IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

APPEAL NO. 14 OF 2016
2016/CC/A018
SELECTED JUDGMENT NO. 50 OF 2018

IN THE MATTER OF: THE PARLIAMENTARY ELECTION PETITON RELATING TO THE PARLIAMENTARY ELECTIONS HELD ON 11TH AUGUST, 2016

AND

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

AND

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

AND

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

AND

IN THE MATTER OF: THE ELECTORAL CODE OF CONDUCT

BETWEEN:

MARGARET MWANAKATWE — APPELLANT

AND

CHARLOTTE SCOTT — 1ST RESPONDENT

ATTORNEY GENERAL — 2ND RESPONDENT

CORAM: Chibomba, PC, Sitali, Mulenga, Mulembe and Musaluke, JJC on 11th April, 2018 and 31st October, 2018

For the Appellant:	Mr. B. Mutale, SC, Ellis and Company
	Mr. E. S. Silwamba SC and Mr J. Jalasi, Eric Silwamba, Jalasi and Linyama Legal Practitioners
	Mr. K.F. Bwalya and Miss Natalie Liswaniso, KBF and Partners
	Mr. Milingo Lungu, Lungu Simwanza and Company
For the 1st Respondent:	Mr. M.H. Haimbe, Malambo and Company
	Mr. K. Mweemba, Keith Mweemba Advocates
	Mr. G. Phiri, PNP Advocates
For the 2nd Respondent:	Miss L. Shula, Senior State Advocate

J U D G M E N T

Sitali, JC, delivered the judgment of the Court.

Cases cited:

1. Chizonde v. The People (1975) Z.R. 66.
2. Mulondwe Muzungu v. Eliot Kamondo 2010/EP/001 unreported.
3. Priscilla Kamanga v. Peter Ng'andu Magande and Attorney-General (2008) Z.R. 7 volume 2.
4. Michael Mabenga v. Sikota Wina and Others (2003) Z.R. 110.
5. Steven Katuka and Law Association of Zambia v. The Attorney-General and 64 others, Selected Judgment No. 29 of 2016.
6. Mubita Mwangala v. Inonge Mutukwa Wina Appeal No. 80 of 2007.
7. Subramanian v. Public Prosecutor (1956) 1WLR 965.
8. Nkhata and Others v. Attorney-General (1966) Z.R. 124.
9. John Wamundila v. The People (1978) Z.R. 151.
10. Anderson Kambela Mazoka and Others v. Levy Patrick Mwanawasa and Others (2005) Z.R. 138.
11. Chizu v. The People (1979) Z.R. 225.
12. Austin Liato v. Sitwala Sitwala Selected Judgment No. 23 of 2018
13. Chrispin Siingwa v.. Stanley Kakubo Appeal No.7 of 2017
14. Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba (1998) Z.R. 49.

15. **Brelsford James Gondwe v. Catherine Namugala SCZ Appeal No. 129 of 2012**
16. **Giles Chomba Yamba Yamba v. Kapembwa Simbao and others, Selected Judgment No. 6 of 2018**
17. **Zulu v. Avondale Housing Project (1982) Z.R. 172**
18. **Leonard Banda v Dora Siliya SCZ Judgment No. 127 of 2012**
19. **Examination Council of Zambia v. Reliance Technology Limited SCZ Judgment No. 46 of 2014**
20. **Sibongile Mwamba v. Kelvin M. Sampa and Electoral Commission of Zambia Selected Judgment No. 57 of 2017**
21. **Boniface Chanda Chola and two others v. The People (1988/89) Z.R. 163**

Legislation referred to:

1. **The Constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 229.**
2. **The Electoral Process Act No. 35 of 2016, section 97 (2) (a) and (b).**

The Appellant, Margaret Dudu Mwanakatwe, who was the 1st Respondent in the Court below, appeals against the decision of the High Court to nullify her election as Member of Parliament for Lusaka Central Constituency. The Appellant and the 1st Respondent, Charlotte Scott, were two of five contenders for the Lusaka Central Constituency seat in the parliamentary election held on 11th August, 2016.

The Appellant was the candidate for the Patriotic Front Party (PF) in the election while the 1st Respondent was the candidate for the United Party for National Development (UPND). Three other candidates contested the election on the Forum for Democracy and

Development (FDD) Party ticket, the Rainbow Party ticket and as independent candidate, respectively.

The Appellant was declared as the duly elected Member of Parliament for Lusaka Central Constituency having received thirty thousand, two hundred and twenty-three (30,223) votes while the 1st Respondent was runner-up having received eighteen thousand, two hundred and ninety-five (18,295) votes. The other three candidates shared the remaining votes which were cast.

The 1st Respondent filed a petition seeking, inter alia, a declaration that the Appellant was not validly elected as Member of Parliament for Lusaka Central Constituency and that the election was void. In her amended petition, the 1st Respondent alleged that the Appellant used Government resources during her campaign; that she engaged in acts of bribery involving the purchase and distribution to congregants of two hundred pieces of chitenge material for a fundraising event at St Matthias Mulumba Catholic Church in Bauleni compound; a promise of one hundred bags of cement to Word of Life Church; and the procurement and commission of two boreholes in the State Lodge area; and that she

used racial arguments on the ZNBC Race to Manda Hill programme implying that the 1st Respondent was not a Zambian and, throughout her campaign, appealed to voters to vote for her as she was of their colour and was born at the University Teaching Hospital (UTH) where her umbilical cord was buried.

Further, that the Appellant's agents were openly campaigning by distributing their party regalia on polling day; that the Appellant's agents perpetrated acts of violence against the 1st Respondent and her supporters at the town centre; that the 1st Respondent's party's campaign materials were being pulled down. Lastly, that the Zambia police officers blocked the 1st Respondent from conducting door to door campaigns in Northmead and in Rhodespark residential area, because she failed to give prior notice to the police of the door-to-door campaign.

The trial Judge reviewed the evidence and held that the allegation regarding the pulling down of UPND campaign materials by the Appellant's agents had been abandoned as no witness had testified regarding it and dismissed it. The trial Judge found that five of the remaining six allegations had been proved to the required

standard except for the allegation that the Appellant's agents were campaigning on polling day. He, therefore, upheld the petition and accordingly declared the election void. He further declared that the Appellant was not duly elected as Member of Parliament for Lusaka Central Constituency.

Aggrieved by the decision of the lower Court, the Appellant appealed to this Court and advanced eleven grounds of appeal as follows:

1) **The Court erred in law and fact when it held that the 1st Respondent was unjustifiably barred from campaigning in Rhodespark and Northmead by the police despite not giving the prescribed seven days' notice of the meeting, assembly or procession to the police and that such a bar materially affected the outcome of the election.**

2) **The Court below erred in fact and law when it found in favour of the 1st Respondent on the bribery allegations relating to the sinking of the boreholes, purchasing of chitenge materials for a fundraising event and the purchase of cement without making adverse findings against the Appellant's witnesses who rebutted the 1st Respondent's evidence.**

3) **The Court below erred in fact and law when it held that the bribery allegations relating to the sinking of the boreholes and purchasing of chitenge materials for a fundraising event materially affected the outcome of the election.**

4) **The Court below misdirected itself when it held that the acts of procuring the sinking of a borehole for the community, purchase of chitenge materials for a fundraising event and purchase of cement for the church fell within the ambit and scope of bribery or vote buying contrary to section 81 of the Electoral Process Act.**

5) **The Court below misdirected itself when it held that an act or acts of violence fell within the ambit and scope of section 97 (2) (b) of the Electoral Process Act No. 35 of 2016 to the effect that the**

election was not conducted in substantial conformity with the Electoral Process Act.

6) **The Court below fell into error when it generalised that the incidents of violence were of such a widespread nature so as to materially affect the outcome of the elections without evidence to the effect that the majority of the voters were prevented from voting for their preferred candidate.**

7) **The Court below erred in fact and law when it took into account events that occurred before the campaign period, namely, a donation of 100 bags of cement as an inducement that materially affected the outcome of the elections.**

8) **The lower Court fell into error when it held that the statements by the Appellant to the effect that she is a Zambian born at the University Teaching Hospital and understands the Zambian culture amounted to racial discrimination without evidence of any unfair prejudice occasioned by the said utterances or remarks to affect the outcome of the election.**

9) **The Court below erred in law and fact when it held that the Appellant's continued stay in office as Minister of Commerce created an irrefutable presumption that the Appellant abused Government resources during the campaign period and that such alleged abuse materially affected the outcome of the election.**

10) **The Court below misdirected itself when it relied on inadmissible hearsay evidence in the form of TV recordings and Facebook postings attributed to the Appellant without proper authentication.**

11) **The Court below misdirected itself when it took into consideration matters that were not pleaded or canvassed at trial, namely that violence by unidentified cadres amounted to non-compliance with the principles of the conduct of elections in the Electoral Process Act No. 35 of 2016, in nullifying the election.**

At the hearing of the appeal, learned counsel for the Appellant, Mr. Milingo Lungu relied on the written heads of argument and orally augmented some of the arguments. The eleven grounds of appeal were argued as follows: ground one was argued on its own, grounds two, three, four and seven were argued together, grounds

five, six and eleven were also argued together while grounds eight, nine and ten were argued individually.

