived in Luanshya with mama Kapoma Bangwa; that the respondent's mother was married in Luanshya to a Tukuyu man and that she was put in a family way by PW3 when she visited the village. He said as a result her husband then chased her. The witness said he was eight years old at the time of the events to which he was deposing. He said at age nine years, he visited the respondent's mother in Chibambo Hospital in Zaire where the respondent (the survivor of twins, a girl and a boy) was born by operation at the hands of one Dr. Dixon.

This witness fared rather badly under cross-examination, even claiming he could not know fellow children and relatives living in the same village allegedly because he was from a poor family. We found his explanations to be as incredible as his other claim that at eight years old he attended a meeting at which PW3 was warned not to claim the pregnancy as his. This was a witness who was untruthful when he said he was visiting a relation of the respondent's known as the mother-of Blaston up to 1984 when she had died in the fifties. This was the witness who failed to identify two gentlemen by the names of Bunkum and Blaston whom he had earlier claimed were his relations and were also relations of the respondent when they were paraded in court. It was highly improbable that PW4 could have been personally privy as a young lad to the kind of facts he sought to speak to. In any event, he withered under cross-examination.

Next, there was PW5, Mr. Gilbert Musangu Chipulu. His evidence was that he knew the respondent as Titus Mpundu while they were schoolmates in the villages and they played together after the respondent had been expelled from Kawambwa Secondary School. He also knew PW34, Champo Thom Musendeka. Later, he learnt that the respondent who was then in the Zambia Congress of Trade Unions was now going by the name of Frederick Chiluba.

The next witness in this category was PW7, Mr. Mark Chilekwa who was called to establish another possible father different from PW3. He said he knew the respondent to be Titus Mpundu Jim Zharare Nkhonde whose father was Mr. Jim Zharare Nkhonde, a miner and part-time herbalist of House number D.4/190 Wusakile Mine Township, Kitwe. He said he ate and played together with jim and Titus, the sons of Mr Nkhonde, during school holidays when they would come from schools in Luapula. According to PW7 Mr. Nkhonde who was a widower was a close friend of their family and used to say he came from Lourenco Marques, Tete Province, Zumbo District, in Mozambique. He disputed the details of the father given by the respondent at nomination. He said he had associated with the respondent from 1955 to 1959, and next saw him in 1977 (according to the evidence in chief) or in 1976 (under cross examination). He was surpirsed to hear that the names had changed to Frederick Chiluba. He said he had resigned from employment with Zambia National Tourist Board voluntarily but accepted when pressed that he was in fact imprisoned for an offence involving dishonesty.

We can interpose two small observations here. One is that there can be no doubt whatsoever that the respondent started life under the names Titus Mpundu and later changed them to his current names. During the course of the hearing, a question arose whether persons could change their names informally, more or less. The short answer seems to be that name – changes before the coming into force of the National Registration Act could apparently take place quite informally so that any formalities and official practices since introduced can not be resorted to in a discussion of name – changes that occurred prior to registration under that Act. The second observation is a passing comment arising from the evidence of PW7 viewed against the evidence of PW4 who said that the father chased the mother when he discovered that she was pregnant by another man: One wonders then how come the father kept the child who was the result of the illegal pregnancy.

The next witness in this line was PW13, Mr. David Kasuba, President of a very minor political party. He did his early primary schooling in Mambilima in Zambia and did the rest in Zaire where he even held political posts, as well as the post of Chief Executive Secretary in that country's Ministry of Health. He oversaw the Africanisation programme at Chibambo Mission. He produced the certificate of registration - the "Chitupa" - of his grandfather one Moses Kabambale a Northern Rhodesian working at Chibambo Mission Hospital under Dr. Dixon whom he knew personally. Subsequently he was told that the respondent was his relative and that one of his parents was not a Zambian, while the respondent himself may have been born outside Zambia. Being aggrieved by the citizenship and domicile provisions in the 1996 amendments to the constitution, he resolved to investigate by conducting an opinion poll in the villages as to who the villagers considered to be the respondent's father. All this multiple hearsay was ruled inadmissible. Mr. Kasuba's evidence was of doubtful value even on the question of whether PW3 was the father or not.

Next was PW14, Mr. William K. A. Banda who was sixty-one years old when he testified. He said he came to know the respondent as Titus Mpundu in 1960 in Mufulira: where the

respondent was then staying with an elder sister in Kankoyo township. The witness testified that the respondent was then a street vendor of vegetables. Towards the end of 1962 to mid 1963, he kept the respondent at his house together with one John Kapapi Mwansa, who was another relative of the respondent. He found a job for the respondent with Central African Road Services (CARS). In mid 1963, the respondent was transferred to Kitwe. Mr. Banda said the respondent used to say his father was "Kafupi" who was somewhere in Zaire. He said the respondent spoke Lingala - a Zairean language - and not Swahili to the Zairean lady vendors. Subsequently, he heard that CARS had sent the respondent to open a branch in Tanzania. Later, he met the respondent in Ndola in 1976 when he was now called Chiluba.

There were some witnesses called by the petitioners whose evidence was to be classified with that of the witnesses testifying to the respondent's personal history and background but whose evidence was so utterly useless that we will not waste time reviewing it. An example of this was the testimony of PWI Mr Chalo Wisdom Muwowo whose evidence flew in the teeth of many other perfectly acceptable accounts when he tried to show that the respondent never went to Kawambwa Secondary School. The witness infact went to that school long after the respondent had been expelled. Of the same flavour was evidence called to show that the respondent never lived in Kitwe.

The next witness of some substance in this line was PW28, Mr. Elijah, Mwape Kakonde who was bom in 1943. He was called upon to recall events when he was seven or so years old. He hails from Musangu Village and knew the respondent there as Titus Mpundu. He said in the early 1950s he lived with the respondent in a mutual relative's home, namely in the house of one Mr. Chonaula. As far as he had heard, PW3 Mr. Kafupi was the "real" father of the respondent. In reference to PW4 (Mr Ngosa), the witness said in one breath that he lived in town and in the next that he lived in the village. The witness got confused with the names of the people he intended to refer to. He was able to tell the court that Mr. Ngosa's relatives included Bunkum Mwenya who was Headman Kaombe, the mother-of-Kapaya, and Zharare the elder brother of Titus Mpundu.

The witness lost his temper and fumbled very badly under cross-examination. He got thoroughly confused in his references to Ngosa and also in reference to when he started schooling allegedly in 1950. According to him, the respondent had started school earlier than him. Other evidence which was more acceptable showed that the respondent started school in 1952. PW28 fared rather badly in the witness box, particularly under cross-examination. We found him not be a witness of credit.

The next witness in this group was PW29 Mr. Jonathan Musonda who was 39 years old and could only depose to what he had been told and what he heard, which was all hearsay. He had heard that the respondent was Titus Mpundu and that PW3 was his father. He was able to say that the respondent's relatives included Bunkum, Blaston, the witness Ngosa (PW4) and the respondent's brother Jim Nkonde.

PW32 was Anna Mwansa Chilekwa, the sister of PW7 Mark Chilekwa. She testified that as an eleven-year-old in 1955, she came to know Jim Zharare Nkhonde and his younger brother Titus Mpundu Jim Zharare Nkhonde who is now known as Frederick Chiluba. She said that they lived with their father a Mozambican called Jim Zharare Nkhonde who was a widower and underground miner but who was also a herbalist and helped their mother conceive and have the youngest sister Zuze now living in Zimbabwe. The youngest sister was named Zuze by Mr. Nkhonde. The witness said that the parents became close friends; PW7 slept at Mr. Nkhonde's house and when, his two sons came for holidays (between 1955 and 1959) they played and ate together. She testified that she has since visited the respondent at State House and has been given some money. She said that after the public debate had started over the respondent's identity, government functionaries drove her to Luanshya with a view to seeing her mother whom they did not find. They threatened her if she talked about knowing the respondent as a result of which she sought an appointment with the respondent. When she saw him, he disclaimed the threateners and gave her a gift of money.

The next was PW33, Mr. Jonathan Mulundu Lengwe. He testified that a Mr. Maxwell Kalesha Chisoko, his mother's true brother, lied on a television programme to say the respondent was his (Kalesha's) nephcw from his sister when the respondent is not a relative of theirs at all.

PW34 was Ruben Champo Thom Musendeka. He told the court that he knew the respondent as Titus Mpundu in 1956 when they were in the same class in standard three at Lubunda Primary School. They continued to be classmates until they completed standard six in 1960 at Johnston Falls. In August 1960, they went together for Form 1 at Kawambwa Secondary school. From what he heard, the respondent's father was PW3. The witness said that in 1961 in the last term of Form 1, the respondent, the witness and twenty others were expelled from school for

a protest demonstration and refusing to cart firewood on the head when the Headrnaster had a vanette which he refused to be used for the purpose. He said he and the respondent were the ringleaders and had been emboldened because they had smoked dagga. He told the court that the Headmaster delivered all the expellees to their villages in the vanette. He continued to visit the respondent until one evening the respondent and two companions of his arrived at his home on foot, carrying their suitcases, en route to Mufulira. He next saw the respondent in Mufulira in 1965 when, still as Titus Mpundu, he was working for CARS as a bus conductor. The witness next saw the respondent at an MMD rally in 1991 and marvelled that Titus Mpundu was now called Frederick Jacob Chiluba.

He tried to see him without success and finally decided in 1995 to go to the Post Newspaper to reveal what he knew of the respondent's identity.

PW51 was Mrs. Evelyn Chikonde. When she was nine or ten years old, she knew the respondent as Titus Mpundu at Kawambwa where he was a friend of her brother. She said he got expelled for smoking dagga. The witness - who was the UNIP Women District Chairperson for Ndola - told the court that the respondent said his father was Kafupi Chabala and that her own father assisted Titus with transport money after the expulsion from school. This was in contrast with PW34 who said the school principal delivered the expellees to their parents' homes. PW51 said that during the run up to the 1991 general elections, the respondent had vowed to deal with her for not supporting his campaign and she believes that most probably it was the respondent who engineered her dismissal from her job at the Ndola Central Hospital. PW51 came through as a most unimpressive witness.

PW59 was Mr. J.P. Chibwe Kenani, the UNIP District Chairman for Chingola. He said he went to the Post Newspaper to refute media claims by his long-standing friend, one Maxwell Kalesha Chisoko that he was the respondent's uncle. He said that in 1990 during a discussion about certain problems in the Mine Workers Union of Zambia where Chisoko was a branch chairman, the respondent was allegedly heard to remark that he did not know this Maxwell Kalesha Chisoko.

Next in this line of witnesses was PW80 Mr. John Jamale Chaziya who was 69 years old and who migrated from Mozambique, as the former Portugues East Africa is known. He told this court that he was related to one Zhuwao Sixpence Tembo and his cousin one Jim Zherari who left Mozambique and went to Salisbury (now Harare) to seek work in the 1920's. In 1943, the witness trekked to Salisbury in the then Southern Rhodesia where he learnt carpentry. From there, he moved to Ndola in the then Nothern Rhodesia in April 1950. In 1954, he met a fellow Mozambican called Kamuchacha who told him about Sixpence being in Mufulira. He cycled to Mufulira and found Sixpence who called Jim Zherari from his own house in the Mufulira mine township. Sixpence introduced the witness to Zherari who came with his son aged about twelve years old who was introduced as Titus Zherari and who was said to be the survivor of twins who were both males. From the various accounts before the court the respondent would have been about ten or eleven years old in 1954. However, to continue with the summary, the witness said he next saw the respondent then known as Frederick Chiluba at Atlas Copco in Ndola in 1976 and the respondent started visiting the witness, sometimes in company of his father-in-law a Mr. Ndhlovu, said to be the father of the first lady.

The witness said that in 1979, when the respondent felt harassed by other trade unionists, he (the respondent) reported that he had met and talked to Honourable Joachim Chissano (President of Mozambique but at the time its foreign Minister) who said the respondent could go home to Mozambique any time. PW80 hotly disputed any claims to the respondent by Zaireans or alleged Zaireans.

Next was PW83 Mr. Rodwell Kasonteka Sikazwe who, apart from alleging that the respondent had manipulated the constitution of a certain trade union, testified that his brother-in-law Maxwell Chisoko Kalesha can not possibly be the respondent's uncle, as he had falsely claimed on television.

Finally in this group of witnesses, there was PW102, Mr. Harry John Mumba who said that he came from the same area as the respondent who was known as Titus Mpundu. He said they went to the same primary schools and that he had heard that PW3 was the respondent's father.

Then there was the category of witnesses whom we have referred to as the others whose evidence in some way touched upon the issue of the respondent's qualifications. These included PWs 9,10,11,12,23,25,38, 48,52,61, 62,87,88,94,95,96,103,104,105,106, and 107. PW9 was Mr. Basil Kabwe whose evidence on the issue was of no value. He grew up and

attended school in Wusakile, Kitwe, and said that during that time he did not know the respondent. The evidence of PWIO, Mr. Sketchley Sachika along the same lines was equally of little assistance. He also said that he knew the respondent in Kitwe in the 60's as Titus Mpundu but that later in Ndola in 1967 or 68 he learnt that he was now Frederick Titus Chiluba. PW11 was Mr. Charles Simpute from the Registrar General's office. He produced the official records of the respondent as Fredrick Jacob Chiluba, NRC No. 168118/67/1. He also talked about the procedures for change names under the National Registration Act, CAP. 126, and the Regulations. The Act came into force in July 1964 and regulations in 1965. A perusal of this law shows that only a registered person was required to follow the procedure for a change of name, especially the surname. It follows therefore - as we have previously observed - that the statutory procedures are irrelevant to changes made prior to the date of the Act and prior to registration. It follows also that the Act was irrelevant to persons who died before any registrations started. PWI2 was Mr. Thilasi, the Chief Passport and Citizenship Officer. He produced the official file on Frederick Jacob Chiluba, which showed that the father was given as Jacob Titus Chiluba of Musangu Village, Chief Lubunda, Mwense District. There was no record on file to show that the father was also known as Jacob Titus Chiluba Nkonde of Lengwe Village, Kawambwa District, as set out in the respondent's oath at nominations.

The next witness under this category was PW23 Jumbe Ngoma who said that his company - Multimedia - printed the book by the respondent called "Democracy – The Challenge of Change" which was produced as an exhibit. It has a brief auto-biographical note about the respondent. PW25 was the learned Mr. John Mwanakatwe, S.C. who wrote the book "End of Kaunda Era" which the petitioners produced in evidence to show the conflicting biographical details of the respondent. The witness wrote in that book that the respondent was born in Musangu Village as Frederick Jacob Titus Mpundu; that the father was a miner while the mother died when the respondent was very young; and that the respondent started primary school in Wusakile, Kitwe. While PW25, alleged in his book that the respondent was born in Musangu started in Wusakile, all other books and articles, including books, affidavits and official forms attributable to the respondent talked about birth in Wusakile, Kitwe. The only other publication produced in evidence which suggested birth in Luapula Province was the book (which was Exhibit P.7) by the National Democratic Institute of the United States of America who were involved in monitoring the landmark elections of October 1991. As far as schooling goes, all other evidence was that the respondent went to schools in Luapula province only. In fairness to PW25, he was not adamant and graciously acknowledged that a mistake may have been made.