In ground one, the Appellant submitted that the 1st Respondent alleged in her amended petition that she was prevented from campaigning on two occasions during the campaign period. The first being in July, 2016 when her campaign team decided to drop off leaflets in Northmead area. The second occasion being in Rhodespark when she attempted to conduct door to door campaign meetings.

The Appellant submitted that the lower Court held that the actions by the police breached rules 3 (1) (f) and (h) and 6 (c) of the Electoral Code of Conduct and that the elections were not conducted in a free and fair manner. Further, that the non-compliance with these rules by the police materially affected the outcome of the elections because "anything that prevents a candidate from campaigning or communicating with the electorate in a particular area affects the result of the election."

The Appellant submitted that the findings and decision of the lower Court were a gross misdirection as the 1st Respondent did not

give the requisite notice to hold the meeting or procession on both occasions. That the meetings therefore were not legally convened and there was consequently no non-compliance by the police as alleged. The Appellant, therefore, submitted that the finding should be set aside.

In arguing grounds two, three, four and seven, the Appellant submitted that the 1st Respondent in her petition alleged bribery or vote buying contrary to section 81 of the Act and cited three incidents namely, the buying of chitenge pieces by the Appellant at Saint Matthias Mulumba Catholic Church in Bauleni, a cash donation of K6,400 by the Appellant to the Word of Life Church at Bauleni and the sinking of two boreholes in State Lodge.

It was submitted that regarding the purchase of the chitenge, two versions of events were given. One version was given by PW3 for the 1st Respondent and the other version was given in rebuttal by the Appellant and her witness, RW4. The Appellant submitted that the trial Judge chose PW3's version of events and discounted the Appellant and RW4's version without making any adverse finding against the Appellant and RW4 which was against the

principle in the case of **Chizonde v The People**[1]. The Appellant contended that the trial Court disbelieved the Appellant's evidence merely because she was a politician and that less weight should have been attached to PW3's evidence because she was a partisan witness according to the persuasive case of **Mulondwe Muzungu v Eliot Kamondo**[2]. The Appellant further submitted that no evidence was led to prove the widespread nature of the incident.

Regarding the sinking of the boreholes, the Appellant submitted that the lower Court found as a fact that the boreholes were sunk by the Muslim Society Trust at the request of the Chongwe District Medical Office and that the Appellant did not donate or finance the boreholes. That the lower Court, however, found that the Appellant's friends helped her to have the boreholes sunk and that she was personally involved in the borehole project. That the Court further found that the sinking of the boreholes was a corrupt act committed by the Appellant's friends with her knowledge and consent and fell within section 97 (2) (a) of the Act.

The Appellant submitted that the sinking of the boreholes by the Muslim Welfare Society was a philanthropic act which is

permitted by the electoral law as held in the case of **Priscilla Mwenya Kamanga v Peter Ng'andu Magande and Attorney-General**[3]. That even if it were to be deemed a corrupt or illegal act, no evidence was led to prove that the number of voters in the State Lodge area persuaded to vote for the Appellant, on account of the donation, was material to the outcome of the election.

The Appellant contended that the lower Court misdirected itself in holding that the Appellant committed a corrupt act when she and her election agents did not donate the boreholes.

On the donation of K6,400 for cement, the Appellant submitted that the uncontroverted evidence was that the donation was made on 8th May, 2016 before the campaign period, which fact the lower Court acknowledged in its judgment at page 73 of the record of appeal. That the lower Court, however, held that the donation was made with the election in mind to induce the congregants and that the act satisfied the requirements of section 97 (2) (a) of the Act. The Appellant contended that this was wrong as section 97 (2) (a) of the Act applies to candidates and their

election agents. That on 8th May, 2016 the Appellant was not a candidate for any election as defined by section 2 of the Act.

The Appellant further submitted that the 1st Respondent should have proved that the alleged corrupt act influenced the voters against voting for their preferred candidate.

It was submitted that the lower Court did not find that the alleged acts of bribery were widespread but relied on the case of **Michael Mabenga v Sikota Wina and Others**[4] wherein it was held that satisfactory proof of any corrupt or illegal practice or misconduct in an election petition is sufficient to nullify an election. That following the repeal of section 93 (2) of the Electoral Act 2006 which was replaced by section 97 (2) of the Electoral Process Act 2016, the **Mabenga**[4] case is no longer good law because section 97 (2) (a) requires the petitioner to prove the commission of the impugned electoral offence by the candidate or with the candidate's knowledge and consent or approval or that of the election agent and proof that the effect of the act was widespread.

In grounds five, six and seven, the Appellant submitted that although the 1st Respondent alleged in the petition that the

Appellant through her agents perpetrated acts of violence in the town centre twice during the campaign period, she failed to identify the youths who attacked her campaign team and conceded that the Appellant and her election agents were not present on both occasions. The Appellant submitted that the trial Judge found that the Appellant and her agents were not involved in the violence and did not consent to or approve of it and that she was out of town on the date of the second attack.

The Appellant submitted that the trial Court abandoned the allegation in the petition and substituted his own allegation by stating that the allegation did not fall to be considered under section 97 (2) (a) but under section 97 (2) (b) of the Act because it related to the general conduct of the election as to compliance or non-compliance with specific provisions of the Act.

The Appellant contended that the approach taken by the lower Court was unfair as there was no allegation at the trial that the violence amounted to non-compliance with the electoral law, and the parties did not have an opportunity to address the case alleged. That the lower Court erred by going beyond the pleadings and

considering matters that were not pleaded by the parties. That the trial Judge's reliance on section 97 (2) (b) of the Act in considering the allegation of violence was a gross misdirection.

The Appellant further impugned the lower Court's reasoning and reliance on the Code of Conduct and argued that section 97 (2) (b) is concerned with the conduct of elections by the Electoral Commission of Zambia and not with the actions of political actors. That the principles referred to in that section are set out in section 3 of the Act and not in the Code of Conduct, which principles only apply to the Electoral Commission of Zambia.

The Appellant submitted that the issues on violence raised by the trial Court on his own should be set aside.

In arguing ground eight, the Appellant submitted that although the 1st Respondent alleged that the Appellant used racist arguments against her, during the "Race to Manda Hill" television programme, when she said she was a Zambian born at the University Teaching Hospital where her umbilical cord was buried, and that she understood the Zambian culture, the statements did not refer to the 1st Respondent. She disputed PW4's allegation that

he heard her say the 1st Respondent would not perform because she was a white person.

The Appellant submitted that although the trial Court held that her statements contravened clause 15 (1) (m) of the Code of Conduct, there was no evidence that she discriminated against the 1st Respondent due to her race and further, that the words she uttered were discriminatory. That with regard to the alleged racial remarks made at a rally, the lower Court presumed that she would have no difficulties in using similar language in her campaign within the constituency, as alleged by PW4, because of her statements on the television program.

The Appellant contended that by assuming that she repeated the remarks, the lower Court released the 1st Respondent from the burden to prove the allegation. She reiterated that it was not open for the trial Court to find for one party without making findings on credibility and submitted that less weight should have been attached to the evidence of PW4 as he was a UPND official and therefore had a possible interest to serve.

In conclusion on this ground, the Appellant argued that even if the Court were to find that PW4's allegation was true, there was no evidence regarding how many people attended the rally and how the number compared to the overall electoral college of Lusaka Central Constituency. She submitted that the allegation by PW4 was not proved to the requisite standard.

In arguing ground nine, the Appellant submitted that whereas the 1st Respondent alleged that she held herself out as a Minister throughout her campaign, and that she used Government resources and a Government vehicle when she went to attend an interview on the ZNBC television programme, "Race to Manda Hill," on 20th June, 2016, the motor vehicle which was alleged to be a Government motor vehicle was a personal vehicle which she had purchased from the Government on 30th May, 2016, as evidenced by the exhibited receipt to that effect.

The Appellant submitted that the trial Judge disregarded her evidence without giving reasons and, instead, found that she had used a Government motor vehicle although the 1st Respondent did not state the make and registration number of the motor vehicle the

Appellant used to prove that it was a Government motor vehicle. The Appellant submitted that the lower Court held that her use of a Government motor vehicle and, inevitably, Government fuel and a Government driver to attend a campaign programme was a violation of clause 15 (1) (k) of the Code of Conduct.

The Appellant further submitted that the lower Court's finding that throughout the campaign period, she illegally held herself out as a Cabinet Minister was a misapprehension of the holding in the **Stephen Katuka and Law Association of Zambia v the Attorney-General and others**[5] case. She contended that the trial Judge's finding that her continued stay in office as a Minister constituted an illegal practice under the Act was a grave misdirection.

The Appellant submitted that the lower Court misdirected itself in holding that the 1st Respondent had discharged the burden of proof on the allegation that she used a Government motor vehicle for her campaign, as less weight should have been attached to her evidence because of her failure to recollect the registration number of the alleged Government motor vehicle.

The Appellant submitted that no evidence was led by the 1st Respondent to support the allegation that the Appellant used Government funds in her campaign and further, that the finding that she used her salary, as a Minister, in her campaign was perverse because the 1st Respondent conceded in cross-examination that she had no information that the Appellant used her ministerial salary in her campaign.

In the alternative, the Appellant submitted that even if the allegation that she used a Government motor vehicle and resources were proved, the lower Court could not nullify the election on this ground because no evidence was led as to how the use of the Government resources influenced the majority of the voters not to vote for their preferred candidate, in terms of section 97 (2) (a) (ii) of the Act. The case of **Mubita Mwangala v Inonge Mutukwa Wina**[6] was cited in support. The Appellant submitted that this allegation, too, was not proved to the high standard of convincing clarity.

Lastly, in arguing ground ten, the Appellant contended that the Court below misdirected itself when it relied on inadmissible hearsay evidence in the form of TV recordings and Facebook

postings, attributed to the Appellant, without proper authentication. She submitted that as proof of the matters alleged, the Court relied on Compact Discs (CDs) containing pictures downloaded from Facebook pages allegedly belonging to the Appellant and on recordings from television footage of an interview and of acts of violence. That the lower Court received the CDs as containing proof of the matters alleged without addressing its mind to whether or not the contents of the CDs were inadmissible hearsay.

The Appellant submitted that in terms of section 2 and 5 of the Electronic Communications and Transactions Act No. 21 of 2009, the record stored on the CDs is considered as a document and that the rule against hearsay applies equally to documents and to oral statements. She cited the case of **Subramanian v Public Prosecutor**[7] where the Privy Council stated that:

> **"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in a statement."**

The Appellant contended that in this case, the person who created the Facebook pages from which the documents were

downloaded; the person or persons who took the pictures relied on as proof of the contents therein; and the persons who took the video recordings, ought to have testified in order to prove the matters contained in the CDs as there was no way of authenticating the pictures or recordings without calling these persons as witnesses. That the Court did not consider the issue of the admissibility of the CDs in its judgment. In sum, the Appellant argued that it was unsafe to rely on the pictures and recordings as they were not properly authenticated.

In conclusion, the Appellant submitted that the findings by the lower Court that the Appellant abused Government resources, and that her campaign was tainted with acts of bribery and corruption, that there was widespread violence in Lusaka Central Constituency, and that such acts materially affected the outcome of the election, were based on an unbalanced evaluation of the evidence and on extraneous and irrelevant evidence, and were a misdirection in law. Citing the case of **Nkhata and Others v Attorney-General**[8], the Appellant urged us to interfere with the trial Judge's findings of fact and set aside the declaration that her election as Member of

downloaded; the person or persons who took the pictures relied on as proof of the contents therein; and the persons who took the video recordings, ought to have testified in order to prove the matters contained in the CDs as there was no way of authenticating the pictures or recordings without calling these persons as witnesses. That the Court did not consider the issue of the admissibility of the CDs in its judgment. In sum, the Appellant argued that it was unsafe to rely on the pictures and recordings as they were not properly authenticated.

In conclusion, the Appellant submitted that the findings by the lower Court that the Appellant abused Government resources, and that her campaign was tainted with acts of bribery and corruption, that there was widespread violence in Lusaka Central Constituency, and that such acts materially affected the outcome of the election, were based on an unbalanced evaluation of the evidence and on extraneous and irrelevant evidence, and were a misdirection in law. Citing the case of **Nkhata and Others v Attorney-General**[8], the Appellant urged us to interfere with the trial Judge's findings of fact and set aside the declaration that her election as Member of

Parliament for Lusaka Central Constituency was null and void. She further urged us to uphold her election as Member of Parliament and to award her costs in this Court and in the Court below.

In his oral submissions in support of the written arguments, Mr. Lungu more or less reiterated the written arguments. We will therefore not repeat them.

In opposing the appeal, the 1st Respondent filed heads of argument which Mr. Haimbe and Mr. Mweemba, Counsel for the 1st Respondent, relied upon and augmented with brief oral submissions. In opposing ground one, the 1st Respondent contended that the Appellant's argument that the failure by the 1st Respondent and her team to give the notice required under section 5 (4) of the Public Order Act, before embarking on their campaign activities in Northmead and NIPA, meant that the campaign activities were not legally organised and that, therefore, the police were entitled to disband them, and in doing so, did not violate the Act, did not aid her case. She argued that the distribution of campaign leaflets to the electorate during a campaign period falls outside the ambit of activities for which prior notice is required to

be given to the police under section 5 (4) of the Act. The 1st Respondent contended that the basis for the lower Court's decision under this ground was that the police failed to act professionally and impartially in the execution of their duties, contrary to the requirements of the Act.

That the conduct of the police fell short of conduct expected of them under rules 3 (1) (f) and (h) and rule 6 (c) of the Code of Conduct and that the learned trial Judge cannot be faulted for holding that the police conduct was a violation of section 97 (2) (b) of the Act and warranted the annulment of the election of the Appellant as Member of Parliament. That the lower Court made findings of fact regarding the conduct of the police based on the evidence before it and that, on the authority of **Nkhata and Others v. The Attorney-General**[8], this Court cannot interfere with those findings in the absence of any misdirection on the part of the trial Judge.

The 1st Respondent further submitted that section 97 (2) (b) states that the election of an MP will be declared void where the High Court is satisfied that there has been non-compliance with the

provisions of the Act, which provisions include the Code of Conduct contained in the Schedule to the Act.

That rules 3 (1) (h) and 6 (c) of the Code of Conduct enjoin the Zambia Police to be professional and impartial during the electoral process and not to use the office to oppress any political party, candidate or supporter. That the police violated these rules in this case. The 1st Respondent argued that ground one lacks merit and should be dismissed.

In opposing grounds two, three, four and seven, the 1st Respondent submitted regarding the donation of boreholes in the State Lodge area, that the learned trial Judge found that the Appellant could be linked to the boreholes by the letter written by RW2 in March, 2016 and by the evidence of PW2, regarding the involvement of PF youths in the clearance of the sites for the boreholes; that the timing of the sinking of the boreholes, being one month after the letter requesting the Appellant to find suitable sites for the boreholes was written, was curious, since the boreholes were intended to contain the emergency cholera outbreak in January, 2016; that the Appellant used the boreholes to enhance

her prospects of being elected by referring to the water projects undertaken in the State Lodge area, during the Race to Manda Hill programme, and by a posting on her Facebook page that the boreholes had just been completed and would soon be commissioned; and that RW2 expressly stated in cross examination, that the Appellant was personally involved with the boreholes even though she did not finance the donation.

The 1st Respondent submitted that the trial Judge based his findings on the evidence before him and that the findings were not perverse according to the plethora of authorities on the principles upon which findings of fact by a lower Court can be reversed.

In response to the Appellant's argument that the trial Judge erred when he accepted the 1st Respondent's version of events over her own version, without making specific adverse findings against the Appellant's witnesses, when the 1st Respondent's witnesses had an interest to serve, the 1st Respondent submitted that the lower Court properly discharged its duty in line with the case of **John Wamundila v. The People**[9] where it was held that a court is entitled to accept evidence of a witness with an interest to serve

where there is "something more" upon which the Court may rely to satisfy it of the truth of the evidence.

That in the present case, the lower Court relied, inter alia, on the letter of 24th March 2016; on the fact that PF youths were involved in clearing the site of the boreholes; and on the Appellant's own utterances during the Race to Manda Hill television programme. The 1st Respondent submitted that the question this Court must consider is whether or not the lower Court erred when it determined that the election could be annulled on the basis of this and other allegations.

The 1st Respondent submitted that the Appellant argued first that she could not be held accountable for the misdeeds of others; secondly, that in any event, there was nothing wrong with making a philanthropic donation; and thirdly, that there was no evidence that the donation affected the majority of voters in accordance with section 97 (2) (a) (ii) of the Act. In response to the first argument, the 1st Respondent submitted that given the evidence on record, and the findings of fact by the lower Court it could not seriously be argued that the Appellant was unaware of, and consented to, the

sinking of the boreholes, as shown by the letter of 24th March, 2016 and that the evidence of RW2 attested to this fact. She contended that the Appellant was caught up under the provisions of section 97 (2) (a) (ii) as rightly observed by the learned trial Judge.

The 1st Respondent argued that the donation of boreholes was not philanthropic in nature because the Appellant associated herself with the borehole project in her campaign to enhance her chances of being elected.