PW38 was Mr. Hamusankwa of the Chronicle Newspaper who said he had read the contradictory biographical materials in Mr. Mwanakatwe's book and in the respondent's book. He sent a questionnaire to Mr. Mwanakatwe and published his reply and an article calling upon those concerned to come forward and clear the air. They did not come forward.

PW48 was Mr. Justine Mwiinga of the Zambia Daily Mail newspaper. He informed their Lordships that he wrote about the President's origins, nationality and place of birth. He was in a delegation co-sponsored by the government which travelled to Zaire and found no documentary evidence that the respondent was born at Chibambo Mission Hospital. He wrote an article about it which was produced in evidence and which was pro-the respondent and highly critical of other earlier reports by other newspapers as to the respondent's alleged place of birth. He also wrote that contrary to other reports there was no Zambia Electricity Supply Corporation powerline from Musangu Village to Chibambo Mssion Hospital. The witness wrote that Chibambo Hospital did not exist at the time of the respondent's birth. This assertion is to be contrasted with other evidence that it did exist as far back as 1930 or oven earlier.

PW52 was Mrs. Pauline Banda of the Zambia Daily Mail who did not make any useful contribution to the case. She was called to produce an article which she had written about a protest staged against the then MMD Publicity Secretary Mwangilwa who was reported in the Post Newspaper to have confirmed that the respondent was born in Zaire. PW61 was Dr. Mwacalimba, the UNZA Librarian whose evidence added nothing useful. He was called ostensibly to produce the respondent's Master of Philosophy Dissertation where there is an autobiography that he was born in Kitwe at Wusakile to Titus Jacob Chiluba Nkonde and Daina Kaimba. Another unhelpful contribution was made by PW62 Mr. Jabani of Zambia Information Services (ZIS who was called to produce a pamphlet since unauthenticated on the respondent, giving his background and academic qualifications. The pamphlet was rendered even more useless when PW87, Mr. Muyunda Sibeso from the Government Printer, was called to say that the government Printer did not in fact print the exhibited pamphlet for ZIS on the respondent so that the legend on it to that effect was false.

PW88 was Mr. Phiri an artist whose contribution was not usable. He sought to show that a picture of the respondent can be "aged" to look like PW3 and the latter's picture can be "rejuvenated" to look like the respondent. He did the same for Dr. Kaunda and his son Panji.

If anything reliance even to a very tiny degree can be placed on mere resemblance of persons, the court's own ocular observation would be more trustworthy than the liberties taken by a fertile artistic imagination. If entertained, Mr Phiri would have us believe that sons and fathers can be transmuted at different ages into virtually identical likeness almost of the identical twins kind. We have discounted Mr. Phiri's evidence.

PW94 was Mr Kaira from the Times of Zambia Newspaper whose evidence was not useful to the issue being discussed. He reported on the death of one Edward Chiluba described as the respondent's brother without verification.

PW95 was Mrs. Mutiti of the National Archives. She produced the file on Chibambo Mission Hospital in Congo-Belgium which had been heavily tampered with by a person or persons unknown. She said the file went missing for some days only to re-appear mysterously on her desk. Someone went to a great deal of trouble to "doctor" the file so that there should be no documents showing the hospital existed even before the respondent's birth. The documents showed it was a Christian Missions in Many Lands (CMML) Church Mission Hospital which was grant-aided by the Northern Rhodesian government because of its service to the local inhabitants of the border area.

PW96 was Masautso Phiri of the Post Newspaper who was an active collaborator with the petitioners. His evidence dealt with issues of the respondent's qualifications as electoral issues. We digest here the evidence as he touched upon the question of qualifications. The witness told this court that he had seen documents generated by various persons or authorities which gave conflicting bio-data on the respondent, for instance, the official MMD bio-data of 1991 said he was born somewhere in Luapula. He said an anonymous circular suggested PW3 as the respondent's father. In March 1995 out of curiosity while on a trip to Luapula, he decided to call on PW3 at Musangu Village and interviewed him. He re interviewed him on a subsequent occasion and wrote PW3's story in the Post Newspaper. He also photocopied the entire Chibambo Mission Hospital file at the National Archives when it was still intact and which was later nobled. The photocopy file was admitted in evidence. He also produced books on the Hospital. He said the Post investigated and published stories about Chibambo which were duly countered in the government media for instance, by the "In search of truth" project and press conferences by Minister Ben Mwila. Cross examination revealed that the witness has sent two persons called Bondo Lusato and Simusokwe to cook up documents from Chibambo recording the alleged birth of the respondent and that both his parents (in this context Daina and Kafupi) were Zaireans. To his credit, it should be stated that the witness did not attempt to produce the alleged birth certificate.

PW103 was Mr. Vicent Tembo, Deputy Chief Inspector of Schools. His evidence was not useful and was to the effect that he failed to find any record at any school in the names Titus Mpundu or Titus Mpundu Chabala or Frederick Jacob Chiluba or Frederick Chiluba as records were not kept by the various schools. PW104 was Mr. Joseph Phiri, the Archivist for Zambia Consolidated Copper Mines (ZCCM) whose evidence was equally not useful. He said he had checked the personnel records from 1929 and found none in the names Jacob Titus Chiluba Nkonde, or Jacob Chiluba, or Jacob Nkonde, or Titus Chiluba, or any combinations of these names. He did not check for house occupancy records. When counsel for the respondent showed him a record for a Jacob Chiluba he said another team of researchers must have pulled it out. It seemed possible that the records had all been nobled. PW105 was Mr. Msimuko of ZCCM whose evidence was equally unhelpful. He produced records cards for employees with the names Jacob Chiluba or Titus but none under Nkonde or Nkhonde. Equally unhelpful was the evidence of PWs 106 and 107, Dr. Siatwinda of ZCCM Luanshya and Dr. Simukonde of ZCCM Kitwe respectively. They did not find any records of birth that might have been for the respondent.

In a nutshell, the foregoing was the evidence concerning the issues of qualification which was placed before us. The issues to be addressed included where the respondent was born; who are or were his parents; what is his own citizenship and what is or was the citizenship of the parents. In paragraph 9 of the petition, the petitioners averred that the identity of the respondent and the identity of his parents has been and was a subject of contradictory public records, public controversy and public concern and has never been ascertained. It is a fact that there was public debate and controversy in the media regarding the respondent's place of birth and parentage especially in respect of his father. However, controversy alone does not take the matter very far. It is also a fact and we so find that Chibambo Mission Hospital contended for by some existed and operated long before the respondent's birth; but so did Wusakile, Kitwe and Musangu Village the other places mentioned. Indeed, so did Luanshya mentioned by PW4 Mr. Thomas Ngosa. It follows that purely as a matter of possibility and technically, he could have been born in any one of these places. From the petitioner's point of view, the most desirable finding would be that the respondent was born at Chibambo. If, for the sake of argument that were the case, would birth at a nearby hospital in another country

render a person a non-Zambian citizen? The current and latest position under the Constitution (In fact since 1973 – see Act 27/73) is that a person born in or outside Zambia becomes a citizen at birth if at least one of his parents is a citizen, thus ensuring citizenship by birth and descent. However, the position is that we have to consider the citizenship of persons who become Zambians on 24th October, 1964, a matter which is governed by the Zambia Independence Order and the Constitution which was scheduled to it.

We had to research into the Constitutional and other legal instruments applicable from the beginnings of any kind of nationhood or statehood for this country. We took note of African migrations and the partition of Africa as recorded by historians. Zambia was formerly the protectorate of Northern Rhodesia in which the British Crown acquired jurisdiction under concessions and undertakings of protection at various times between 1891 and 1900. The King of the Lozi's gave what was North-Western Rhodesia to the British, while four or so other chiefs signed away what was North-Eastern Rhodesia. The protectorate was first administered under Charters and Orders in Council by the British South Africa Company. An administrator of Northern Rhodesia governed the territory on behalf of a High Commissioner who was based at Cape Town. An all-white Advisory Council acted as some kind or non-binding legislature: see generally The Northern Rhodesia Order in Council, 1911 and the previous orders which it revoked, namely The Barotseland-North-Western Rhodesia Orders in Council, 1899, 1902 and 1909 and the North-Eastern Rhodesia Orders in Council, 1900, 1907 and 1909. As a nascent but coherent political entity, this country started off as a white man's country and it was viewed as suitable for European settlement. A perusal of the Northern Rhodesia Gazettes of the period (e.g. for 1923 and 1924) shows that some whites were even applying for letters of naturalization under the Northern Rhodesia Naturalization Order in Council, 1914. The minutes of the Advisory Council meetings with the Administrator gazetted in 1923 and 1924 show that even as the British South Africa Company prepared to hand over the administration and governance of Northern Rhodesia to His Majesty's direct jurisdiction, European settlement was uppermost in their minds. This was to be reflected in the formal "Constitutional" instrument promulgated, which was the Northern Rhodesia Order in Council, 1924 published in the British South Africa Company's Northern Rhodesia Government Gazette No. 209 of Friday, 21st March, 1924. This order in Council (a) constituted the office of Governor and defined his powers; (b) constituted an advisory Executive Council; (c) provided for a Legislative Council; (d) provided for the courts; and (e) provided for native affairs. There were also detailed royal instructions given to the Governor (see page 27 of the Gazette) clause 23 of which enjoined the Governor to ensure the welfare and interests of the native inhabitants, especially their religion and education. The natives were not directly or indirectly involved in the legislature which was outlined in a separate order in Council.

On Tuesday, 1st April,1924, Herbert James Stanely, former Imperial Secretary under the High Commissioner for South Africa became the first Governor of Northern Rhodesia. Between 1924 and 1928 (see for example Government Notice No. 153 of 1924; Government Notice No. 89 of 1926; and Government Notice No. 107 of 1927) Commissions of Inquiry were set up to recommend the establishment of Native Reserves for the benefit of natives along the line of rail and in other districts who would be affected in their occupancy of land by actual or probable European Settlement along or near the railway line or by actual or probable mineral development or near the same. Elsewhere in the territory, it was found necessary to set aside land for the exclusive use of the natives and which would not be available for expansion of white settlement. The exercise was crowned by the Crown Lands and Native Reserves Order in council, 1928 and the Regulations (see page 69 for the Order in Council and Government Notice No. 149 of 1928 for the Regulations).

As far back as 1927, the European settlers discussed plans to merge Northern Rhodesia with other East African dependencies or with Southern Rhodesia or even to split it up and add the parts to other adjacent territories – see the Governor's speech to the Legislative Council at page 247 et seq of the Gazette. The reason advanced for this was the alleged sparse population which made it necessary – according to the Governor – for the native labour to circulate freely to and from Nyasaland, Portuguese East Africa, Katanga, Southern Rhodesia and Tanganyika. the natives were viewed as a source of cheap labour and were to be encouraged free movement in all the surrounding countries and within the territory –see the governor's speech to the Legislative council on 16th April 1928 (page 56 et seq). And so it was that for the purposes of native tax, the colonial administration taxed two categories of native, that is to say, natives with a village and domiciled in the territory and natives domiciled in some other country but resident in the territory. And so it was too that under the Native Registration Ordinance, CAP 59 of the Laws of Northern Rhodesia 1930, indigenous natives of working age had had to register while alien natives of working age had to register under the Alien Natives Registration Ordinance, CAP 60 of the Laws of Northern Rhodesia, 1930. Under the latter statute, alien natives who had shown an intention to settle in the territory could be treated as natives of the territory.

Meanwhile, the European settlers brought in the ill-fated Federation of Rhodesia and Nyasaland. Northern Rhodesia continued to be a protectorate. As from 1948 when two Africans got into the Legislative Council, the so-called natives steadily began to make in-roads into the political organs of Government. A useful summary of this can be read in Halsbury's Laws of England, 3rd Edition, vol. 5 from paragraph 1273. We are taking some time to outline the constitutional progression to statehood for a good reason which will soon become apparent.

The next "Constitutional" milestone was the passing of The Northern Rhodesia (Constitution) Order in Council, 1962 –see Gazette 213 of 1962. This Order (a) revoked the previous "Constitutional" Orders in Council; (b) made provision for the governor, the Executive Council, the Legislative Council, the High Court and the House of Chiefs; (c) provided for a power-sharing arrangement between the Europeans and the Africans; and also the Coloureds and Asians; (d) it divided the voters into higher franchise and lower franchise voters; (e) such voters had to be, inter alia, a citizen of the United Kingdom and Colonies or of the Federation of or a British protected person by virtue of his connexion with Northern Rhodesia. Under this arrangemesnt the right to vote was given to any British protected person by virtue of his connexion with the Territory; or any British subject or a British protected person who had been resident for an aggregate of at least four years out of the preceding seven years; or a resident registered under a chief's area; or any person who had been continuously resident for seven years during the preceding ten years; or the wives of any of the foregoing.

The Order of 1962 was revoked by that of 1963 – see Government Notice No. 25 of 1964 vol. 1 of Government Notices from page 228. The 1963 Constitution introduced a bill of rights which included a non-discrimination clause excepting, inter alia, "with respect to persons who do not belong to Northern Rhodesia". It also introduced a Constitutional Council. Up to this point in time the British nationality law both statutory and common laws applied and there was in none of what may be termed the "Constitutional instruments" thus far any talk of "Citizenship" of Northern Rhodesia. Instead, chapter 1 of the 1963 Constitution talked of persons belonging or not belonging to Northern Rhodesia. Section 16(3) of the 1963 Constitution provided as follows:-

> *"16 (3). For the purposes of this chapter a person shall be deemed to belong to Northern Rhodesia if he is a British subject or a British protected person and:*
>
> > *(a) was born in Northern Rhodesia or of parents who at the time of his birth were ordinarily resident in Northern Rhodesia;*
> >
> > *(b) has been ordinarily resident in Northern Rhodesia continuously for a period of seven years or more and since the completion of such period of residence has not been ordinarily resident continuously for a period of seven years or more in any other part of the common wealth;*
> >
> > *(c) is a citizen of the United Kingdom and colonies by virtue of registration in Northern Rhodesia, or the grant of naturalisation in Northern Rhodesia, under the British Nationality Act, 1948;*
> >
> > *(d) is the wife of a person to whom any of the foregoing paragraphs applies not living apart from such person under a deed of separation; or*
> >
> > *(e) is the child, stepchild, or child adopted in a manner recognised by law under the age of eighteen years of a person to whom any other foregoing paragraphs applies."*

A little later, we will be citing the House of Lords' decision in Motala And Others v Attorney -General (1991)4 ALL E.R. 682 among other things in connection with the automatic though there unwelcome acquisition of Zambian Citizenship by operation of law by the children of parents who had migrated to Northern Rhodesia from India. For the moment, we rely on it too as very persuasive authority for considering the question of citizenship against the backdrop of the pre-existing or previously existing state of the law and official practice. We would figuratively speaking underline the constitutional provision which in 1963 said a person "belonged" to Northern Rhodesia if born there or even if only born"….of parents who at the time of his birth were ordinarily resident…" There were thus no persons known as citizens of Zambia prior to 24th October ,1964.

Zambia Citizenship came with the grant of independence and it is the legal instruments of that time which made provision for the very first time for citizenship of Zambia. In this connection we wish to refer to some salient provisions in the Zambia Independence Act 1964; The Zambia Independence Order, 1964, and the Independence Constitution which it ushered in.