In response to the assertion that there was no evidence that the sinking of the boreholes had a widespread effect, the 1st Respondent invited us to consider the evidence before us, that Bauleni compound, where the boreholes were sunk, has the largest catchment area of the whole Constituency. She contended that the Appellant used the boreholes to campaign to a larger audience on both national television, during the Race to Manda Hill programme, and on her Facebook page which had a following of not less than 17,000 people. That in those circumstances, the trial Judge rightly held that the majority of voters were affected by the sinking of the boreholes since section 97 (2) (a) (ii) only required the 1st

Respondent to prove that the majority of voters may have been prevented from electing a candidate of their choice, due to the conduct complained of. The 1st Respondent submitted that the arguments under this limb, therefore, lack merit and must be dismissed.

The 1st Respondent further argued that the trial Judge was correct in finding that the sinking of the boreholes rendered the election of the Appellant void because section 97 (3) of the Act empowers the Court to nullify an election based on a single act of corruption or illegal practice and does not require proof that the corrupt or illegal action affected the majority of voters in the Constituency.

The 1st Respondent submitted that while section 97 (2) (b) of the Act is subject to the provisions of section 97 (4), subsection (4) only applies where the non-compliance is alleged to have been committed by an election officer in breach of that officer's official duty. That where the non-compliance is not alleged to have been committed by an election officer, the natural unqualified meaning of section 97 (2) (b) should be applied. The 1st Respondent contended

that the interpretation given to section 97 (2) (b) by the learned trial Judge was correct.

Regarding the submission that the learned trial Judge strayed from the pleadings when he determined that the violent conduct complained of violated section 97 (2) (b), and not section 97 (2) (a), the 1st Respondent submitted that this argument was misconceived because the Appellant was effectively saying that a Court cannot apply the law where it is confronted with facts that arise which, while establishing a legal position, fall short of the facts as pleaded.

It was submitted that the Appellant's assertion contradicts the holding in the case of **Mazoka and Others v Mwanawasa and Others**[10] that a Judge is not precluded from considering a matter that is not pleaded, if such matter is let into the evidence without objection. The 1st Respondent submitted that in the present case, the trial Judge was faced with uncontroverted evidence that violence took place in the Constituency. That the trial Judge was therefore not precluded from considering the facts before him against the law as contained in section 97 (2) (b) of the Act,

notwithstanding that, as it turned out, the violence was not attributable to the Appellant as alleged in the pleadings.

The 1st Respondent further submitted that contrary to the Appellant's allegations of unfairness, by properly applying the law to the facts, the trial Judge simply discharged his duty to deal with matters in controversy within his judgment. That he, therefore, cannot be faulted in any way. The 1st Respondent argued that grounds two, three, four and seven lack merit and should to be dismissed.

In opposing ground eight, the 1st Respondent submitted that the issues raised in support of this ground were practically the same issues that were canvassed in the Court below. That for that reason, she would rely on her submissions regarding the allegations of discrimination which she made in the Court below as set out in paragraphs 49 to 73 at pages 151 to 155 and on the video evidence submitted in the Court below, and annexed to the record of appeal marked CS1 and CS2.

The 1st Respondent added, in augmenting her submissions before the lower Court, that regarding the effect of the racial

discrimination she suffered, the evidence of PW4 was cardinal, especially when considered from the perspective of the trite principle of law that the evidence of a single witness is sufficient to prove a fact. That the case of **Chizu v the People**[11] is instructive on the point.

The 1st Respondent submitted that the lower Court accepted PW4's evidence on the strength of the Appellant's own admission that she used public address systems in her campaign and on the televised broadcast on the Race to Manda Hill programme which the Court took as corroboration. She submitted that the trial Court established the "something more" that was required for it to accept PW4's evidence as per authority of **John Wamundila v the People**[9].

The 1st Respondent contended that it was self-defeating for the Appellant to argue that the 1st Respondent's witnesses' evidence should not have been readily accepted by the Court below when the Appellant's own witnesses were similarly circumstanced. The 1st Respondent submitted that ground eight equally lacks merit and ought to be dismissed with costs.

In opposing ground nine, the 1st Respondent relied on her submissions in the lower Court at pages 146 to 151 of the record of appeal. She submitted that contrary to the Appellant's assertion that there was no evidence in the lower Court that she used a Government vehicle and resources during her campaign, the Appellant admitted, under cross examination, to using a Government pool vehicle and to drawing a salary in the sum of K25,000 and privileges, all of which, the 1st Respondent submitted, placed her at an advantage over the 1st Respondent in the campaign as a whole.

The 1st Respondent submitted that the Appellant's campaign was therefore inextricably tainted and that the learned trial Judge was in order to hold as he did. She submitted that ground nine lacks merit and ought to be dismissed with costs.

In opposing ground ten, the 1st Respondent submitted that although the Appellant attacked the trial Judge for relying on Compact Discs containing video and photographic footage, alleging that the same was inadmissible, the said CDs were admitted onto the Court's record by consent and, as such, the Appellant cannot

now be heard to raise any objection to them. The 1st Respondent submitted, in conclusion, that ground ten lacks merit and ought equally to be dismissed with costs.

Learned counsel for the 1st Respondent more or less reiterated the written arguments at the hearing. We shall, therefore, not recast them here.

The 2nd Respondent did not file any submissions and similarly made no oral submissions at the hearing.

We have considered the grounds of appeal, the respective parties' heads of argument and their oral submissions as well as the judgment of the lower Court. The main issue we have to determine in this appeal, is whether the lower Court was on firm ground when he nullified the election of the Appellant, in light of the law and the facts.

The law regarding the circumstances in which an election may be declared void is set out in section 97 (2) of the Electoral Process Act No. 35 of 2016 (henceforth referred to as the Act). Section 97 (2) (a) of the Act on which the petition in this case was based provides as follows:

"(2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councilor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that-

(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election –

(i) by a candidate; or

(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and

the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;

A consideration of the above section of the Act reveals that the election of a candidate can only be nullified if the petitioner proves to the satisfaction of the Court that the candidate personally committed a corrupt or illegal practice or other misconduct in relation to the election or that the act in issue was committed with the candidate's knowledge and consent or approval or that of the candidate's election or polling agent.

Having proved the commission of the assailed electoral offence, the petitioner must further prove that, as a result of that offence, the majority of the voters in the constituency, district or ward were or may have been prevented from electing their preferred

candidate. As we held in **Austin Liato v Sitwala Sitwala**[12] and in **Chrispin Siingwa v Stanley Kakubo**[13], it is not sufficient for a petitioner to prove only that a candidate committed an electoral offence in relation to the election without further proving that the electoral offence was widespread and prevented or may have prevented the majority of the voters from electing a candidate of their choice.

We reiterate that as in all other civil cases, the petitioner bears the burden of proof in an election petition but the standard to which the electoral offence complained of must be proved is higher than proof on a balance of probabilities which is required in an ordinary civil action. The evidence adduced in support of allegations in an election petition must establish the issues raised to a fairly high degree of convincing clarity. We find authority for this in the persuasive case of **Akashambatwa Mbikusita Lewanika and others v Fredrick Jacob Titus Chiluba**[14] wherein the Supreme Court said:

> **"...that parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probability... the issues raised are required to be established to a fairly high degree of convincing clarity."**

This was reiterated in **Brelsford James Gondwe v Catherine Namugala**[15] when the Supreme Court said:

> **"The burden of establishing the grounds lies on the person making the allegation and in election petitions, it is the petitioner in keeping with the well settled principle of law in civil matters that he who alleges must prove. The grounds must be established to the required standard in election petitions namely fairly high degree of convincing clarity."**

In the present case, it was incumbent upon the 1st Respondent (as the petitioner) to prove her allegations against the Appellant with cogent evidence to a fairly high degree of convincing clarity and to demonstrate that any electoral offences proven to have been committed by the Appellant or her election agents were widespread and that the majority of voters in the constituency were or may have been prevented from electing their preferred candidate.

We are guided by these principles and the law in determining this appeal.

In determining the appeal, we shall first consider ground ten as it relates to a procedural issue. Thereafter, for convenience, we shall follow the order in which the remaining grounds of appeal were argued by the parties.

In ground ten the Appellant challenges the lower Court's reliance on the television recording and the Facebook postings attributed to the Appellant on the ground that they were inadmissible hearsay evidence and were not properly authenticated. In considering this ground we note from the record of appeal that the DVD and CD containing the television recording of the Race to Manda Hill programme and the Facebook postings attributed to the Appellant were admitted into evidence without objection from the Appellant after the initial objection by counsel for the Appellant was waived. Mr. Bwalya as counsel for the Appellant in the lower Court in that regard said to the trial Judge at page 208 of the record of appeal:

> **"My Lord my instructions are quite clear. My instructions my Lord is to allow the introduction of the DVD and the CD in the interest of justice."**(sic)

That being the case, the Appellant cannot on appeal challenge the lower Court's reliance on that evidence for not being properly authenticated when she consented to the introduction of the evidence onto the lower Court's record. Having received the said evidence, the trial Judge was entitled to consider it in determining

the matter before him and he cannot be faulted for doing so. Ground ten therefore lacks merit and is dismissed.

In ground one of the appeal, the Appellant challenges the trial Court's findings that the 1st Respondent was unjustifiably barred from campaigning in Rhodespark and Northmead by the police and that the bar materially affected the outcome of the election. Although the Appellant took issue with the lower Court's finding that the police unjustifiably prevented the 1st Respondent from campaigning in Rhodespark and Northmead, the real issue we have to determine under this ground is whether there was non-compliance with the electoral law in the conduct of the election, which non-compliance affected the result of the election so as to warrant nullifying the election under section 97 (2) (b) of the Act.

The allegation to which ground one relates has to do with the conduct of the Zambia Police. In her evidence in support of the allegation, the 1st Respondent stated that during the campaign period in July 2016, she and her team decided to drop leaflets in the Northmead area. Before proceeding with their programme, they approached the Police to inform them of their presence in the area.

However, the officer-in-charge at Northmead Police Post refused to permit them to proceed with the programme as they had not made a prior written application to the police. The 1st Respondent said she then made the application to proceed but the officer-in-charge refused to permit them to proceed at short notice.

The second incident happened in the NIPA area in Rhodespark when she and her team were stopped from dropping leaflets under the doors of the flats by armed police officers who said their meeting was illegal.

In rebuttal, the Appellant denied the 1st Respondent's allegation that she used her ministerial position to influence the police to stop her door-to-door campaign in Northmead and Rhodespark. She asserted that Ministers did not possess power to influence police action.

The learned trial Judge considered the allegation and held that the police had breached rule 6 (c) of the Code of Conduct which directs them to refrain from disrupting a legally convened campaign, rally or meeting by a political party and consequently, that there had been non-compliance with the provisions of the law

in the conduct of the election by the Zambia Police in terms of section 97 (2) (b) of the Act.

The Appellant submitted that the learned trial Judge erred by holding that the police breached rule 6 (c) of the Code of Conduct when the 1st Respondent's evidence revealed that in both instances she did not give the requisite notice to hold the meeting to the police under section 5 (4) of the Public Order Act and that the meetings were therefore not legally convened. The Appellant contended that there was no non-compliance with the electoral law as alleged and that there was no evidence that the alleged non-compliance with rule 6 (c) of the Code of Conduct materially affected the outcome of the election. She urged us to set aside the lower Court's findings of fact.

The 1st Respondent, on the other hand, contended that the distribution of campaign materials did not require prior notice of the activity to be given to the police under section 5 (4) of the Public Order Act and that the trial Judge was right to hold that the police by their conduct breached rule 6 (c) of the Code of Conduct. She further contended that their conduct amounted to a violation of

section 97 (2) (b) of the Act, which violation warranted the annulment of the election of the Appellant as Member of Parliament. The 1st Respondent submitted that based on the principle in the case of **Nkhata and Others v The Attorney-General**[8], we as an appellate Court, cannot interfere with the findings of fact as the trial Judge did not misdirect himself. The 1st Respondent contended that ground one lacks merit and should be dismissed.

We have considered the submissions relating to ground one. As the learned trial Judge rightly stated, the allegation to which ground one relates is not provided for under Part VIII of the Act, which provides for electoral offences. The learned trial Judge therefore considered and determined the allegation in light of the duties of the police as set out in paragraph 6 (c) of the Code of Conduct in the Schedule to the Act. Paragraph 6 (c) of the Code of Conduct reads:

> **"6. The Zambia Police Service shall-**
> **(c) refrain from disrupting any campaign, rally or meeting which is legally convened by any political party;"**

The lower Court accepted the 1st Respondent's testimony and held that the police prevented the 1st Respondent and her team from campaigning in two areas within Lusaka Central Constituency in violation of rule 6 (c) of the Code of Conduct and thus violated the principles laid down for the conduct of free and fair elections.

The trial Judge observed that in terms of section 97 (2) (b) of the Act, an election can be declared void where there is non-compliance with the provisions of the Act. He acknowledged that section 97 (2) (b) requires the petitioner to prove that the non-compliance with the provisions of the Act affected the result of the elections. However, the trial Judge proceeded to say:

> **"In my considered view, anything that prevents a candidate from campaigning or communicating with the electorate in a particular area affects the result of the election."**

The learned Judge further said:

> **"Unlike under paragraph (a) of section 97 (2) of the Act, non-compliance with the provisions of the Act under paragraph (b) need not be by the candidate or that candidate's agent. All that is required is evidence of non-compliance by the relevant player, in this case, the Zambia Police. In dealing with this allegation, I have considered subsection (4) of section 97 of the Act and find that it does not apply because the subsection relates to an election officer's act or omission. The allegation in this case relates to the conduct of the Zambia Police."**

Section 97 (2) (b) of the Act which the learned trial Judge relied upon in determining the allegation against the Zambia Police

provides for the nullification of an election where there has been non-compliance with the law in the conduct of elections. The provision reads:

> "97 (2) **The election of a candidate as a Member of Parliament, mayor, council chairperson or councilor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be that -**
>
> **(a) ....**
>
> **(b) Subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election."** (Emphasis added.)

It is clear to us that section 97 (2) (b) which is set out above, relates to non-compliance with the provisions of the Act in the conduct of elections. It provides for the voiding of an election where it is established that there has been non-compliance with the provisions of the Act in the conduct of the election in issue and that the non-compliance has affected the election result.

The question that arises in view of the provisions of section 97 (2) (b) of the Act is, which institution has the mandate to conduct elections? The answer is found in Article 229 (2) (b) of the Constitution as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution as amended)

which vests the power to conduct elections in the Electoral Commission of Zambia. Article 229 (2) (b) provides as follows:

> **"(2) The Electoral Commission shall –**
>
> **(b) conduct elections and referenda;"**

The Constitution does not vest the power to conduct elections in any other institution or person.

Further, the long title to the Electoral Process Act No. 35 of 2016 clearly states that the object of the Act is, inter alia, to provide for the conduct of elections by the Electoral Commission of Zambia and to empower the Commission to make regulations in matters relating to elections. The function of the Commission to conduct elections is further clearly illustrated by section 56 (1) of the Act which provides that:

> **"(1) If it is not possible to conduct a free and fair election at a polling station on a prescribed polling day, the Commission may, at any time before voting at the polling station has commenced, postpone voting at that polling station."** (Emphasis added.)

In the case of **Giles Chomba Yamba Yamba v Kapembwa Simbao and others**[16], we held that:

> **"...the Constitution expressly gives the function to conduct elections to the Electoral Commission of Zambia ... The ECZ must fulfill this function by ensuring that the requirements of the Electoral Process Act are respected and observed in the electoral process. Section 97 (2) (b), therefore, concerns non-compliance to the provisions of the Act by the ECZ, the body charged with the**

conduct of elections under Article 229 (2) (b) of the Constitution, and not the candidates to an election or their agents."

We restate that position in this case.

In order for non-compliance with the law to result in the invalidation of an election under section 97 (2) (b), it must be established that the non-compliance affected the result of the election and must be attributable to the ECZ as the conductor of elections. This is evident from the fact that section 97 (2) (b) of the Act is made subject to section 97 (4) of the Act which reads:

"(4) **An election shall not be declared void by reason of <u>any act or omission by an election officer</u> in breach of that officer's official duty <u>in connection with an election</u> if it appears to the High Court or a tribunal that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such act or omission did not affect the result of that election."** (Emphasis added.)

In the present case, the trial Judge clearly said that the non-compliance with the law was not attributable to any election officer and that section 97 (4) therefore did not apply.

Given the clear provisions of the law which we have cited, the learned trial Judge misinterpreted the law when he held that all that is required for an election to be nullified under section 97 (2) (b) is evidence of non-compliance with the law in the conduct of

elections "by the relevant player, being the Zambia Police, in this case."

The role of the Zambia Police in the electoral process is restricted to enforcing the law and maintaining peace and order during campaign meetings and processions and on polling day. This role is clearly stated in section 4 (6) of the Act and in paragraph 6 (a) of the Code of Conduct. Section 4 (6) of the Act as relevant reads:

> **"4 (6) The Zambia Police Service shall enforce law and order at polling stations..."**

Paragraph 6 (a) of the Code of Conduct reads:

> **"6. The Zambia Police Service shall-**
>
> **(a) enforce law and order at campaign meetings and processions in order to maintain peace and order."**

The learned trial Judge thus misdirected himself when he said the police breached the electoral laws because, as we already stated above, the mandate to conduct elections is exclusively vested in the Electoral Commission of Zambia.

Whether or not there was non-compliance with the electoral law in the conduct of elections and whether or not such non-compliance affected the result of the election, in the present case,

were matters that needed to be proved with cogent evidence by the 1st Respondent and were not matters to be left to the conjecture of the trial Court.

We have examined the 1st Respondent's evidence before the lower Court on the record of appeal and observe that she did not adduce any evidence to prove that the result of the election was affected by the refusal by the police to permit her to carry out door to door campaigns in Northmead and Rhodespark.