We wish to quote Sections 2(1) and 3(2) and (3) of the Zambia Independence Act 1964 which read:

''2. Operation of existing law----(1) Subject to the following provisions of this Act, on and after the appointed day all law which,whether being a rule of law or a provision of an Act of Parliament or of any other enactment or instrument whatsoever, is in force on that day or has been passed or made before that day and comes into force thereafter, shall, unless and until provision to the contrary is made by Parliament or some other authority having power in that behalf, have the same operation in relation to Zambia, and persons and things belonging to or connected with Zambia, as it would have apart from this subsection if on the appointed day Northern Rhodesia had been renamed Zambia but there had been no change in its status."

3. (2) A person who, immediately before the appointed day, is for the purposes of those Acts and of the said Order in Council of 1949 a British protected person by virtue of his connection with Northern Rhodesia shall not cease to be such a British protected person for any of those purposes by reason of anything contained in the proceeding provisions of this Act, but shall so cease upon his becoming a citizen of Zambia.

(3) Except as provided by section 4 of this Act, any person who immediately before the appointed day is a citizen of the United Kingdom and colonies shall on that day cease to be such a citizen if he becomes on that day a citizen of Zambia."

Thus, it is seen that those who granted this country its nationhood made provision that, until replaced, the existing law, that is to say the law existing before independence day, should continue to operate in relation to the country as well as to "persons and things belonging to or connected with Zambia" as if Northern Rhodesia had simply changed its name without change in status. We should also draw attention to the fact that the terms of the citizenship provisions at independence which we are about to set out made no suggestion that being native or indegenous or of any particular race would be part of the definition of criteria. Section 6(1) and (2) of the Zambia Independence Order, 1964 read as follows:

"6. (1) Any person who, at the commencement of this Order, is entitled to be registered as a citizen of Zambia under section 4 or 8 of the constitution shall, until he becomes a citizen of Zambia or until 24th October, 1966, (whichever is the earlier) and subject to the provisions of subsection (3) of this section, have the status of a citizen of Zambia.

(2) Any person who has the status of a citizen of Zambia by virtue of the provisions of this section shall be regarded as such a citizen for the purposes of the provisions of the Constitution (other than Chapter II or section 66 (1) and the provisions of any other law for the time being in force in Zambia (other than a law made or having effect as if made in pursuance of section 11 of the Constitution)."

The Constitution which was a schedule to the Zambia Independence Order dealt with citizenship in chapter II. Sections 3, 4, 5 and 6 of that Constitution were in the following terms:--

"3. (1) Every person who, having been born in the former Protectorate of Northern Rhodesia, is on 23rd October,1964, a British protected person shall become a citizen of Zambia on 24th October,1964.

(2) Every person who, having been born outside the former Protectorate of Northern Rhodesia, is on 23rd October,1964, a British protected person shall, if his father becomes, or would but for his death have become, a citizen of Zambia in accordance with the provisions of subsection (1) of this section, become a citizen of Zambia on 24thOctober, 1964."

"4. (1) Subject to the provisions of this section, any woman who, on 23rd October, 1964, is or has been married to a person--

(a) who become a citizen of Zambia by virtue of section 3 of this Constitution; or

(b) who, having died before 24th October, 1964, would but for his death, have become a citizen of Zambia by virtue of that section,

shall be entitled, upon making application in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen of Zambia.

(2) Subject to the provisions of this section, any person who, on 23rd October,1964, is a citizen of the Untied Kingdom and Colonies, having become such a citizen by virtue of his having been naturalisedor registered in the former Protectorate of Northern Rhodesia under the British Nationality Act 1948, shall be entitled, upon making application before such date and in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen as a citizen of Zambia:

Provided that any person who is under the age of twenty-one years (other than a woman who is or has been married) shall not be competent to make an application for registration under this subsection, but an application may be made on behalf of that person by his parent or guardian.

(3) Subject to the provisions of this section, any woman who-

(a) is on 23rd October, 1964, married to a man who after that date becomes a citizen of Zambia; or

(b) is on 23rd October, 1964, married to a man who becomes entitled to be registered as a citizen of Zambia under subsection (2) of this section but whose marriage is terminated after that date by death or dissolution and before that person exercises his right to be so registered,

shall be entitled, upon making application before such date and in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen of Zambia.

(4) Subject to the provisions of this section, any woman who on 23rd October 1964 has been married to a person who becomes or would, but for his death, have become entitled to be registered as a citizen of Zambia under subsection (2) of this section, but whose marriage has been terminated by death or dissolution before 24th October 1964, shall be entitled, upon making application before such date and in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen of Zambia.

(5) An application for registration as a citizen under this section shall not be made by or on behalf of any person who, under any law in force in Zambia, is adjudged or otherwise declared to be of unsound mind."

"5. Every person born in Zambia after 23rd October 1964 shall become a citizen of Zambia at the date of his birth;

Provided that a person shall not become a citizen of Zambia by virtue of this section if at the time of his birth--

(a) neither of his parents is a citizen of Zambia and his father possesses such immunity from suit and legal process as is accorded to the envoy of a foreign soverign power accredited to Zambia; or

(b) his father is a citizen of a country with which Zambia is at war and the birth occurs in a place then under occupation by that country."

"6. A person born outside Zambia after 23rd October 1964 shall become a citizen of Zambia at the date of his birth if at the date of his birth his father is a citizen of Zambia otherwise than by virtue of this section or Section 3(2) of this Consitition."

The scheme of the Constitution at independence was such that some became citizens

automatically; some became entitled to that status and could register as of right; while others who were potential citizens could apply to naturalize. Even the law enacted to facilitate registration and naturalisation introduced another element of automatic acquisition of citizenship by adoption: See, the Citizenship of Zambia Ordinance, 1964 (61 of 1964) and subsequent legislation. The Constitutional provisions at independence defined a "British protected person" by reference to the British Nationality Act, 1948, Section 32 of which provided that a British protected person meant a person who was a member of a class of persons declared by order in Council to be protected persons by virtue of their connection with the relevant protectorate, state or territory. The British Protectorates, Protected States and Protected Persons Order in Council, 1949, gave various instances of such protected persons including, under Section 9, those born in a protectorate or a trust territory and those born elsewhere but whose fathers were born in a protectorate or a trust territory. As will be seen shortly when we refer to the MOTALA Case, the state of affairs brought about by the British Nationality Act, 1948 as read with the citizenship provisions in the instruments which ushered in our independence must be viewed in light of the pre-existing state of the law on the subject. Viewed in this way, it is seen that the Legislation of the Untied Kingdom dealing with nationality and elaborated subsequently begins with the British Nationality and Status of Aliens Act, 1914. Under that law, there was a common British nationality for all subjects of the Crown throughout the Commonwealth and Empire which had grown out of the common law doctrine of allegiance to the King. As the learned authors of Halsbury's Laws of England, 3rd ED: vol. 1 point out in Note (i) at page 528---

> *"Before 1st January 1949, the terms "British national" and "British nationality" were generally used to indicate a British subject and the status of a British subject. In fact, there existed at that time another group of British nationals, i.e. British protected persons, but in strict law they were treated as aliens, although they were deemed not to be aliens for the purposes of any provision having effected by virtue of the Aliens Order, 1920……..."*

The Act of 1948 radically changed the whole of the citizenship law of the United Kingdom. We have already mentioned the Order in Council dealing with protected persons which was made under this Act. However, as early as 1934, there was promulgated the British Protected Persons Order, 1934: See Government Notice No. 91 of 1934 in the 1934 Government Notices of Northern Rhodesia, at page 109. The object of that Order in Council was to define which persons were to "regarded as belonging" to the affected territories and therefore British protected persons. The persons to be regarded as belonging included those born in the territory and those whose fathers belonged by their own birth in the territory. We have previously quoted Section 16(3) of the 1963 Constitution in which an extended and more expansive definition of the persons who belonged to Northern Rhodesia was given. This was long after 1934 and 1948. This was an expanded list of the persons – to use the language of the recitals in the 1934 Order in Council – regarded as belonging to the territory and who were afforded Her Majesty's protection and were known as British protected persons.

The Zambian citizenship provisions at independence were considered in the Court of Appeal as well as in the House of Lords in the MOTALA case reported respectively in (1991) 2 ALL E.R. 312 (CA) and 1991) 4 ALL E.R. 682 (HL). The claimants Safiya and Farug Motala were born in British Protectorate of Northern Rhodesia. Their parents were Indian citizens born in Gujerat who married at Fort Jameson (now Chipata) in Northern Rhodesia in July, 1950 and brought up a family of eleven children there. Their father had gone to live in Chipata in 1946 and had carried on a successful business as a trader until he went to live in Manchester, England, shortly before he died in 1984. The father applied to become a citizen of the Untied Kingdom and Colonies by registration. It was granted to him on 13th February, 1953, at Lusaka by a certificate signed by the Chief Secretary of the Government of Northern Rhodesia. Subsequently, Mrs. Motala also registered as a citizen of the United Kingdom and Colonies. The two claimants were citizens of the United Kingdom and Colonies by descent at birth under Section 5(1) of the British Nationality Act 1948 because their father, who had been born in India, had already become a citizen of the United Kingdom and Colonies by registration in Northern Rhodesia. In 1979, the claimants were refused United Kingdom passports on the ground that they were not citizens of the United Kingdom and Colonies and were in any case illegitimate because their parents' marriage was not valid. In 1983, they applied successfully for a declaration that they were legitimate and that they were citizens of the United Kingdom and colonies. The Attorney General appealled, contending that although the claimants had been entitled to citizenship of the United Kingdom and Colonies by descent they had also been British protected persons as defined by the 1948 Act and therefore by virtue of Section 3(3) of the Zambia Independence Act 1964 and Section 3(1) of the Constitution of Zambia which was scheduled to the Zambian Independence Order, 1964 they had lost their status as citizens of the United Kingdom and Colonies by descent on 23rd October 1964, the day before Zambia became independent, and had become citizens of Zambia on Independence Day, 24 October 1964. The Court of Appeal reject the Attorney General's contention, holding that under the

1948 Act the status of a British Protected person and that of a citizen of the United Kingdom and Colonies were inconsistent and mutually exclusive so that a person could not be both at the same time. Accordingly, the claimants were not British protected persons immediately before Zambia's independence and, in the absence of express provision in the 1964 Act, they did not become Zambian Citizens on Independence Day but retained their status as citizens of the United Kingdom and Colonies. The Court of Appeal simply considered the language of section 3(3) of the Zambia Independence Act 1964 and section 3(1) of our Independence Constitution and proceeded to construe it in light of the 1948 Act and the British Protectorates, Protected States and Protected Persons Order in Council 1949. They looked at the law against the background of the common law which traditionally considered protected persons to be aliens and held that it was not necessary for the draftsman to state in the 1948 Act that a citizen of the United Kingdom and Colonies was not and could not at the same time be a British protected person. This was considered to be implicit in the law. The Court of appeal upheld the trial judge's finding that the claimants had become British Overseas Citizens. The Attorney General took the matter to the House of Lords and was rewarded with success. Their Lordships held that although the status of a British protected person was different from that of a citizen of the United Kingdom and Colonies, the one status was not inconsistent with the other and therefore a British protected person did not cease to be such on becoming a British subject. The claimants were from their birth in Northern Rhodesia until Zambia became independent both citizens of the United Kingdom and colonies by descent under Section 5(1) of the 1948 Act and British protected persons by virtue of Section 32(1) of that Act, read with Section 9(1) of the British Protectorates, Protected States and Protected Persons Order in council 1949, and therefore by virtue of section 3(3) of the 1964 Act they ceased to be citizens of the United Kingdom and Colonies and became citizens of Zambia on 24th October 1964 under Section 3(1) of the Constitution of Zambia.

The question in the MOTALA case was whether the claimants were British protected persons who became Zambian citizens under section 3(1) of the Constitution or if, inspite of the wording of section 3(3) of the Zambia Independence Act 1964 they continued to be citizens of the United Kingdom and Colonies by descent. The question was also whether the status of a protected person and an overseas citizen were mutually exclusive. The House of Lords considered the common law and the pre-existing law in order to construe the 1948 and 1949 legislation in the proper context and to demonstrate that the Court of Appeal had misapprehended the common law position which preceded the 1948 Act precisely because it did not attempt to look at the pre-existing law. We can do no better than to quote from the leading opinion of Lord Bridge from page 685 where he said:

> *''Hence the critical question is whether from birth until 23rd October,1964, they each had the dual status of citizen of the United Kingdom and Colonies and British protected persons or whether, under the 1948 Act, that was an impossibility.*
>
> *Before addressing that question I must say at once that the courts below were denied the advantage which your Lordships have enjoyed of being referred to J Mervyn Jones British Nationality Law and Practice (1st edn. 1947), which is a valuable source of information with respect to the status of British protected persons at common law, or to the British Protected Persons Order 1934, SR & 01934/499, which shows how the status was treated in previous legislation.*
>
> *As an inevitable consequence the Court of Appeal approached the issue which arose on the construction of the 1948 Act and the British Protectorates, Protected States and Protected Persons Order in council 1949, SI 1949/140, made under the 1948 Act, without reference to their proper context.*
>
> *As will appear, when construed in the context of the pre-existing law, the 1948 and 1949 legislation wears a very different aspect.*
>
> *Mr. Mervyn Jones' book is a most useful starting point. It appears to have been the first comprehensive textbook on the subject matter of its title. It carries a foreword by Mr W E Becket, who was then the legal adviser to the Foreign Office Apart from giving the work his laudatory imprimatur, Mr Beckett points out that;*
>
> *'in the field of British Nationality law very few cases have ever gone to the courts at all, whereas a very large number of problems have confronted the two Departments of State, the Home Office and the Foreign Office, and have been dealt with administratively.Mr Mervyn Jones has been able to see the papers of these two departments where cases of interpretation have arisen. Not being an official, he has been entirely free to form his own judgement upon them, and in fully exercising this*

freedom, he has shown his own qualities as a scholar and as a lawyer.

This inspires confidence that the ensuing text accurately reflects both contemporary practice and accepted contemporary opinion in matters of nationality and status.''

The most significant passage from the text, for present purposes, appears where the author states (p279):

''It may often happen that a person may be, at one and the same time, both a British subject and a British protected person. for instance, a number of British subjects also possess Palestinian citizenship. There are a large number of people from India who are, at one and the same time, British subjects by virtue of their connection with British India, and British protected persons by virtue of connection with some Indian state. It is a sort of domestic double nationality.

In many territories under British protection, eg the Indian native states, the several states in what is now Malaysia and the protected states on the shores of the Persian Gulf, the question who was entitled to be regarded as a British protected person was determined by the local law in the sense that whoever was recognised as a subject of a protected state was also recognised as a British protected person.''

But, as Mr Mervyn Jones points out (at p 294) in the British protectorates, being:

''territories mainly in Africa where there is no native ruler…….. the rules defining who can claim the status of a British protected person, by virtue of their connection with protectorates, have to be laid down by the British Crown.''

It was for this reason that the British Protected Persons Order 1934 was enacted. The territories to which the order applies are the British protectorates, including Northern Rhodesia, and mandated areas set out in the schedule. The order recites:

''……And whereas certain persons who are regarded as belonging to those territories are afforded His Majesty's protection, and are known as British protected persons: and whereas it is expedient to define in relation to those territories the persons who are so regarded as belonging thereto…….''

Again, after dealing with various aspects of the decision in the Court of Appeal, Lord Bridge continued, at pages 688 to 689:

"The 1948 Act came into force on 1 January 1949. The British Protectorates, Protected States and Protected Persons Order in Council 1949 and the order in council revoking the British Protected persons Order 1934 were made on the same day, 28 January 1949. The draftsmen of the new legislation must have been perfectly familiar with the pre-existing law and, if it had been intended that henceforth British protected persons could not at the same time be citizens of the United kingdom and Colonies and vice versa, it is inconceivable that this would not have been made clear in express terms, in the same way as it was made clear in express terms that henceforth British protected persons would no longer be aliens.''

Even if there was an ambiguity in the 1948 Act, there is available one further aid to its construction which was not brought to the attention of the Court of Appeal. Your Lordships are indebted to Mr Collins, whose industrious research unearthed a relevant provision in the Solomon Islands Act 1978; which he very properly brought to the attention of Mr Holman, Q.C., who naturally relies on it. It is s4(1),
which provides:

''A person who immediately before Independence Day is a British protected person by virtue of his connection with the Solomon Islands protectorate;

(a) shall cease to be a British protected person on that day if he then becomes a citizen of Solomon Islands or is then a citizen of the United Kingdom and Colonies….''

This provision clearly assumes that prior to Independence Day there may be some Solomon

Islanders who are both British protected persons and citizens of the United Kingdom and Colonies. In the words of Lord Sterndale, MR, in Cape Brandy Syndicate v IRC (1921) 2 K.B. 403 at 414, approved by your Lordships' House in Ormond Investment Co Ltd v Betts (1928) A.C. 143 at 156 (1928) ALL E.R. Rep 709 at 715-716:

> *''I think it is clearly established in Attorney-General v.Clarkson (1900) 1 Q.B. 156) that subsequent legislation on the same subject may be looked to in order to see what is the proper construction to be put upon an earlier Act where that earlier act is ambiguous. I quite agree that subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier. Hence, if the 1948 act were ambiguous on the point in question, s.4(1) of the Solomon Islands Act 1978 would resolve the ambiguity."*

We consider the House of Lords' decision as ample persuasive authority for having taken the expedition into the history of the instruments of the constitutional developments in this country. In context, therefore, the people said by the 1963 Constitution to "belong" to Northern Rhodesia were all British protected persons by virtue of their different kinds of connection with Northern Rhodesia. The legislation of 1963 being subsequent to 1948 and 1949 threw considerable light on the question of British protected persons by virtue of their connection with Northern Rhodesia and hence who became citizens. Using the House of Lords' approach, we are quite satisfied that belonging to Northern Rhodesia on any ground listed in the 1963 Constitution constituted the necessary connection for one to be a British protected person to that the non-repetition or specific mention of each and every category of the 1963 British protected persons in the 1964 legislation did not result in any lacunae so as to deprive the affected of their right to claim citizenship of Zambia or of the United Kingdom and Colonies as the case may be.

In light of the law discussed, the respondent "belonged" to Northern Rhodesia and was clearly a British protected person whichever biography out of the several proposed is or were to be adopted. In light of the law, therefore, the respondent's own citizenship cannot be in any doubt. He is a Zambian citizen. It must be stressed and sight should not be lost of the real issue here which is the citizenship of the respondent himself which cannot be affected by being born at Chibambo, if that is where he was born. As already shown, it was not solely one's own birth within Northern Rhodesia which resulted in "belonging" and being a British protected person. The contention in the petition was that if he was born at Chibambo he would be a foreigner: The law says otherwise, as already discussed. In the event, we are of the considered view that it would be idle, otiose and pointless to make a positive finding as to where the respondent was born although we note that the preponderance of the evidence of the available official records favours Kitwe.

The next question is who are or were his parents? a number of other questions arise such as whether the Constitution is concerned with legal or biological parents and whether in the event of a person being legally fatherless or illegitimate such a person is not entitled to become the President. Other questions arising include whether parents born before independence can be regarded as citizens of Zambia by birth or descent or if the provision should be construed as including only the parents who are or were literally Zambians by birth or descent (none of whom would be older than our independence so as to have any child of not less than 35 years old as required for presidential candidates).

We begin with the evidence. From the evidence given, there was no dispute who the mother of the respondent was, namely the late Daina Kaimba Mulaye of Musangu Village. The evidence has shown that the she belonged to that village and to Northern Rhodesia and she would, but for her prior death, have become a citizen of Zambia at independence. Three fathers have been proposed for the respondent in the evidence before the court and the question is: was it (a) PW3; (b) Jim Zharare Nkhonde or (c) Jacob Titus Chiluba Nkonde? In favour of PW3 Luka Chabala also known as Kafupi – "the short one" – was firstly PW3 himself. He laid his claim with much conviction and gusto. Then there was PW4 Mr. Ngosa a relative of the respondent who harboured undisguised bitterness and who fared very badly in the witness box. He was discredited and we found his evidence to be unreliable. It can not be resorted to in order to afford support to PW3. Then there was PW13 Mr Kasuba whose evidence on the point was all multiple hearsay and inadmissible. Next was PW14 Mr. Banda who claimed that the respondent himself told him in 1962 in Mufulira that his father was a Zairean called Kafupi who had other children in Zaire and that his home was in Zaire. He said the respondent spoke Lingala, a typical Zairean language, thereby suggesting that the respondent associated with or was brought up by or among Lingala-speaking folk. Mr Banda's evidence was in sharp contrast with that surrounding the respondent's educaion and that of PW3 himself who was either working on the Copperbelt or

living in the villages in Luapula province and had all his children in Zambia. While it is quite possible that PW14 knew the respondent and even kept him and procured the employment he had as a bus conductor with C.A.R.S., we gained the distinct impression that he was overly keen to embellish and colour his evidence, especially on the issue of the respondent's paternity.

The other witness to support PW3 was PW28 Mr. Kakonde. However, his evidence on the point was patently hearsay and, as already observed, he was in any case thoroughly discredited and not credible. Again as already noted when we recited a digest of the evidence, there was the inadmissible hearsay evidence of PW29, Mr Musonda. PW34 Champ Thom Musendeka the schoolmate, said he had heard that PW3 was the real father. This was obviously hearsay. There followed the evidence of PW51 Mrs. Chikonde who was not a credible witness and was contradicted by PW34. It was she who alleged that the respondent (then known as Titus Mpundu) had himself said his father was Kafupi Chabala when the respondent and her brother were expelled from school. Her allegation that her father gave the respondent transport money after the expulsion conflicted sharply with the account given by PW34 who said that the Headmaster delivered them to their homes in his vanette. Again, we have already commented upon the evidence of PW102, Mr Mumba, which was all hearsay. The position therefore is that PW3 largely stands alone with any kind of direct evidence, with no or very little support mainly of the hearsay type from the relatives and acquaintances. We now turn to the evidence in favour of Zharare Nkhonde, of Mozambican origin. The evidence given by PW7, Mr Mark Chilekwa and his sister PW32 Mama Anna Chilekwa was agreed that they lived in Wusakile and came to know the respondent and his father. The auto biography of the respondent agrees that he lived in Wusakile. These witnesses put the period at 1955 to 1959. We have also noted the similarity between the name Nkhonde (with an "h given by PWs7 and 32 and the name Nkonde (without an "h") given by the respondent himself at his nomination as a presidential candidate. In a general way, PW80 Mr. Chaziya was in support of the father being of Mozambican origin and known as Jim Zharare, without any other surname. It was PW80 who described how Sixpence and Zharare had worked at Bwanamkubwa and then transferred to Mufulira; thence to Chambeshi for two years until the mine collapsed thence back to Mufulira Mine where he found them in 1954. It was a notorious fact that Mufulira Mine – and Luanshya Mine suggested by PW4 – used to belong to Roan copper Mines Limited while Nkana – Kitwe used to belong to what was then Nchanga Consolidated Copper Mines Limited, before the companies merged in the seventies to form the Zambia Consolidated Copper Mines Limited. We were troubled by some aspects of the accounts relating to Mufulira and Kitwe which we found difficult to reconcile. Quite apart from the unlikelihood of transfers of miners between different companies those days, there was the timing of the events in Mufulira and Kitwe; the surnames used; and the claim by PW80 that Titus Zherera was the survivor of twins who were both male. The evidence relating to Kitwe was in agreement and tallied with other evidence that the respondent lived in Luapula where he was attending school, coming to Kitwe only during the school holidays. In contrast, PW80 suggested that the respondent and his father were living in Mufulira.

The evidence in favour of the respondent's father being Jacob Titus Chiluba Nkonde came from the published biographies and also from the documents which were produced by the witnesses, such as PW11 Mr. Simpute and PW12 Mr. Tilasi. There was also support from the documents in the bundles of documents at the trial. The rest of the evidence of the others, as already discussed when we summarised their evidence is peripheral.

From the evidence discussed, all the accounts as to which one might have been the father are quite plausible; but they are irreconcilable. PW3's evidence was otherwise quite believable; but so was the version supported by the Chilekwas and Mr. Chaziya regarding Mr Zharare which was otherwise also quite believable. Although there was no viva voce evidence to support the third father named in the official documents, that story too was plausible and was not positively discredited. In the absence of an affirmative case in support of a specific father, the petitioners finally urged that PW3 be found to be the father and proposed – without any evidence to support the linkage – that it be taken that the respondent was the illegitimate son of PW3, the product of an illicit affair while the respondent's mother was married to a Mozambican who brought him up. Assuming PW3 to have been the biological father but without making any finding to that effect, what would be the position? Would the respondent have been unqualified to stand on account of the citizenship of the presumed father? In other words, is PW3 a Zairean (or now Congolose)? PW3 testified that his parents settled in Northern Rhodesia and he was born in the Congo as it were by accident of circumstance when his mother visited a sick relative. The birth in that country would have the same flavour as the mothers in the border areas of this country who had to resort to Chibambo Mission Hospital which was grant-aided by the Northern Rhodesian Government. Their children did not cease to belong to Northern Rhodesia where they themselves belonged. The case proceeded on the assumption that PW3 who is otherwise a Zambian with a Zambian National Registration Card had a village where his own parents become a foreigner by birth in the then Belgian Congo. We have already dealt at great length with what will be the consequence had the respondent

infact being born in Chitambo in the Congo. The reasoning and the law which we set out in relation to the respondent's position applies with equal force PW. By law, he belonged to Northern Rhodesia and was British protected person born of parents – to lift an expression directly out of the 1963 Constitution – "who at the time of his birth were ordinarily resident in Northern Rhodesia." One of the counsel for the petitioners submitted that PW3 became a Zambian by registration – if we understood correctly – under the National Registration Act. This Act is concerned with the registration of all persons in Zambia who are over 16 years of age and whether they are Zambians, commonwealth citizens or aliens. It is not the Act for obtaining citizenship by registration for which a separate Act exists. The fallacy of assigning citizenship by registration for which a separate Act exists. The fallacy of assigning citizenship by registration to PW3 is self-evident. But in fact, by operation of law as already demostrated he became a citizen at independence so that if the law in the constituion were concerned with natural or biological parents, and if he were the father as he claims, the respondent would not have been disqualified.

We did pose the question whether the Constitution had in contemplation biological parents or legal parents. The citizenship law at independence traced its roots to the British legislation on the subject and if such legislation is resorted to, one finds that the law is concerned with legitimate. Thus, for example, Section 32(2) of the British Nationality Act 1948, provides as follows:

"32(2). Subject to the provisions of section twenty-three of this Act, (which considered the position of children legitimated by the subsequent marriage of their parents) any reference in this Act to a child shall be construed as a reference to a legitimate child; and the expressions "father ", "ancestor" and "descended" shall be construed accordingly."

The words in brackets are ours. Again, if the respondent were a non-marital child or filus nulius - to use an obsolete latin expression - the legal position appears to have always been that such a child has derived domicile and personal status through the mother. On the facts of the case at hand, that is, if the case were that the respondent was the illegitimate son of PW3 but brought up by the legal parents, he would undoubtedly have been considered to be a marital child - see for instance, the Affilliation and Maintenance of Children Act, CAP 64 of the 1995 edition of the Laws of Zambia. The parentage qualifications indeed raise a number of questions. For instance, it was suggested in the submissions that the reference to parents who are or were Zambians by birth or descent was intended by the legislature to disqualify those who are not indigenous. As we have pointed out in a number of cases in the past - for example in Samuel Miyanda v Raymond Handahu S.C.Z. Judgment No. 6 of 1994 - the fundamental rule of interpretation of all enactments to which all other rules are subordinate is that they should be construed according to the intent of the parliament which passed the law. Such intent is that which has been expressed and when the language used is plain and there is nothing to suggest that any words are used in a technical sense or that the context requires a departure from the fundamental rule, there would be no occasion to depart from the ordinary and literal meaning and it would be inadmissible to read into the terms anything else on grounds such as of policy, expediency, political exigency, motive of the framers and the like; see also Capper v Baldwin (1965)2 Q.B.53 by Lord Parker, C.J., at page 61. Accordingly, it is not possible to read the provisions as requiring or permitting only the indegenous sons and daughters who belong to one of the tribes native to Zambia and who have a village and chief in Zambia. Applying the fundamental rule, the provision would not disqualify for example a person born in Northern Rhodesia or in present day Zambia 35 years ago of Chinese parents (say who died) who has since been adopted by Zambian parents who are Zambian by birth or by decent; See for instance the automatic acquisation of citizenship by adoption introduced by section 3 of Ordinance 61 of 1964, that is the citizenship of Zambia Ordinance which read:

> "3. A child adopted, on or after the commencement under the provisions of any law relating to the adoption of children shall, if he was not a citizen at the date of such adoption, become a citizen by adoption on the date of that adoption if the adopter, or, in the case of a joint adoption, the male adopter, was at the date of the adoption a citizen."

(Now see s. 11 CAP 124 of the 1995 Edition of the Laws)

In the not too distant future, there will be second and third generation Zambians descended from ancestors who originated from a variety of continents and countries all over the world which ancestors are now "disqualified" Zambians. We have also pointed out a number of other questions which arise, including whether or not "biological" parents were intended and whether or not persons who were or are non-marital children are thereby excluded. We consider that the point has to be made that the parentage qualifications introduced into the constitution in

1996 pose a number of apparently solutionless problems and difficulties. In giving the example of the adopted Zambian of Chinese origins, we mean no disrespect to that great race but illusrate some of the difficulties. We doubt if the framers of the amendments had these problems in mind. If the aim was to provide for indigenous presidents only as suggested by counsel, then quite clearly the language of the amendments actually employed did not and could not achieve this. Had explicit language to that effect been employed, such language might conceivably have run the risk of infringing the non- discrimination provisions in the part of the constitution which is entrenched. This was not an issue here and we make no finding. However, we should mention the case of Akar v Attorney -General Of Sierra Leone (1969) 3 ALL E.R. 384 which we considered during our research. In that case, the appellant was born in 1927 in the former British protectorate of Sierra Leone of an indigenous mother and a Lebanese father who was born and bred in Senegal but who had lived in Sierra Leone for the last 56 years, and never been to Lebanon. On the attainment of independence by Sierra Leone on 27th April 1961 the appellant by virtue of Section 1(1) of the Constitution became a citizen of Sierra Leone. Act No. 12 of 1962, by Section 2, purported to amend the Constitution retrospectively to limit citizenship to persons of negro African descent. This, by the definition of the term (defined as meaning "a person whose father and his father's father are or were negroes of African Origin")- excluded the appellant. By Section 23 of the Constitution, laws discriminating, inter alia, on the ground of race, were prohibited except, inter alia, in cases where a disability imposed having regard to its nature and to special circumstances pertaining to persons on whom it was imposed, was reasonably justifiable in a democratic society. By a majority of four to one, the House of Lords affirmed the Chief Justice of Sierra Leone and reversed their Court of Appeal by holding that Act No. 12 of 1962 was unconstitutional; it was discriminatory within the meaning of Section 23 of the Constitution since different treatment was accorded to different people and the differentiation was attributable to wholly or mainly to respective descriptions by race. while their Lordships expressly stated with the wisdom or desirability or fairness of passing such a measure, nonetheless they commented as follows, at page 393:....