We are mindful of the plethora of case authorities which state that an appellate court ought not to interfere with the findings of fact made by a trial court except on very clear grounds. In **Zulu v Avondale Housing Project**[17] it was held that:

> **"An appellate court will not reverse the findings of fact made by a trial Judge unless it is satisfied that the findings in question were either perverse or were made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court, acting correctly, could reasonably make."**

In the present case, the trial Judge's finding that there was non-compliance with the provisions of the Act relating to the conduct of elections by the Zambia police, rendering the election of the Appellant liable to be nullified was not supported by the

evidence on record and was premised on an erroneous interpretation of the provisions of section 97 (2) (b) of the Act.

In the absence of evidence that the result of the election was affected by the Police action against the 1st Respondent, we find that this is a proper case for us to interfere with the trial Judge's findings of fact related to the allegation against the police. We reverse them accordingly. Ground one therefore succeeds.

Grounds two, three, four and seven were argued together. In ground two the Appellant contends that the lower Court was wrong to find in favour of the 1st Respondent regarding the bribery allegations relating to the sinking of the boreholes, the purchase of chitenge materials and the purchase of cement without making adverse findings against the Appellant and her witnesses. In ground three she attacks the lower Court's finding that the bribery allegations affected the outcome of the election. In ground four, the Appellant challenges the lower Court's findings that the alleged bribery allegations were acts of bribery or vote buying contrary to section 81 of the Act. Lastly, in ground seven, the Appellant contends that the trial Judge erred when he took into account the

donation of 100 bags of cement which occurred before the campaign period as an inducement that materially affected the outcome of the elections.

The first issue we shall consider is whether the sinking of the boreholes, the purchase of the chitenges and the purchase of the cement were acts of bribery or vote buying in terms of section 81 of the Act. We shall further consider whether there was any evidence that the alleged acts of bribery were so widespread that they prevented or may have prevented the electorate from voting for their preferred candidate. Section 81 (1) (c) reads:

> **(1) A person shall not, either directly or indirectly, by oneself or with any other person corruptly –**
> **(c) make any gift, loan, offer, promise, procurement or agreement to or for the benefit of any person in order to induce the person to procure or to endeavor to procure the return of any candidate at any election or the vote of any voter at any election.**

The above section prohibits, among others, the giving or procurement of gifts by any person in order to obtain the vote of a voter in an election. In this case, the 1st Respondent alleged that the Appellant procured the sinking of two boreholes in the State Lodge area so that voters in the area could vote for her. The evidence in support of the allegation was adduced by the 1st

Respondent and PW2. The 1st Respondent did not witness the sinking of the borcholes. However, she said PW2 informed her of the sinking and commissioning of the boreholes and further that members of the community told her that they would vote for the Appellant because of the boreholes. She alleged that the Appellant used the boreholes to her advantage in her campaign. The 1st Respondent conceded that making campaign promises is not illegal.

The evidence of PW2, Stephen Mafunga, a UPND official, was that on a date towards the end of June, 2016 he found youths in PF regalia clearing a bush in the State Lodge area. They informed him that a borehole was to be sunk at that site. The first borehole was drilled on 10th July, 2016 while the second one was drilled on 18th July, 2016. PW2 identified two young men in the public gallery in Court as Musonda and Zayelo who were among the PF youths who cleared the bush.

PW2 asserted that after the boreholes were drilled and put in use, he heard the Appellant whilst campaigning in the State Lodge area in July 2016 inform the electorate through a public address system that she had procured the two boreholes for them and that

they should vote for her. PW2 denied that he informed the 1st Respondent about the drilling of the two boreholes in the State Lodge area as alleged by the 1st Respondent. He conceded that he was not aware that the two boreholes were drilled by the Muslim community or that their progamme to sink boreholes was nation-wide. PW2 said that he pointed out the two young men in Court because they were active in campaigning for the Appellant.

The evidence in rebuttal regarding the sinking of the boreholes was given by RW2, RW3 and the Appellant. RW2, Dr. Charles Msiska, the District Medical Officer for Chongwe, testified that following an outbreak of cholera in some areas of Lusaka, including Bauleni, in January 2016, a provincial committee decided to sink boreholes in Bauleni and at State Lodge area. They identified the Appellant to work with them as they had previously worked with her when they constructed a clinic and school in Nachitete area. RW2 said he therefore wrote a letter to the Appellant on 24th March, 2016. He said the boreholes were drilled by a drilling company engaged by the Muslim Welfare Trust on 26th and 29th May, 2016.

He also said the Appellant did not make any monetary contribution to the drilling of the boreholes.

RW3 Mubasshir Mehta's evidence was that he was a Coordinator at the Muslim Social and Welfare Trust which undertakes projects for the provision of clean and safe water and helps health institutions in Zambia. In early May, 2016, RW2 informed him about the need for a borehole to be sunk in the State Lodge area. He visited the area and decided that two boreholes were needed instead of the one that was requested for. He mobilized resources from donors and the first borehole was drilled by the Muslim Society on 28th May, 2016 while the second one was drilled on 29th May, 2016. The sites were cleared by the community. RW3 denied that the boreholes were sunk on 8th and 18th June, 2016. He further said that he did not know the Appellant at the time the boreholes were drilled and that he first met her in September, 2016. He conceded that he would not know if PF youths were involved in clearing the borehole site.

The Appellant testified that the two boreholes were sunk by the Muslim Society under the Muslim Welfare Trust on 28th and

29th May, 2016. She denied that the boreholes were sunk on 10th and 18th July, 2016 as alleged by PW2. She further denied that she commissioned the boreholes or that she took advantage of the sinking of the boreholes in her campaign. She said her campaign promises regarding water were futuristic.

The trial Judge reviewed the evidence and found as a fact that the evidence did not clearly demonstrate the Appellant's role in the drilling of the boreholes and that the Appellant did not donate or finance the drilling of the two boreholes. The trial Judge, however, held that the Appellant was linked to the boreholes by the letter written to her by RW2 asking her to help identify two sites for the boreholes to be sunk in State Lodge area and Bauleni Compound. He stated that the Appellant's friends helped her by drilling the boreholes close to the polling day and she confirmed her personal involvement in the project when she spoke passionately about the need to resolve the water problem in Bauleni on the Race to Manda Hill programme in a quest to endear herself to the voters and to enhance her prospects of being elected and when she wrote about commissioning the boreholes on her facebook page.

The lower Court found that the involvement of the two youths identified by PW2 in the clearing of the sites confirmed that the Appellant helped to identify the sites as requested by RW2 and mobilized the PF youths to clear the sites. The trial Judge found that the drilling of the boreholes was a corrupt act committed by the Appellant's friends with her full knowledge and consent, which act prevented the majority of the voters from electing a candidate of their choice. After citing the case of **Leonard Banda v Dora Siliya**,[18] the lower Court stated that an election will be nullified under section 97 (2) (a) (ii) even though a malpractice is committed by someone else so long as the candidate or his election agent was aware of it and approved of it. The Court held for that reason that the allegation was proved.

In arguing this appeal, the Appellant submitted that since the Court found that the Appellant did not donate or finance the boreholes and that the persons who donated the boreholes to the community were not her election agents, the lower Court was wrong to hold that the Appellant committed a corrupt act. The Appellant further submitted that the drilling of the boreholes was a

philanthropic act which benefited the entire community and that even if it were to be considered a corrupt or illegal act, evidence should have been led regarding the number of voters in the State Lodge area who were swayed from electing their preferred candidate. The Appellant contended that that was not done and therefore the allegation was not proved.

The 1st Respondent on the other hand, submitted that the trial Judge was right to find that the Appellant was aware of and consented to the sinking of the boreholes as evidenced by the letter from RW2. She contended that the sinking of the boreholes was not a philanthropic activity because the Appellant associated herself with the borehole project in order to enhance her chances of being elected. That her comments on the Race to Manda Hill programme and her posting on her face book page attested to the fact that the Appellant campaigned on the back of the boreholes as alleged by PW2.

Regarding whether or not the sinking of the boreholes had a widespread effect, the 1st Respondent invited us to consider the evidence that Bauleni compound where the boreholes were sunk

has the largest number of voters in the whole constituency and that the Appellant used the boreholes to campaign to a larger audience on the ZNBC "Race to Manda Hill" programme and on her face book page with a following of more than 17,000 people.

The 1st Respondent thus argued that the trial Judge was right to hold that the majority of the voters were affected by the sinking of the boreholes because, under section 97 (2) (a) (ii) of the Act, the burden of proof is satisfied by the petitioner merely demonstrating that the majority of voters may have been prevented from electing a candidate of their choice due to the conduct complained of.

The 1st Respondent further contended that under section 97 (3) of the Act, the Court can nullify an election based on a single act of corruption as there is no requirement under that section that the corrupt or illegal act should affect the majority of voters in the constituency for an election to be nullified.

We have considered the above submissions. We note that the allegation in paragraph 8 of the petition was that the Appellant resolved the long standing water problem in the State Lodge area by having two boreholes sunk during the campaign period, that she

commissioned the boreholes and campaigned to the people during the event promising that if they voted for her, she would continue the works she was already doing.