> "In view of the conclusions which their Lordships have expressed they need not refer further to the problems which have been raised. The circumstances that they are posed... is commentary enough of the difficulties which have been created by the scheme of legislation which it was thought appropriate to attempt to adopt."

The comment was rather apt. Another point already dealt with but worth noting again was the assertion by the petitioner Mrs. Phiri and other witnesses that there were no Zambian citizens as such prior to independence and that Zambian citizenship and nationality only commenced on 24th October 1964. This assertion which we accept as technically and legally correct means that the constitutional provision regarding parents or anyone born prior to independence who are or were Zambian by birth or by descent can meaningfully only be construed as a reference to those who became Zambians on 24th October 1964 or who would, but for their prior death, have become Zambians on that day.

To conclude on the question of the respondent's qualifications, we find that the various accounts as to the paternal parentage were irreconcilable in consequence of which an affirmative case has not been proved to the necessary degree of convicing clarity. In the circumstances, there is no basis for foisting a father upon the respondent nor for finding against the one he has officially declared. Above all we have already explained how even the most favourable finding from the petitioners' point of view would not have resulted in the respondent becoming unqualified.

ELECTORAL FLAWS

We now turn to the aspect of the petition which related to the election, including the whole of the electoral process. The issues raised under this part according to prayers of the petition were that the election process had been neglected by the Electoral Commission, thereby facilitating fraud and that the election was rigged and not free and fair, therefore null and void. The detailed particulars in the petition and the evidence raised issues of (i) bribery and corruption; (ii) irregularities and (iii) flaws in the electoral system. Since a presidential election is conducted under the practices and procedures set out by or under the Electoral Act, cap.13 of the Laws of Zambia (1995 Edition), this court had determined quite early in the proceedings that guidance would be sought from that Act on many of the issues that arose, for example, the grant of indemnities to witnesses. In the same vein, we had to look to the Act and the Regulations when considering the issues of bribery and corruption; irregularities; and the flaws. We also had to borrow from the principles set out in Section 18 of cap.13 which reads:

"18. (1) No election of a candidate as a member of the National Assembly shall be question except by an election petition presented under this Part.

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

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

(b) subject to the provisions of subsection (4), that there has been a non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election;

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

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

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

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

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

(c) in all other respects the election was free from any corrupt practice or illegal practice on the part of such candidate or his election agent; then the High Court shall not, by reason only of such corrupt practice or illegal practice, declare that election of such candidate was void.

(4) No election shall be declared void by reason of any act or omission by an election officer in breach of his official duty in connection with an election if it appears to the High Court that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such act or omission did not affect the result of that election."

The evidence on these issues came from a fairly large number of witnesses.

(i) **Bribery and Corruption**

Thus, under bribery and corruption can be listed firstly the witnesses whose evidence touched upon the Sale of Council houses. These were PWs 53, 55, 56, 57 and 27. Then there was evidence touching upon what the Regulations terms as "treating" in the form of for example the distribution of meat and grinding mills in the Western Province and salt and cement in Mbala. The witnesses included PWs 24, 30, 49, 67 and 68. Then there was evidence of cash gifts given mostly by the witnesses from Chongwe and by some of the peititioners who complained of Ministers donating money to various causes. the witnesses under this head included PWs 26, 84, 85, 90 and 91. For the sake of economy, we summarise the gist only of the evidence of these witnesses as follows:

PW53 was Mr. Muyakwa of Mongu district Council. He told their Lordships that, acting

on a circular from the Ministry of Local Government, Council houses were sold at valuation less discounts ranging from 100% for pre-1959 houses to 20%. In September 1996, the respondent visited and fixed a maximum of K750,000. Under cross-examination, the court learnt that the respondent and the MMD candidates came off worst in all the Mongu constituencies during the elections. PW55 was Mr Chibbonta, Town Clerk of Livingstone. His evidence was that the Council had already decided to sell the houses and got permission to sell some and that the circular from the government was welcome and had better prices. He said the residents made representations to Lusaka and the houses had to be sold at the prices determined by the Council which were lower, less discounts. He informed us that the respondent had visited Livingstone before the government circular came out. PW56 was Mr. Mumbi, the Solwezi Town Clerk. He informed us that his council already had a programme to sell houses in 1995 and sought permission to sell. He said the government circular of May 1996 resulted in 229 houses being offered for sale, 44 of them "free" at 100% rebate. Under cross-examination, he informed the court that the respondent and the MMD infact fared very badly in Solwezi. PW57 was Mr Ali Simwinga, the Kitwe Town Clerk. He said that the Council decided to sell its houses as far back as 1993 as the minutes would show. The Council applied for permission to sell 5% of its 13,500 units and the Minister gave approval in February 1994. He said that the Council hoped to expand and develop the City more by selling so that the government circular was welcomed. by then, 530 units had already been sold. He said the respondent did not fix the prices; the circular set out the procedure and rebates. He informed their Lordships that Kitwe City council persuaded the government to reduce the prices even further below the circular's prices. PW27 was Mr. Munga of Zambia National Broadcasting Corporation who produced and showed us some video tapes. The first tape showed the respondent opening the MMD Southern Province Conference and it was not relevant to the issues. The second dated 18 April 1996 showed the respondent touring Council houses in Livingstone when the respondent was clearly compaigning against UNIP and for himself and his Party as he indicated there would be discounts. The third date 20 April 1996 showed the respondent on tour of Council houses in Ndola where he even handed over some Certificates of Title. The fourth tape recorded his tour of Western, North-Western and Luapula provinces and where he directed reductions on Council houses and generally held campaign rallies. The firth was an irrelevant film of 7 March 1991 titled "personalities in politics". The sixth and last film was his interview in Kabwe on 6 January 1996 when he made donations to public causes like the waterworks and also urged people to register as voters.

On the evidence we are satisfied and it is our finding that programmes for the sale of Council houses were long already in place and were otherwise unexceptionable but for the timing of the discounts in an election year. The exercise was clearly used to assist the campaign. The question we had to consider was whether the government exercise which was taken advantage of could amount to the corrupt practice of bribery under Regulation 51 of the electoral (General) Regulations so as to be caught by the spirit of Section 18 of the Electoral Act, CAP 13. The Regulation has eight paragraphs and we have read them most carefully but cannot find that the activity complained of falls within any of those paragraphs. We note also that had that been the case, it would have been extremely doubtful that the house sales could have significantly affected the result of the election in a nation-wide constituency. the results in Mongu and Solwezi where the respondent fared very badly are quite telling.

With regard to <u>treating .</u> PW24 Mr. Sikazwe, a polling agent for ZADECO, said that the MMD parliamentary candidate in Mbala was dishing out cement, salt and cash to the headmen and the villagers and gave some salt to the witness, urging them all to vote for the MMD candidates. PW30 Mr. Chituse was the ZADECO parliamentary candidate for the Luampa Constituency in Kaoma. He testified that the MMD parliamentary candidate Mr. Manjata was campaigning using a Government vehicle; that he tried to disrupt a public meeting called by ZADECO. He also said the MMD candidate used the installation of a public grinding mill to campaign for his party and to threaten those who would not vote for MMD. He said about six days before the elections day he found that at one place the people were feasting on the meat of three head of cattle slaughtered for the occasion by Mr. Manjata. PW49 was Mrs. Ruth Emelio, the ZADECO candidate for Sinjembela who testified on this point that the MMD parliamentary candidate donated a boat to the people on nomination day. He also bought beers and food and killed an animal to feed the people as they shouted "Vote for the hand that feeds you!" PW67 was Mr. Muteba, the ZADECO candidate in Lukulu who testified on the point that the MMD Parliamentary candidate dished out free meat to the people who began to query what ZADECO could do for them. PW68 was Mr. Wayoya, an election agent for ZADECO. He told us on this point that during the campaigns in Lukulu, only MMD supporters were allowed to use a grinding mill at Kakulanda Women's Club. He also told us that a few days before the voting, MMD killed cattle and dished out free meat, urging the people to vote for MMD candidates.

From the foregoing evidence, we accept and find that there was treating. The instances given were proved. We are also mindful of the provisos in the Electoral Act so that a candidate is only answerable for those things which he has 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 since, under Regulation 67 of the electoral (General) Regulations, an election agent has to be specifically so appointed. We have borne in mind that the constituency for the presidential candidates is national and were not satisfied that the treating established may have prevented the majority of voters in the country from electing the candidate whom they preferred.

There was evidence of cash gifts being given to some voters, which would amount to bribery, a corrupt practice. PW26 Mr. Rex Sinkonde was a ZADECO polling agent at one of the polling stations in Mbala. He informed us that he caught the MMD Chairlady in the area giving money – amounting to one pin (one thousand kwacha) – to a voter just outside the polling station and telling her to vote for the MMD. Then there were allegations of money being given to some voters by the MMD Councillor a Mr. Kasongo in the Chongwe area to persuade them to use his pre-marked ballot papers and surrender their own which they would be given in the polling station. The witnesses were PW84 Mr. Kabanje, PW90 Mr. Nkalamu and PW91 Mr. Nyeleti. It transpired that PW90 was a discreditable character and an outright liar who had posed as Mr. Martin Nkalamu but it turned out that the fellow's actual names were Boniface Mwansomeka. The evidence of these witnesses from the Chongwe area was characterised by improbability, placing Kasongo in several far distant places at the same time. The most notable was the pair of PWs 98 and 99 (Mr. Kanyembe and Mr. Lubansa) who said that Councillor Kasongo drove them and twelve others that morning from Chongwe to Ngwerere to ghost-vote in fictitious names at a non-existent polling station. It was highly improbable, in fact clearly impossible, that Kasongo could have been that ubiquitous. The evidence from this group of witnesses both as to allegedly voting with Kasongo's pre-marked ballot papers and with regard to obtaining national registration cards and ghost-voting in fictitious names was not credible. PW99 whose performance collapsed under cross examination had clearly never entered a polling station in his life. Above all the evidence of PWs98 and 99 rendered it impossible that Kasongo could have been in Chongwe at distantly located polling stations waylaying the voters and paying them to use his pre-marked ballot papers while he was also far away in Ngwerere. The allegations from these witnesses have not been established satisfactorily or at all. The single instance testified to by PW26 was insufficient to affect the national election.

There was evidence from some of the petitioners who complained that various Ministers and the respondent donated public funds to public causes, which donations were widely reported in the media. The donations have taken place before the elections, during and since. They continue to date. We have anxiously examined the Regulations in which various kinds of conduct or misconduct is prohibited or made an offence. We have tried to see where the allegation in the petition and in the evidence of various political leaders donating to community projects might fit in, without success. The timing of such public philanthropic activity must have had some influence on the affected voters yet the Regulations are silent on such matters and on any possibly improper donations when not directed at individual benefit. As at the present moment, public philanthropic activity is not prohibited by the Regulations and we can do no more than to urge the authorities concerned to address this lacuna so that there can be a closed – season at election time for an activity suggestive of vote buying; including any public and official charitable activity involving public funds and related to emergencies or any life-saving or life threatening situations.

(ii) **IRREGULARITIES**

The irregularities which were canvassed consisted of nine distinct subcategories which we have identified and which consisted of the following:

(a) The suggestion that unregistered persons could vote;
(b) Election materials were thrown away or destroyed obviously to cover up malpractices;
(c) That some voted twice; others even had two identities;
(d) That some election officials at polling stations were partisan and even allowed wrongful campaigning at polling stations;
(e) That voting procedures were not properly followed;
(f) That results were altered without proper justification or explanation;
(g) That some people were wrongfully prevented from voting;
(h) That voting certificates were wrongly used and wrongly issued; and

(i) That pre-marked ballot papers were in use.

As to (a), there was firstly the evidence of PW17 Mr. Meleba who is also Headman Joshua. He produced a note from the local school headmaster Muloya who had written urging that those who did not register as voters could still go and vote if they had national registration cards and were 18 years or more. The witness did not see any unregistered person actually vote, which would have been illegal. Then there was the evidence of PW44 Mr. Collins Chimgukuma. He testified that he was one of those who campaigned for the MMD parliamentary candidate in the Bwacha Constituency of Kabwe. He said the Kabwe Mayor produced twenty (20) blank voters' cards which he used to fill in the names of the witness and nine other MMD cadres who were each given two voters cards. The witness said because he was promised some money for doing so he voted twice at two polling stations despite not being registered. He said he voted only in the parliamentary election; not in the presidential election. To put it mildly, Mr. Chimbukuma withered under cross-examination when it was shown that his name allegedly unregistered friends who allegedly voted twice with him using fake voters' cards were in fact duly registered and voted in their proper polling stations. PW44 was thoroughly discredited. He was effectively and completely contradicted by the evidence of two of his friends who testified as RWs 1 and 2. RWI was Mr. Edward Phiri who was actually a registered voter and who said PW44 was simply a member of an MMD choir during the election campaigns. RW2 was Mr. Masumba who testified that, contrary to what Mr. Chimbukuma said, he was duly registered and voted regularly. The evidence in rebuttal of PW44 was fully corroborated by the evidence of CWI Mr. Kalale of the Elections Office who produced documents to show that the persons said by PW44 to have been unregistered were actually duly registered as voters. In the event Mr. Chimbukuma's story was not believable and we have rejected it. Finally under this part, there was the evidence of PWs 98 and 99. PW98 was Mr. Kanyembe of Chongwe who said that in expectation to be paid K300,000 he and fourteen others who had neither national registration cards nor voters' cards agreed to be given national registration cards and voters' cards in the names of fictitious persons. He said that on polling day, they were driven by MMD Councillor Kasongo from Chongwe to Ngwerere and there voted in the fictitious names. PW99 was Mr. Lubansa of Chongwe who testified to the same effect and also said they were taken to Ngwerere early in the morning. Cross-examination destroyed him utterly. We have already made reference to the evidence of PWs 98 and 99 when we were considering the allegations of cash gifts made by PWs 84, 90 and 91 and when we noted that the two accounts nullified each other and rendered it highly improbable that Kasongo was way laying voters at various polling stations in Chongwe and paying them to use his pre-marked ballot papers while he was also so far away in Ngwerere. The evidence of these witnesses was discredited and it can not be believable, In the result, there was no credible evidence to support the suggestion that unregistered persons could vote and did vote. We find the irregularity alleged not established.

As to (b), there was firstly the evidence of PW18, Mr. Chita, the parliamentary candidate for ZADECO in Muchinga Constituency. Acting on reports received he went to check where a much-delayed truck carrying election material had parked in the bush. He found a parcel under a Musuku tree in the bush which contained election materials, including the official marks and the ballot paper counterfoils for both parliamentary and presidential elections. These were produced in evidence and estalished beyond any doubt that in the affected constituency – where most of the election materials have to date not been delivered to the Elections Office as required by law – someone threw away these materials in the bush in order to cover up some wrongdoing and a fiddle of some kind. Secondly under this part, there was the evidence from the Bwacha Constituency in Kabwe and which came from PWs 40, 41, 42, 54, 63 and 82. PW40 was Mrs. Febby Ngosa a supporter of Mrs. Nyirongo (PW82) in the Bwacha Constituency. She told the court that on Monday 2nd December 1996 she happened to go to the Recreation Club hall and found the returning officer for Bwacha a Mr. Chintu and two other persons had an open ballot box on which was written the work "parliamentary". They were holding some ballot papers. The witness informed her husband (PW41) about what she had seen and he informed Mrs. Nyirongo. PW41 was Mr Ngosa, a polling agent for Mrs. Nyirongo and he relayed to her what his wife had reported. His other evidence was that there were election monitors from FODEP and ZIMT at the polling station where he was on duty on election day. The presiding officer stopped the FODEP monitor from crossing out the names being called out from his copy of the register. Other than that some MMD cadres wore T-shirts with campaign material on them within the prohibited radius of the polling station, he saw nothing wrong with the voting or the counting at his polling station. However, at the place for the tallying of all the votes, the returning officer, was making alterations to all the results brought to him. Another odd circumstance which he observed was that the parliamentary box from one polling station strangely took five hours to arrive at the counting hall. PW42 was Mr. Chisha, another polling agent for Mrs. Nyirongo. At the polling station where he was, the presiding officer refused to allow the polling agents to sit close to the table where the count took place with the result that they did not properly witness the count by the presiding officer who was miscounting Mrs. Nyirongo's votes. This evidence did not touch upon the election of the respondent as such. PW54 was Pastor Jim Nyirongo, the husband of PW82. He testified

that the returning officer Mr. Chintu was altering all the results when he received them from the polling stations, as the MMD cadres were openly boasting of having played their cards well. Subsequently, the returning officer was caught opening ballot boxes and burning some ballot papers. A report was made to the police. PW63 was Mrs. Edith Banda who said she was a pre-school teacher. She told the court that the returning officer for Bwacha and other officials opened the ballot boxes, sorted out the ballot papers and asked her on 25 November 1996 to burn some ballot papers which were in a carton box and which were for both parliamentary and presidential elections. PW82 was the woman of God Pastor Gladys Nyirongo.

The upshot of her evidence was that she was an independent candidate in the parliamentary elections for the Bwacha constituency. She said that the election officials in that constituency altered the results from the polling stations allegedly in order to balance but they were later caught destroying some ballot papers for both the presidential and the parliamentary elections and this was after she had already lodged an election petition. When she confronted the returning officer, he pleaded for mercy and forgiveness. She reported these happenings to the police.

Related to the foregoing was the evidence of two witnesses called on behalf of the respondent. RW4 was Mrs. Chikoti of Kabwe Municipal Council who produced a file on PW63 showing that she was a general cleaner and not a preschool teacher at the Council's nursery school as she had claimed. RW5 was Mr. Mwale also from the Kabwe Municipal Council who was mentioned as one of the persons who were with the returning officer when destroying some papers. He was an Assistant Returning Officer for Bwacha under Mr. Chintu. He denied ordering PW63, a general worker and others to burn any ballot papers saying that he had only asked them to clean up the hall which was littered with scrap paper and to burn the litter. These were papers used to compute the results and torn posters. He told the court that a verification of ballot paper accounts was duly done from 12 to 30 December 1996 during which the papers were physically recounted to see if there was any overcounting or undercounting from the polling stations. He denied the allegations by PWs 40, 63 and 82 that ballot papers were being sorted out and burnt. He conceded that the official results which were published and reflected in the official documents which were exhibits before the court and which showed that there were no rejected ballot papers in Bwacha were false.

We have considered the evidence from Bwacha Constituency. The records of the verification of ballot paper accounts referred to by RW5 were nowhere to be found. It should also be noted that he described a rather strange way of conducting the verification when there is Regulation 47 in the Electoral (General) Regulations which sets out what ought to be done. In our assessment of the evidence, we find that we are persuaded by the combined weight of the petitioner's witnesses' evidence the substance of which had a distinct ring of truth to it. Mr. Chintu did destroy some papers obviously in an effort to cover up a fiddle. No wonder the results in the official documents were described by RWS as false. We will consider the consequence of this finding after we have discussed the other irregularities.

As to (c), that is regarding some voting twice or even having two identities, we heard evidence from PWs 19,22, 44, 75, 78, 79 and 81. PWI9 informed the court-and there is no reason to disbelieve her - that she was properly in possession of a national registration card in the names of Theresa Kalo but that in 1995 she got a second national registration card while posing as a much, younger person by the name of Evelyn Mutale. She registered as a voter twice using the two national registration cards and actually voted twice using the two sets of documents. She said that she had registered twice at the request of the MMD constituency Chairman for Mandevu and that she had decided to come forward and testify because the rewards promised by the MMD official did not materialise. PW22 was Mr. Musonda from the Elections Office. He confirmed the assertion made by PWI and others about a Mr. Zgyambo: The official documents showed that Zgyambo registered three times in three different places and was in three registers. He actually voted twice. PW22 explained that the Electoral Commission had authorised the issue of voters' cards to two or three people having identical national registration card numbers provided some other detail was different, such as name or date of birth or an address. Zgyambo exploited this and it is a matter to which we will return later when we come to consider some of the flaws in the system. Next, there was PW44 Mr. Chimbukuma whose evidence we have already discussed and discounted. PW75 was Mr Munamwela of the Lima Party. He testified that four MMD officials were caught having been allowed to vote twice each by the presiding officer at one of the Bweengwa polling stations. He was supported by PW78 Mr. Miyanda who was the election agent for the Lima Party candidate in Monze. He said at that polling station three people were apprehended who had voted twice. The presiding officer even apologized. The matter was reported to the police. PW79 Mr. Moonga was the polling agent for the ZDC candidate at the same polling station. His evidence was the same as that given by PWs 75 and 78 saying that some MMD chaps were caught having voted twice each; at first using their voters' cards and later using voting certificates. PW81 Mr. Hampondo also testified to the same event. He said that at Bweengwa

three people were caught voting twice: in the daytime with a vote's card and at night with a voting certificate.

The instances of double voting were well proved. In the case of PW19, it is understandable that the dishonest could device this method of cheating by posing as two different persons. In the case of Zgyambo, a decision of the Electoral Commission facilitated the fraudulent multiple registration and double voting. In the Bweengwa incident, the electoral process was deliberately massaged by the dishonest voters with full collaboration of a dishonest and partisan presiding officer. We will consider the consequence of this finding on the nationwide election later.

As to (d), that is, that some election officials at polling stations were partisan and allowed wrongdoing, we considered the evidence of PWs 20, 24, 45, 46, 49, 58 68 and the witnesses from Bweengwa whom we have just talked about. PW20 was Mr. Sinyangwe, the ZDC candidate for Mpulungu Constituency who said that polling assistant issuing ballot papers would in the course of explaining to the illiterates keep overstressing on the MMD symbol and telling the voters they could vote on the clock if they wished without similar stress or suggestion for the other parties. He also said that the MMD were allowed to sing and dance and to campaign freely within the prohibited radius at some polling stations. PW24 of ZDC in Mbala also testified similarly both in relation to the MMD being allowed to campaign within the prohibited radius and to the polling assistant issuing the ballot papers explaining who the candidates were but stressing the desirability of voting for the respondent's side. PW45 was Mr. Mwila of Kabwe, a supporter of the candidate Mrs. Nyirongo. He saw a woman police reservist and an MMD official using their wrist watches to campaign for the MMD at and within a polling station. Upon his complaint, the offenders were expelled from the polling stations by the presiding officer. PW46 Mr. Kandeke voted at a polling station in Kabwe which was established at a beer tavern belonging to the local MMD Chairman who sat within the prohibited radius wearing an MMD campaign T-shirt. He said that the police officers on duty at that polling station confisticated wrist watches. PW49 was the ZDC candidate in Sinjembela. She testified that the MMD campaigned too near the polling station where she voted and at other stations. She said that at several polling stations some election officers were openly campaigning for the MMD and describing other political parties in derogatory terms. PW58 Mr. Nyemba was a polling agent for ZADECO at Mufuchani polling station in Kitwe. He said that prior to election day, the MMD candidate Mr. Newstead Zimba used his official government vehicles on his campaign tours and in his attempts to disrupt ZADECO meetings. On polling day, one polling assistant kept on stressing the desirability of voting for the MMD candidates while an MMD official campaigned on the voters' queue and was not stopped. PW68 Mr. Wayoya who was an election agent for the ZDC candidate in Lukulu spoke of some polling assistants who consorted openly with MMD officials at campaigns and elsewhere. He told the court that on election day, one polling assistant did not stamp the official mark on the ballot papers of all those he knew to be ZDC members and this affected ten (10) voters out of the over 250 voters at that polling station. Upon consideration and careful evaluation of the evidence, we are satisfied that some election officials at polling stations were indeed partisan in an overt fashion and unfit for election duties. The evidence itself, however, disclosed that such officials were largely countered by the vigilance of the polling agents and any other election monitors there may have been. Above all, we take judicial notice that the Zambian voters are extremely intelligent and enlightened; only an insignificant proportion can be so fickle as to allow any official at a polling station to subvert their freedom of choice. However, with regard to the consequence of the finding on the presidential election, this we will discuss after we have dealt with all the irregularities.

As to (e), which is that voting procedures were not followed properly, we considered the evidence of PWs 46, 58 and 97. PW46 who voted at a polling station in Kabwe established at a tavern belonging to the local MMD Chairman complained that his voter's card was not perforated. PW58 who was at Mufuchani polling station in Kitwe informed the court that of the nine voting certificates which were issued, some were issued to officials on election duties who are registered in a different constituency. This was, of course, quite wrong and contrary to the relevant Regulations. PW97 was Mr. Sumaili of Petauke who was on duty at a polling station. He told their Lordships of one registered voter, a lady, who was allowed to vote without her voter's card. We considered this type of irregularity to have been insignificant. The instances deposed to by PWs 46, 58 and 97 were not shown to have been so widespread that the elections could no longer be considered as having been conducted in substantial conformity with the lawful procedures.

As to (f), that is, that the results were altered without proper justification or explanation there was the evidence of PWs 49, the Bwacha group (including PW54), PW93 and PW96. PW49 Mrs. Ruth Emelio informed us that her returning officer had altered her results from one of the polling stations from 80 to 30 and only corrected the records after protests on her behalf. We have already dealt with the Bwacha group of witnesses who talked of the returning officer Mr.

Chintu routinely altering almost all the results as he received them from the polling stations. We propose to set out the evidence of PWs93 and 96 when we come to deal with the flaws in the system but for the moment mention only that in their analyses, they had identified the alterations which were made to the results in various places. This related to the variances between the initial results released by the Electoral Commission and subsequent results released by the same authority. We are satisfied that the irregularity contended for was established.

As to (g), which is that some people were wrongfully prevented from voting, there was the evidence of PWs 50, 67, 75 and 92. There was a category of voters who could not vote because of various flaws in the system which we propose to come to when we consider such flaws. However, under the present subheading, PW50 Mr. James Mulenga Chasaya of Ndola informed us that despite being duly registered as a voter to vote at Chintu polling station in Ndola, the officials refused to allow him to vote because the particulars on his voter's card had faded off. PW67 Mr. Muteba of ZDC in Lukulu spoke of a polling station where the voting opened late in the afternoon but closed early, leaving many voters stranded outside. PW75 Mr. Munamwela of the Lima Party in Bweengwa said that he had seen a 53 years old voter and a 45 years old voter turned away as being underaged, despite being on the register. In the course of the hearing, we had asked an official from the Elections Office who confused that the officials were not allowed to use their common sense to allow such voters to vote on the basis that they were registered and their national registration cards showed that they were not toddlers, as shown on the register. They were needlessly prevented from voting when the mistake was that of the persons who compiled the register. We are satisfied that this type of irregularity was established. For completeness, we should also mention that there were some voters who were wrongly prevented from voting by some of the petitioners, especially from the parties that had decided to boycott the elections and had gone further to collect the voters cards. Thus, PW92 Mr. Lukonde, Deputy Commissioner of Police, produced 28,000 unused voter' cards which the police had retrieved from a house in the Chilenje township of Lusaka.

As to (h), which is that voting certificates were wrongly used or wrongly issued, there was firstly the general allegation voiced by PW35 Dr. Chongwe that voter certificates "flew like flies" at the polling stations. Then there was the evidence of PW58 Mr. Nyemba to which we have already made reference. His complaint was genuine to the extent that the wrong kind of certificate of authority to vote was given to the officers on duty, and in some cases for the wrong constituency. There were only nine certificates issued at Mufuchani. We have also already dealt with the Bweengwa group of witnesses (i.e. PWs 75, 78, 79 and 81) whose evidence established that three or four MMD officials who had already voted during the day time using their voters' cards were again issued with voters' certificates in the evening to enable them each to cast a second vote. Again there was the evidence of PW76 Mr. Joseph Tembo, a polling agent for Dr. Guy Scott, the Lima candidate in Chongwe. His testimony which was fully corroborated by the registers and the documents in court established that three people were wrongly allowed to vote at his polling station using certificates of authority to vote when they were not on official duties there; and in the case of one of them, when the person was a voter in Rufunsa which was a different constituency altogether. Then there was the evidence of PW31 Mr. Kabinda, the election agent for Mr. Pikiti the Lima Party parliamentary candidate in the Munali Constituency of Lusaka. Mr. Kabinda complained that there was misuse of the certificate of authority to vote at a polling station and the voting certificate. He said that some voters were even filling in their own certificate and they were allowed to use the certificate to vote obtained on the very voting day instead of at least four days before election day as required by the regulations. On the latter point other evidence received in the case from the officers of the Elections Office showed that the Electroral Commission had authorised the issue of certificates even on the polling day in order to counter the boycott and the burning of boters' cards by the United National Independence Party. PW31 said that his candidate was trounced so badly that he the witness wept. CW1 Mr. Kalale of the Elections Office was called to open the marked registers for Munali when it transpired that there were relatively only a few voting certificates. They were not as rampant as PW31 had alleged. In fact, it turned out that some people who got them were bona fide registered voters who were otherwise entitled to vote while others were officials on elections duties. The Court learnt from CW1 that the Electoral Commission allowed certificates to be issued up to 10% of the total registered voters which was in the case of Munali up to 4,300 although only 135 certificates were actually used in the constituency. This we consider was an insignificant number. In the case of the Munali Constituency, a verification exercise ordered by this court and carried out by the Registrar of the High court in the presence of the advocates for the parties established that only 135 voters' certificates were completed and used. The marked registers for two of the Munali polling stations were not available at the verification, otherwise for the remainder it was established that the total number of names cancelled in the marked registers was 23,377 while the total number of ballot papers actually used for the constituency was found to be 25,388. We are satisfied that in the examples given and most probably countrywide as well, certificartes did not fly like flies; they were used in moderation and in all instances well within the range of quantities acceptable to the Electoral Commission. There was thus no rampant misuse of the voting certificates and therefore it can not be said that the

respondent was in anyway unduly assisted to win through the use of voting certificates.