The evidence on record however, proved that the boreholes were drilled by the Muslim Welfare Society and that the Appellant did not procure the drilling of the two boreholes. No evidence was led to prove that the Appellant commissioned the boreholes.

A careful examination of the letter which was written to the Appellant by RW2, Dr. Msiska, which letter is exhibited at pages 131 to 132 of the record of appeal revealed that the sinking of the boreholes arose from a need to improve water and sanitation in the State Lodge and Bauleni areas in the wake of a cholera outbreak in Lusaka Province in February, 2016. This was a nationwide programme according to paragraph 5 of the letter on page 131 of the record of appeal which reads:

> **"Chongwe District has been working in collaboration with the Muslim Welfare Society to install Bore Holes not only in Lusaka Province but in other provinces where there is been need.(sic) The Bore Holes have been installed at Public Institutions like Schools, Clinics, Hospitals and also in the Community."** (Emphasis added).

The reason the Appellant was approached by RW2 regarding the boreholes is clearly explained in the second paragraph of the letter at page 132 of the record, which reads:

> **"We have opted to approach you having worked with you and observed your enthusiasm in creating health awareness and demand for health services in Nachitete which has led into the construction of Nachitete Health Post."**

The boreholes were meant "to improve the well-being of the people" in State Lodge and Bauleni as stated in the last paragraph of the letter at page 132 of the record of appeal. The sinking of the boreholes was therefore intended as a philanthropic activity, which fact did not change by their subsequent drilling during the campaign period.

It is significant to note that the Appellant was not a candidate in any election in March, 2016 when the letter was written to her nor had she been adopted by the PF party as their candidate for Lusaka Central Constituency. This fact was acknowledged by the trial Judge in his judgment at page 70 of the record of appeal when he said:

> **"The fact that she had not yet been officially nominated as a candidate did not diminish her interest as she was hoping to be adopted by her party and officially nominated...."**

The lower Court's findings that the Appellant was personally involved in the drilling of the boreholes and that the boreholes were drilled by her friends are not supported by the evidence on record. The Muslim Welfare Trust were not the Appellant's friends as RW3 clearly said he did not know the Appellant at the time the boreholes were drilled and only met her in September 2016. This evidence was not discredited in cross-examination. Further, there was no evidence that the two PF youths Musonda and Zayelo, who were identified by PW2 in Court and whom he alleged participated in clearing the site for the borehole in State Lodge, were the Appellant's election agents or that they did so with the Appellant's knowledge and consent. There is further no evidence that the Appellant mobilised PF youths to clear the site as stated by the lower Court in his judgment at page 71 of the record. It is settled law that not everyone in a candidate's political party is his election agent as an election agent has to be specifically appointed in terms of the law. Section 2 of the Act defines an election agent as:

> **"a person appointed as an agent of a candidate for the purpose of an election and who is specified in the candidate's nomination paper."**

A candidate is responsible only for illegal or corrupt acts or other misconduct which the candidate commits or which are committed with the candidate's knowledge and consent or approval or that of his election agent. In **Lewanika and Others v Chiluba**,[14] the Supreme Court observed thus:

> **"We are mindful of the provisions of the Electoral Act that a candidate is only answerable to 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 political agent since under regulation 67, an election agent has to be specifically so appointed."**

We agree with these observations.

The lower Court accepted the evidence of PW2 that he heard the Appellant ask the voters in State Lodge area to vote for her as she had procured the boreholes for them. PW2 was a partisan witness as he was an official in the UPND party. His evidence therefore required to be corroborated as a matter of law as he was a witness with a possible interest to serve. No corroborating evidence however was adduced by the 1st Respondent as we have not seen any such evidence on the record of appeal. In our view, the evidence of RW2 and RW3 was independent evidence regarding the date of sinking of the boreholes and yet the lower Court rejected the evidence on the ground that they were not eye witnesses to the

sinking of the boreholes. And further that the Appellant did not produce a borehole completion report. We are perplexed to note that the trial Judge accepted the evidence of RW2 and RW3 that the two boreholes were drilled by the Muslim Welfare Society and yet he rejected their testimony regarding the dates when they were drilled.

Having carefully examined the evidence on record, we observe that the drilling of the boreholes by the Muslim society to improve the water and sanitation situation for the benefit of the people of Bauleni and State Lodge area was not a corrupt act as held by the lower Court. The finding that the act of drilling the boreholes in State Lodge area and Bauleni was a corrupt act done by the friends of the Appellant with her knowledge and consent is not supported by the evidence on record. As the trial Judge clearly stated in his judgment at page 69 of the record that the evidence did not clearly demonstrate what role the Appellant played in the drilling of the boreholes, the allegation that she donated the boreholes was not proven to the requisite standard in terms of the requirements of section 97 (2) (a) of the Act. We accordingly reverse the trial Judge's finding that the allegation was proved.

Turning to the allegation of bribery regarding the purchase of chitenge materials, the evidence was given on behalf of the 1st Respondent by PW3 Victoria Chipende a UPND member and an employee of the 1st Respondent. She testified that on a date she could not recall in June or July, 2016 she attended the 07:00 hours Sunday mass at St. Matthias Mulumba Catholic Church in Bauleni Compound. As she left the church at the end of the service, she saw people scrambling for chitenge materials which were meant for fundraising by the church. PW3 alleged that the Appellant had bought about 200 pieces of chitenge which she was distributing to the public and that she heard her assure the crowd, when the chitenge material ran out, that she would buy some more. PW3, however, conceded that she did not see the Appellant buy 200 pieces of chitenge materials and further that she did not see her pay for the chitenge material.

The evidence in rebuttal was adduced by the Appellant and RW4. The Appellant testified that she attended the 09.00 hours service at St. Matthias Mulumba Catholic Church with her entourage on 12th June, 2016 at the invitation of the parish priest

to participate in the unveiling of the chitenge material to be used on 26th June, 2016 in commemoration of the Saint Matthias Mulumba day. The chitenge was unveiled towards the end of the service. After the service, women in her entourage requested her to buy them the chitenge for the celebrations.

She bought twenty pieces of chitenge, distributed twelve to her entourage and remained with eight. She denied that she bought two hundred pieces of chitenge and distributed it to the women at the church after the 07:00 hours mass as alleged by PW3. She further denied assuring the women that she would buy them more chitenge pieces. She stated that it would have been against protocol for her to have engaged the women of the church before she was formally received by her host, the parish priest. She further said the church had only bought three thousand five hundred metres of chitenge material and that only 35 x 2 metre pieces were cut out by the church on that day. The rest were sent out to the sections. She said she got this information from the church chairman.

The Appellant conceded that she distributed some of the chitenge materials to her entourage on 12th June, 2016 during the campaign period.

RW4, Ireen Kasonde, a PF member testified that on 12th June 2016 she attended the 09.00 hours mass at Matthias Mulumba Catholic Church with the Appellant. After the service, the women in the Appellant's entourage requested the Appellant to buy for them the chitenge material which had been launched by the church for the St. Matthias Mulumba celebration. The Appellant bought twenty (20) pieces of the chitenge material and gave some to members of her entourage before she left.

RW4 denied that the Appellant bought two hundred (200) pieces of chitenge material and distributed them to the women in the church premises before mass commenced. She admitted that there was chitenge material on sale in the church grounds when she arrived before the 09:00 hours mass commenced although she did not specify the specific chitenge material on sale.

The trial Judge considered the evidence and held that the purchase of the chitenge by the Appellant within the church

premises was not disputed. That what was disputed was the number of pieces purchased as PW3 alleged that the Appellant purchased about 200 pieces while the Appellant said she bought only 20 pieces at the request of members of her entourage after the 09.00 hours mass.

The trial Court accepted PW3's evidence and dismissed the Appellant and RW4's evidence. The lower Court said RW4's testimony that the chitenge material was being sold before the second service started corroborated PW3's testimony that she found a commotion outside the church after the first service as women jostled for chitenges. The learned trial Judge dismissed the Appellant's assertion that she could not have engaged the women before her host, the parish priest, officially received her, because in the trial Judge's view, there was nothing to stop her from doing so since she was a politician.

The lower Court found as a fact that the number of chitenge materials the Appellant bought was unknown but that the Appellant did buy some chitenge pieces; that she distributed them in full view of the congregants, thereby making it a public donation

and not a philanthropic act. That since this happened in the campaign period, in a densely populated part of the constituency, it was an act of inducement proscribed by the Act. He held that the act was an illegality committed by the Appellant and that it fell within section 97 (2) (a) of the Act.