As to (I), which is that premarked ballot papers were in use, there was firstly the evidence of the Chongwe group of witnesses who alleged that MMD Councillor Kasongo waylaid them and gave them pre-marked bsallot papers. We have already dealt with their evidence which we have discounted as unbelievable. This is the group which included PW90 Mr. Nkalamu who was actually Mr. Mwansomeka testfying under a fictitious name. Then there was the evidence of PW60 Mr. Katunasa, ZDC parliamentary candidate in the Chembe Constitutency. He told the court that acting on a report he had received and with the help of a police officer who was on duty at one of the polling stations, he chased and caught an MMD gentleman who had a bag containing 350 pre-marked presidential ballot papers. The police took those papers. At another poliing station, he found that his younger brother who was his agent had been in a fight with some MMD gentlemen from whom he had confiscated eight premarked presidential ballot papers. He said the eight ballot papers were kept by his younger brother. The younger brother was not called to testify and this court has not been shown either the eight or the three hundred and fifty premarked papers as none were produced in evidence. The non-production of at the very least the eight ballot papers said to have been in the custody of PW60's young brother detracted quite considerably from his credit, rendering his story to be unbelievable.

Some of the irregularities which we have found to have been established by the evidence were quite serious, though not widespread. They revealed that there were those who were prepared by dishonest means to massage the elections, oblivious of the risk that the elections might thereby be nullified to the disadvantage of the candidates who might themselves have been quite innocent and free of any personal wrongdoing. On a perusal of the whole of the evidence reviewed under this part, we have not found any evidence that the respondent personally or by lawful electoral agent was privy to the irregularities and malpractices described. In the event and having regard to the type of constituency concerned, which is nation-wide , it was not established to our satisfaction that the proven irregularities were such that nationally the majority of the voters were or may have been prevented from electing the candidate whom they preferred or that the extent, frequency and nature of the irregularities was such that they must have affected to any significant extent the national result of the election. It is clearly not possible to hold that by reason of the irregularities the result of the election nationwide was not substantially the true reflection of the free will and choice of the voters who went and cast their votes.

(iii) **FLAWS**

This brings us to the flaws in the system. From the evidence, we identified that there were raised or alleged some flaws associated with (a) national registration cards (b) voters cards (c) the registers (d) the polling districts (e) the siting of the polling stations and (f) the results.

(a) **NATIONAL REGISTRATION CARDS**

As to (a), that is national registration cards, we considered the evidence of RW3, PW22, CW1 and also PWs93 and 96 who analysed the registers. Apart from RW3, the other witnesses covered other aspects apart from the question of national registration cards and it is perhaps more convenient to set out the precis of all their other evidence at this point in time. RW3 was Mr. Mwiinga from the National Registration Department. We learnt from him that the problem of the same national registration card number being held by two persons surfaced in 1988 when registration forms were printed which bore old or repeat numbers which were pre-printed on the forms. There were shown to the court examples of sets of forms printed by the Government Printer which contained numbers which had already earlier been issued to other citizens. Apparently, the department even ignored the district codes when issuing a repeat booklet. Mr. Mwiinga told us – and we have absolutely no reason to doubt his word – that the situation country-wide is very bad and that there could be more than 500,000 duplications since 1987. The witness told us that, upon a query from the Electoral commission in 1996, the department deleted the last applicant's name from the list supplied but as other evidence showed, the Commission itself decided to keep both sets of persons on the registers.

PW22 was Mr. Musonda from the Elections Office. His evidence which touched upon the question of national registration cards also dealt with the other flaws which we will be considering and it is now convenient to summarise all his evidence at once. In his testimony, Mr. Musonda described the voters registration process conducted by the Electoral Commission, including the attempts to correct the mistakes made. He explained that the Electoral Commission authorised NIKUV who were doing the data processing to issue voters' cards to two or three people having identical national registration card numbers provided some other detail was different, such as names or date of birth. He also explained that some registration

officers made mistakes in the coding of the polling districts which necessitated the making of corrections and the issuance of replacement voters' cards. It was in evidence that because of such replacements some voters ended up with two voters' cards where the first card was not physically withdrawn. Mr. Musonda explained that where corrections were made, the voters could not use the earlier card and could not vote twice, but only once and in the corrected register. The witness admitted that massive misplacement of voters occurred due to wrong coding but that attempts were made to effect corrections. He also readily admitted that the voters, especially those in the rural areas, may not have heard about the corrections and they certainly did not read the Gazette notices which described the polling districts. Mr. Musonda conceded that in the process of correcting the registers, some voters were put in polling districtsd where they did not register. In part because of such confusion, some voters never collected their voters cards. The witness also asserted, and we agree with him that registration officers and not NIKUV made the errors and that the inclusion of duplicated national registration cards was a decision of the Electoral Commission, not NIKUV. We accept Mr. Musonda's evidence.

CWI Mr. Daniel Kalale of the Elections Office also explained that the duplicate national registration card cases had been allowed by the Electoral Commission to remain on the registers, He said there were on the registers 52,703 duplicate national registration cards cases with different names and 9,540 duplicate national registration cards with the same names but different dates of birth. We also learnt from this witness that they were 33,444 double registrations by a person where the decision made by the Electoral Commission was to leave him or her where he or she registered first. He further informed us that there were 3,545 duplicates of the same person but with different serial numbers, a mistake by the assistant registration officers: The Commission removed one and left one, We accept the evidence of this witness. CWI also informed us that some Polling districts returned a nil registration.

From the evidence of Messrs Mwiinga, Musonda and Kalale, it seems to as that there is a much more serious problem with the national registration cards than with duplicate voter registrations. We will comment further on this matter a little later but for the moment we do have to observe that even the statistics show that we should be really worried about the national registration cards which was supposed to be but apparently no longer is the most distinctive and the most reliable means of identifying each other for all manner of purposes, including elections.

PW93 talked about the national registration cards problem and also covered all the other flaws to be discussed. It is appropriate to set out the summary of the whole of his testimony at this stage. PW93 was Dr. Steven Moyo. He had carried out, on behalf of the petitioners (especially UNIP) a detailed faulty – finding analysis of the electoral process and found flaws in three areas, namely the polling districts, the registers and the results. With regard to the POLLING DISTRICTS, he queried the discrepancies in the official documents as to numbers of polling districts in 1996 when compared to the position in 1991. He said that the gazette notices did not reflect all the polling districts and in any case queried why the Electoral Commission had chosen to increase the number of polling districts. He informed the court that his research uncovered the fact that there were nineteen (19) polling districts which were not reflected in the official electoral documents but which were in the gazettes while there were sixteen (16) polling districts which were reflected in the official electoral documents but which were ungazetted. The witness further informed the court that some polling districts had been shifted from one constituency to another without the sanction of a delimitation Commission. He gave the example of ten (10) polling districts in Ndola which had been shifted farm Chifubu to Kabushi without a delimitation Commission. With regard to the shifting or non-gazetting or listing of some polling districts, the witness gave other examples from Nakonde and Isoka and also from Kabwe and Petauke. His research had even uncovered two unnamed polling districts in the Southern Province; one in Mapatizya and the other in Itezhitezbi. Dr. Moyo also complained that some polling districts though accounted for were not numbered in logical serial sequence. He queried the logic of creating so many new polling districts in some areas of very low voter population.

With regard to the REGISTERS, Dr. Moyo analysed twenty-four (24) constituencies which were randomly selected. He set out to make a comparison between the provisional registers and the final registers. He told us that he carried out a statistical analysis between the provisional and the final registers and this showed that they tallied. He said he detected a number of faults and drew our attention to examples in the documents. These related to omissions of voters' names where for instance only one name would be given; duplication of voters' national registration cards and multiple listing of some voters which to him indicated the possibility of double-voting. The other faults related to misplacement of voters in certain polling districts and, incomplete particulars against certain voters. The witness agreed that in some cases, the final registers showed that corrections had been made though some faults persisted into the

final registers.

With regard to the RESULTS, the witness referred the court to a document containing provisional results and another containing what he termed- the final results. He drew attention to the altered results as well as to the initial results which had reflected identical scores for the candidates in various constituencies. The witness informed us that there were variances between the provisional and the final results so that the Copperbelt had a variance of 4,857 votes; the Eastern Province 1,185 votes ; Luapula nil; Lusaka Province 1,741 votes; Northern Province 279 votes; North- Western Province 64 votes; Southern Province 1,679 votes; and Western Province 1,302 votes. The witness found that the variances totalled country wide 16,788 for the rejected ballot papers and 52,857 for the total votes cast. Dr. Moyo had truly gone to great lengths to find faults. Thus, he gave examples of altered results between the provisional and the final results and he gave the national variance total of 62,037. The witness then drew attention to the identical results which were initially given. These were the pair of Chipata and Luangeni Constituencies where the first results were identical but corrected to different figures in the final results. Then there were the pairs of Lukashya and Malole; Liuwa and Lukulu West; Kankoyo and Kafulafuta; and Shiwang'andu with Isoka East. In all cases, the final results reflected that corrections had been made and the results were now different. The witness also drew attention to Mansa and said that the votes cast exceeded the maximum number of registered voters by 2,000. He also gave examples of what he considered to be an odd coincidence of the presidential candidates getting the same number of votes in various places.

All the foregoing was during his examination in chief. PW93, and to lesser extent PW96, can be credited with provoking and inspiring much of the distruct of the registers and the electoral processes during the last general elections. However, when Dr. Moyo was cross-examined he wilted completely in many respects and had to concede - very graciously we must say - that many of the major faults he had highlighted were as a result of his having formed a view on insufficient evidence or inadequate research or that he had taken a view of the facts which can infact not reasonably be entertained. Thus , for example, in relation to the polling districts in Ndola which were allegedly wrongfully shifted from one constituency to another, Dr. Moyo had to concede when shown the gazettes and the maps that the polling districts in question were infact PHYISICALLY LOCATED in one place though inadvertently listed under another in some 1991 Elections Office documents. The witness very propery admitted that he had seen the gazettes and the maps and he would not have made the allegation as he had done. The witness was also shown some gazettes which established that the allededly ungazetted polling districts were infact gazetted in various government gazettes containing corrigendar, which Dr. Moyo had not previously seen. This obliged him to withdraw his earlier assertions. Again, it was shown to the witness that the allegedly unlisted polling districts were in fact reflected in various documents, including the gazettes and that the Electoral Commission bad simply made a few mistakes in listing some polling districts for one place under another. When it came to the results, the witness was shown the voter registration figures for Chembe and Mansa and it was demonstrated that the results were transposed by error so that there were infact no 2,000 extra votes beyond the maximum number of registered voters. In the typical fashion of the gentleman that he proved himself to be, Dr. Moyo graciously conceded this; just as he readily admitted that there were no pairs of identical results in the results acknowledged as authentic by the Elections Office. It was also shown to the witness that there were indeed duplicate national registration cards entries on the registers due to a decision of the Electoral Commission as well as due to the mistakes of the Department of National Registration so that different people shared the same national registration card and registered as voters in different places. We should mention in fairness that the witness was on firm ground on some points, such as the fact that in the final registers there were still a few uncorrected errors of polling districts which had been shifted to the wrong place, for instance in Mumbezhi..

PW96 was Mr. Phiri of the Post Newspapers who had actively collaborated with some of the petitioners.His evidence disclosed in effect that he and his newspaper wrote a number of stories whipping up suspicion about the whole electoral process including, "Ghost voters" on the electoral rolls (which was a reference to duplicate national registration cards). They wrote that the Electoral Commission was partisan and that there were pre-marked ballot papers which would be used. Like PW93, he too analysed the results from an initial document availed him by an officer from the Elections Office when compared with the final results released later. He noted the discrepancies and the odd coincidence of having idential pairs of results affecting ten constituencies and the odd coincidence of having identical pairs of results affecting ten constituencies, that is five pairs. He also drew attention to the instances in more than forty constituencies where the results were later varied or altered. The witness also attempted – without much succcess – to show that there was a predetermined set pattern in the number of votes received by (or perhaps "allotted" to) each of the presidential candidates.

As previously indicated we have digested and made some comments upon the whole of the evidence of PWs93 and 96 only for convenience at this stage since the specific item being discussed pertains to the problems associated with national registration cards. On the evidence of the witnesses reviewed, we consider that the situation and the state of affairs revealed amounts to a near national disaster. It is unacceptable and improper, indeed it is contrary to the plain intention of the legislature which enacted the National Registration Act, that there should be any, let alone hundreds of thousands of, national registration card with identical numbers shared by two or three Zambians. The franchise and the electoral system's integrity has relied quite heavily on the national registration cards as a means of identifying and vouching for the Zambian voter. We take judicial notice that the national registration card plays a major role in identifying a person in connection with many other things, such as employment and social security. It seems to us that, as long as the concerned Department and the authorities do not correct this anomaly, the electoral system will continue to be seriously undermined and questioned. The statistic for duplicate national registration cards reflected in the voters' registers given by Mr. Kalale pale into insignificance in camparison with the far worse problem of national registration cards revealed by Mr. Mwiinga. At the end of the day, however, it can not be said that the flaws associated with the national registration card – which are harmful to the system as a whole – benefitted or disadvantaged any one of the presidential candidates any more or less than the others.

(b) **VOTERS CARDS**

As to (b), that is voters cards, we considered three areas of concern raised by the witnesses. firstly there was the problem of fading which PW2, PW50 and others spoke about. We saw such cards and we accept that it is a weakness of the new card that it fades and can even be rubbed clean. We note that the problem of fading cards could be mitigated by the facility of the voting certificate – when not misused – and replacement during a revision exercise. However, the mischief which was not acceptable and which could have been avoided had the officials used some common sense was the unwarranted refusal to allow voters like PW50 the chance to exercise their right to vote on account of the fading of the card. The second problem concerning the voters' cards was that some people ended up with two voters' cards each, leading to the suspicion on the part of the petitioners that they could vote twice. We saw such cards which were produced by the witnesses. However, it was also explained to us by the witnesses from the Elections Office (notably PW22 Mr. Musonda) that there had been a lot of misplacement of voters in the wrong provisional registers on account of errors of the coding of polling districts which were committed by the officials at the time of completing the registration forms. This necessitated corrections which entailed the issue of replacement cards and the transfer of voters' names to the correct final registers. In the process, some voters ended up having tow voters' cards because the earlier one was not always physically withdrawn. This confusion also resulted in many affected voters not collecting their replacement cards and not voting. In some cases, the corrections were still not made in final register. We accept the evidence of PW22 and find that where a second voters' card was issued in replacement of an earlier one affected by misplacement in the registers on account of the wrong coding, the result was simply that the whole process become rather untidy. However, we accept that the concerned voters could not vote twice; they could not use the first card. The mischief of double voting which was apprehended can safely be ruled out.

The third problem regarding voters' cards concerns the category of crooked and dishonest persons like Zgyambo and Ms Kalo who had more than one voter's cards and successfully voted two or more times. This category are illustrated not a flaw in the system but a fraud on the system. The sad part is that Zgyambo's tricks were facilitated by an official decision to accept the same national registration cards and treat it as representing different persons even when obviously not.

(c) THE REGISTERS

As to (c), that is the registers, the evidence much of which we have already outlined pointed to four main complaints. We should first make the observation, which is trite, that the exercise of the right to vote in periodic, genuine, free and fair elections is predicated upon the availability of a decent and acceptable register of voters in which all the eligible Zambians who took the trouble to register should be reflected. It is a fact also that while a provisional register can have mistakes which are expected to be corrected through the process of the publication of such registers, the final registers should generally reflect a high degree of accuracy so that no registered voter is disenfranchised. We should also make the observation that in this trial, there was no single witness who was a potential voter who came to say that he was refused registration. The only examples of unjustified disenfranchisement we heard were of the two voters in Bweengwa who were reflected as toddlers and the many who were the victims of uncorrected misplacements due to wrong coding. Otherwise the frontal attack on the integrity of the registers came mostly from PW93 as we have already seen. He spent a lot

of time on the provisional registers but his criticisms were valid only in respect of any mistakes which were not corrected.

Of the four areas of complaint, the first related to the unpopular decision of the Electoral Commission to authorise identical national registration cards to remain on the registers. This was confirmed by PW22 and CWI as well as the provisional and final registers exhibited in the case. This resulted in 52,703 duplicate national registration card cases with different names representing different individuals. We also accept that there were 9,540 other duplicate national registration cards with the same names but different dates of birth and which could conceivably mean that some people appeared twice and had potentially two votes. We also accepted the evidence of CWI who told us that there were 33,444 double registrations by the same individuals where a correction was made in the final register by leaving them where they registered first. In the last case, although leaving a person where he/she registered last would be more logical, we accept that the necessary correction had been made to prevent double voting. In relation to the whole complaint of duplicates remaining on the registers, we note that all of them put together do not exceed or even reach 100,000 which, when looked at proportionately and in the context of a nation-wide election which a presidential election is, speaks for itself. We have already made reference to the fact that the decision to allow duplicates also facilitated multiple registration by crooks like Zgyambo who must have been assisted by partisan officials. PW93 also gave instances of multiple listing of a voter, a phenomenon which was so isolated and so rare that it required the keen-eyed vigilance and virtually microscopic scrutiny of this witness to spot it.

The second area of complaint related to the use by some election officials of provisional or final registers indiscriminately at the polling stations. The complaint was voiced by PW93 and the phenomenon was confirmed by PWs 21 and 22. Apart from showing carelessness and untidiness in the performance of the election officials' duties, no specific mischief or baneful consequence was shown to have resulted.

The third area of complaint related to the misplacement of voters in the registers which was not corrected in the final registers. PW93 spoke about this and was on firm ground on Mumbezhi. There was other evidence suggesting that some voters were affected by this in the Isoka, Mbala and Mporokoso areas. There was also the evidence of PW39 Mr Andrew Bwezani Banda, one of the ZADECO Vice Presidents and a candidate in the Chipata Central Parliamentary Constituency. His evidence touched on a number of aspects, including the flaws resulting from the misplacement of voters. Mr. Banda complained about the MMD's use of government motor vehicles in their campaigns when they were also distributing medicines in the rural clinics in the Lumezi Constituency in neighbouring Lundazi. He talked about how the leaders dished out money to schools and other public projects and also how the respondent visited Chipata and announced sale of council houses at give-away prices, urging the voters to vote for him. We have already dealt with these aspects of the case. However, Mr. Banda also informed the court that a lot of polling stations (which he named) were wrongly listed or misplaced. We learnt that there was much confusion due to the misplacement of polling districts and polling stations belonging to Chipata Central into Luangeni which resulted in some voters not voting. Some of the voters ended up having two voters' cards while the gazetting of any corrections made was not brought to everyone's attention. The confusion was, needless to say, attributable to the elections administrators and there was no suggestion that this flaw in the system benefitted any particular candidate or disadvantaged one any more than the other.

Finally, PW93 complained of instances of incomplete personal particulars such as a missing first name or an incomplete residential address of a voter.

Having examined the flaws on the registers, we can confirm - and it is our finding - that there were indeed flaws or faults which did not contribute to building confidence in the system and which could and should have been avoided. Flaws which facilitated the possibility of more than one vote per person conduced to illegality since the democratic system we have embraced which is underpinned by the Constitution and the Electoral Act envisages and confers only one vote in each election. However, having reviewed and analysed all the evidence, it is our finding that there is nothing to support the suspicion which was voiced of a built-in majority for the MMD or anyone.

(d) **POLLING DISTRICTS**

As to (d), that is the polling districts, we considered the complaints and the flaws, if any, in the light of the evidence given by PWs 93, 96 and 39. Having carefully considered the evidence, it is our finding that the evidence of the increase in the number of polling districts was not evidence of any flaw in the system. There was nothing in the evidence to warrant the raising of suspicion by PWs 93 and 96 nor was the increase itself evidence of some sinister development

to do with rigging or something of the sort. The other flaw testified to by PW93 was the allegation that some polling districts were not gazetted. As we have already seen, this was shown not to be true and the witness had to concede under cross-examination. Similarly, the suggestion that there were or there may have been sinister and subterranean adjustments to the constituencies was not borne out. Thus, the allegation of ten polling districts in Ndola being shifted from Chifubu to Kabushi when some 1991 documents had listed them under Chifubu had to be abandoned and PW93 conceded he would not have raised the complaint had he seen the maps, the gazettes and the other documents. However, it is to be noted that PW39 at least was on firm ground when he complained about the polling districts and polling stations which were wrongly listed or misplaced in Chipata. It was true to say that the corrections in the gazette, if any, would not have been seen by many. Some of the misplacements persisted up until the polling day, thereby preventing the electorate from voting. The evidence of PW39 Mr. Andrew Banda on this point was not rebutted and the point was well-taken. The misplacements ought to be rectified so that none is disenfranchised and dissatisfaction and unwarranted suspicion avoided.

(e) **POLLING STATIONS**

As to (e), that is flaws associated with the siting of polling stations we heard three types of complaint. The first was that in this day and age when the values of multiparty democracy ought to be evident both in practice and in perception there actually were some polling stations established at premises belonging to party officials. This was obviously wrong and conducive to malpractice, Examples were given by PWs 69, 77 and 46. PW69 was Mrs. Prisca Nkhoma, a polling agent for the Lima Party in Chongwe. We heard from her that her polling station was a tent erected at the local MMD Chairman's house. The Chairman kept telling the people to vote on the clock; his wife offered free traditional beer and drew a clock on the voters' palms before they went in to vote. The witness saw at least one voter who collected her voter's card from the Chairman who was keeping a batch of them. The evidence of PW77 Mr. Machina, a polling agent for Dr. Guy Scott was to the same effect as that of PW69. Apart from the foregoing, we have already alluded to the example given by PW46 Mr. Kandeke who voted in Kabwe at a polling station established at a beer-hall or tavern belonging to the local MMD Chairman. The second type of complaint concerned the misplacement of polling districts which resulted in the loss of polling stations or their own misplacement so that some people could not even vote. This came out of the evidence of PW39. The last kind of complaint under this part was that by PW49 Mrs. Emelio who complained of the vast distances many voters were expected to walk to the polling stations in Sinjembela as a result of which people did not vote. This was a valid complaint of general interest and occurrence and which should be considered by the authorities concerned, notwithstanding that some people - like PW93 - would probably still not favour the creation of any more polling districts.

(f) **RESULTS**

As to (f), that is flaws in the results, the main evidence was that given by PWs 93 and 96 a precis of which we have already given. One complaint related to the initial results announced which had five identical pairs of results farm ten constituencies, provoking the suspicion or allegation that the results were predetermined and cooked up or plucked from the blue. We accept that corrections were made but nonetheless such identical sets were there at first. Whether this was as a result of gross negligence or carelessness or not (in the prevailing climate of political distrust, hatred and mutual dislike), it led to a lot of suspicion on the part of the petitioners. The second complaint related to non-identical results but which were nonetheless altered. We accept that all this weakened confidence and belief in the system and did not redound to the credit of those managing the electoral process. The third complaint we consider not to have been well-taken and this was that candidates got a similar number of votes in a variety of constituencies; suggesting that there was an allocation of predetermined figures which had been conjured up. We examined the evidence very closely and did not discern odd coincidences of the kind to arouse this type of suspicion in an objective observer. The trouble is that there was very little objectivity and too much distrust.

The flaws of all types which we have said were established, of course, did not reflect well on those managing the electoral process. Many of them can and should be addressed in order to enhance our democratic profile and in order to engender greater confidence in the electoral process. Elections, it goes without saying, are the sole lawful, constitutional, and legitimate method for the peaceful and legal acquisition of political power. They are the culmination of the exercise of some of the most basic fundamental rights such as the rights of free association, free assembly and free speech the maintenance of which is vital in order to sustain free political discussion and free political choices. Those in power should govern with the consent and by the will of the governed expressed in periodic genuine open, free and fair elections where the result reflects the exercise of free choice. If it be the will of the people, through the electorate, that there be changes, elections guarantee that the changes desired

shall be obtained by peaceful means. We repeat: The flaws identified need to be addressed by the authorities. However, flaws by their very nature go to the general integrity of the system and do not necessarily suggest that the electoral system has been comprehensively massaged or predisposed to grant an unfair or any advantage or disadvantage to any one, in advance.

CONCLUSION

Having reviewed the evidence, it is necessary to conclude. Admittedly, there are some witnesses whose evidence we have not specifically alluded to and which we considered to be unhelpful to the issues before us. Persons like PW70 Mr. Jerade Sekeleti, PW71 Mr. Kayanda and PW72 Mr. Jackson Sekeleti who complained that the MMD candidate Mr. Nkausu visited their polling stations and greeted some people did not make any useful contribution to this case. Neither did PW43 Mr. Tiyaonse Kabwe who - having read the evidence of PWI2 in the Post newspaper - wished to comment on it and to dispute his assertions. There were a number of witnesses from the media who produced various newspaper articles which did not advance the case in any useful fashion. There were other witnesses not specifically mentioned - such as PW37 a polling agent for PW82 - because the point they covered has been adequately dealt with by reference to the evidence of other witnesses.

We should also mention that, from the evidence of the petitioners PWI, Mr Zulu, PW2 Mr. Lewanika, PW8 Mr. Kambaila and PWI6 Mr. Mung'omba, the petitioners had a number of grievances which are largely if not purely of a political nature. The resolution of such political issues would have more naturally sounded in another forum than in a courtroom where the parties have vented their feelings in default of meaningful dialogue among our politicians. Thus, they complained of the manipulation of the constitution by the amendments of 1996 which appeared to them to have been selectively and advisedly targeted. One of the them, Mr. Kambaila, even went so far as to call upon their Lordships to declare the 1996 amendments requiring the parents of a candidate to be citizens as null and void. Such call, of course, went beyond the ambit of an election petition which was not constituted for such a purpose. Some of the petitioners raised concerns about the need for a mutually agreed independent Electoral Commission to manage the elections; concerns about the use of the public media and the limited access to it by the opposition; and concerns about the Public Order Act. There were complaints concerning the use - or perhaps more accurately the misuse - of public or government resources, concerns some of which the Electoral Commission endeavoured to address when it set out a code of conduct (by Statutory instrument 179 of 1996) apparently more honoured in breach than in observance. It seems to us that resolution of political issues in the political arena is to be preferred to litigation. For example, some measures which may be considered offensive, provocative, unjust or unfair in the political arena so as not to be universally acceptable may yet strictly speaking be "legal" as a matter of strict law. It seems to us that in such event where the court may be unable to pronounce upon their validity based on their possible illegality or unconstitutionality, the politicians owe it to the citizens - (who are undoubtedly entitled to peace and the quiet enjoyment of life) - to resolve the political issues and to underight the political well-being of the nation. This we find to be the challenge facing our politicians on some of the grievances brought to our attention by the petitioners. It is certainly not part of the remit of any court (to borrow from the language in the Akar case) to start debating the wisdom or desirability.or fairness of some of the measures if a legal or constitutional challenge is unavailable.

We are also aware that there were allegations made in the petition which have either not been supported by any evidence or not been proven. Examples of this include the allegation 'that at the poll, the polling stations and rooms where people cast their votes had intimidating presence of heavily armed soldiers and policemen there through bullying voters into voting for the respondent and his party in government as the particulars of the voters were also endorsed on their ballot papers thereby ensuring that the vote was not secret, and a voter's choice could be traced." There was not an iota of evidence tendered; not a single witness, of the many who testified 'to events at a polling station, said there were the alleged "heavily armed solders" at all or any police officers bullying any one. Not one person said particulars were written on the ballot papers unless the reference was to the voter's serial number which is written on the ballot counterfoil; a practice which has always been there in Zambia. There was also an allegation that double-voting was facilitated by the provision of substandard ink that could be washed off and by the failure "to put measures in place to detect and stop the use of invisible rubber hand gloves" which allegedly allowed many people with more than one voter's cards to vote as many times as they had cards. While there was some evidence of double voting by the dishonest like Zgyambo and Miss Kalo who washed off the ink, no one came to talk about invisible rubber gloves. We have already dealt with the case of the voter who had two voters' cards because of coding errors and we have already found as a fact that such voters could not vote twice, even if they tried to do so, because their names only appeared once in the final registers in respect of the corrected polling district.

There was yet another allegation that the Electoral Commission created new polling stations which were secretly used. No evidence was led to support this claim. There was an allegation that persons who had died prior to the election somehow voted in the election using MMD cadres who were supplied with the requisite documents. This allegation may have been intended to be proved by the witnesses from Chongwe who claimed to have been given false identities and to have been driven to Ngwerere to vote in those other names. We have already discussed this evidence which was not believable, as already found.

When all is said and done, we accept that there was on the whole reasonable cause for complaint and for bringing this petition which it was in the public interest to ventilate in court. Some of the grievances and issues taken up were certainly well- taken while obviously some could not have been pursued had the complainants been possessed of the full facts or explanations which emerged during the trial. For reasons we have given, we decline to determine and declare that the provisions of Article 34(3) (a), (b) and (e) of the constitution have not been satisfied in respect of the respondent. We find that he was qualified to contest the election. It follows also that we do not find that he falsely swore as to the citizenship of his parents. We were asked to declare that the election process was not free and fair and that the election was rigged and therefore null and void; The election process had flaws and irregularities, as we have already pointed out. The bottom line, however, was whether, given the national character of the exercise where all the voters in the country formed a single electoral college, it can be said that die proven defects were such that the majority of the voters were prevented from electing the candidate whom they preferred; or that the election was so flawed that the defects seriously affected the result which could no longer reasonably be said to represent the true free choice and free will of the majority of the voters. We are satisfied, on the evidence before us, that the elections while not perfect and in the aspects discussed quite flawed were substantially in conformity with the law and practice which governs such elections; the few examples of isolated attempts at "rigging" only served to confirm that there were only a few superficial and desultory efforts rather than any large scale, comprehensive and deep rooted "rigging" as suggested by the witnesses who spoke of aborted democracy.

The petition is unsuccessful and it is dismissed. However, it is clearly in the interests of the proper functioning of our democracy that challenges, to the election of a president which are permitted by the constitution and which are not frivolous should not be inhibited by unwarranted condemnation in costs. In the event, it is only fair that each of the parties should bear their own costs.

Petition Dismissed