We have considered the evidence on record on this issue. We note that PW3 was not present when the Appellant allegedly bought the chitenge as she said she came out of the church only to find women scrambling for the chitenge pieces. She admitted that she was not certain that the number of chitenge pieces the Appellant allegedly bought was 200 pieces. As PW3 was not an eye witness to the alleged purchase of chitenge, there was need for the 1st Respondent to have adduced cogent evidence to support the assertion that 200 pieces of chitenge were bought. Further, no independent evidence was adduced from any of the women who allegedly received the chitenge pieces to corroborate the evidence of PW3. The reason stated by the lower Court for choosing to believe the version of events given by PW3 who was not only partisan but also an employee of the 1st Respondent was that there was nothing

to stop the Appellant from engaging the women in the church grounds and purchasing chitenge materials for them, as it were, because she was a politician. That reason was clearly not based on the evidence before the lower Court.

The lower Court therefore took extraneous matters into account in accepting PW3's evidence. Further, since PW3's evidence was not corroborated, the evidence clearly did not meet the high standard required to prove the allegation in terms of section 97 (2) (a) of the Act. We also note that the lower Court found that the Appellant committed an illegal act in terms of section 97 (2) (a) by purchasing 20 pieces of chitenge and distributing 12 pieces to members of her own entourage because it was done in full view of the public. This reasoning was clearly faulty as there is no law against a candidate giving a gift of that nature which was for a specific event to members of her own team. We do not see how the purchase of chitenge material for the Appellant's team could be an inducement to voters in those circumstances as no independent witness testified to that effect. There was also no evidence to support a finding that the purchase of the chitenge materials

influenced or may have influenced the voters from voting for the 1st Respondent. As the Appellant submitted, and we agree with her, if indeed 200 people benefited from the purchase of the chitenge as alleged by RW3, evidence should have been led to show how that number affected the outcome of the election.

In the absence of supporting evidence to that effect, we cannot support the lower Court's finding that the purchase of chitenge for her entourage by the Appellant was an act of inducement falling within the ambit of section 81 (1) (c) of the Act or that it influenced the voters from choosing their preferred candidate so as to warrant nullifying the election. In the circumstances, the findings were at odds with the evidence on record and we accordingly reverse them.

Regarding the cash donation of K6,400.00 for 100 pockets of cement, the 1st Respondent testified that the Appellant made the donation of 100 pockets of cement to the Word of Life Church congregation towards the construction of the church building during the campaign period. No other witness testified on behalf of the 1st Respondent regarding the donation of K6,400.00 cash.

RW1, the Pastor of the Word of Life Church, testified in rebuttal that the cash donation of K6,400 was made by the Appellant on 8th May, 2016 and not during the campaign period as alleged by the 1st Respondent.

The trial Judge found as a fact that the donation was made on 8th May, 2016 which was outside the campaign period and further that the Appellant had not yet been adopted as a candidate at that time. However, he stated that his task was to determine whether illegal practices committed outside the official campaign period can affect the election. The trial Judge held that the Appellant made the donation with elections in mind to induce the congregants to vote for her. That since 8th May, 2016, was just a few days before the dissolution of Parliament when the official campaign period would commence, the act satisfied the requirements of section 97 (2) (a) of the Act.

The Appellant has contended that the lower Court misdirected itself in finding that the act was within section 97 (2) (a) because section 97 (2) (a) of the Act applies to candidates or their election agents. That in this case, the Appellant had not been adopted by

her party nor was she a candidate for any election as defined by section 2 of the Act.

The Appellant submitted with regard to the alleged corrupt act that the petitioner was required to demonstrate that the act complained of prevented or may have prevented voters from voting for their preferred candidate. That in this case, no evidence was adduced regarding the number of congregants who witnessed the donation of K6,400 for the purchase of cement. That the lower Court made no effort to find that the act was widespread due to his reliance on the case of **Michael Mabenga v Sikota Wina and Others**[4] which is no longer good law after the repeal of section 93 (2) of the Electoral Act of 2006.

To start with, we wish to reiterate that an election will be nullified under section 97 (2) (a) of the Act where cogent evidence is provided to show that a candidate or the candidate's election or polling agent committed an electoral offence or that the offence was committed with their knowledge and consent or approval. Further, that the offence prevented the electorate from choosing a candidate of their choice. In this case, the donation of money for cement was

made before the commencement of the campaign period. It therefore could not be an inducement for voters or an electoral offence in terms of section 81 (c) of the Act and was therefore not proved in terms of section 97 (2) (a).

Regarding whether or not the alleged bribery allegations had a widespread effect, we note that the 1st Respondent did not adduce any evidence to prove that that was the case. We find that in the absence of evidence as to the widespread nature of the alleged acts of bribery, all the allegations of bribery were not proven to the required standard in terms of section 97 (2) (a) of the Act. Grounds two, three, four and seven therefore succeed and are upheld.

In grounds five, six and eleven, the Appellant challenges the lower Court's findings that the acts of violence fell within section 97 (2) (b) of the Act so that the election was not conducted in substantial conformity with the Act; that the acts of violence were widespread and affected the outcome of the elections; and that violence by unidentified cadres amounted to non-compliance with the principles for the conduct of elections and warranted nullifying the election. The Appellant submitted that the lower Court was

wrong to consider matters which were not pleaded and cited the case of **Mazoka and others v Mwanawasa and others**[10] wherein the Supreme Court stated that pleadings give fair notice of the case to be met and define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties. That once pleadings are closed, the parties are bound by their pleadings and the Court must adhere to them as such.

In support of the allegations of violence, the 1st Respondent said the first incident occurred when she and her team went to the town centre to campaign. They were confronted by aggressive youths clad in PF regalia and were forced to abandon their campaign.

The second attack occurred when they were distributing UPND campaign materials in the town centre. They were attacked and two of the team's motor vehicles were damaged in the incident. A member of her team was nearly stabbed with a screw driver and so the team abandoned their campaign.

The 1st Respondent conceded that she did not know any of the youths who attacked her campaign team and that the Appellant was not present on both occasions.

PW5's testimony was that on the second occasion, he was with the 1st Respondent on a campaign trail in the town centre in a convoy of motor vehicles. They were suddenly confronted by a group of young men clad in PF regalia who came in two mini buses. One youth approached the Land Cruiser and attempted to stab him with a screw driver but missed him. The men smashed the rear windscreen of the Land cruiser with stones. The matter was reported to the police. PW5 conceded that the Appellant was not present when they were attacked.

The Appellant, on the other hand, denied that she or any member of her team was involved in any act of violence. She explained that she was at the Trade Fair in Ndola on 4th July, 2016 when the 1st Respondent's campaign team was allegedly attacked in the town centre.

The learned trial Judge found as a fact that the Appellant and her agents were not responsible for the violence and that she was

out of town on the date of the second attack which was more serious than the first. Nonetheless, the trial Judge held that the allegation fell to be considered under section 97 (2) (b) of the Act, and not section 97 (2) (a) because, in his view, it spoke to the general conduct of the election regarding compliance or non-compliance with specific provisions of the Act.

The trial Judge cited clause 4 (2) (d) of the Code of Conduct which prohibits a member or supporter of a political party or a candidate from disrupting another political party's meeting or rally and stated that the provision of the Code is meant to ensure a free and level playing field for all political parties. The lower Court held that:

> **"... any act by supporters of a political party intended to prevent members of another political party from exercising their right to solicit for votes from the general public, offends against the spirit of section 97 (2) (b) of the Act."**

He reiterated that the candidate against whom the petition is brought need not be involved or have knowledge of such actions by a political party and stated that the subsection is not concerned with who the actual perpetrator is but whether or not the election was conducted in accordance with the principles in the cited

provisions of the Act. He concluded that the allegation had succeeded.

The Appellant has submitted that the lower Court abandoned the allegation on violence in the amended petition and substituted his own allegation when he considered the allegation under section 97 (2) (b) of the Act. The Appellant contended that there was no allegation at trial that the violence amounted to non-compliance with electoral rules and that the lower Court was not entitled to go beyond the matters pleaded by the parties.

The Appellant argued that the principles referred to in section 97 (2) (b) of the Act are those found in section 3 of the Act which dictate how the ECZ is to conduct elections. The Appellant urged us to set aside the issues introduced by the lower Court in relation to the allegation on violence.

The 1st Respondent endorsed the lower Court's approach regarding the allegation of violence and contended that the interpretation given by the lower Court to section 97 (2) (b) was correct in the circumstances. She argued that the learned trial Judge was not precluded from considering the facts before him

against the law contained in section 97 (2) (b) although, as it turned out, the violence was not attributed to the Appellant as alleged in the pleadings.

We have duly considered the above submissions.

In considering grounds five, six and eleven, we note that the 1st Respondent's allegation in paragraph 12 of the amended petition set out on pages 97 to 106 of the record of appeal reads as follows:

> **"12. Your Petitioner also states that on 4th June, 2016 whilst doing door to door campaigns, the Petitioner's campaign team was attacked by the Patriotic Front (PF) cadres at town centre. Further, in the same occurrences of the events the Petitioner's Land cruiser was damaged and one of the Petitioner's party member was stabbed (sic) with a screw driver in the aforementioned attacks."**

The manner in which the above allegation was pleaded does not suggest that there was non-compliance with the provisions of the law in the conduct of elections. As we stated under ground one, section 97 (2) (b) of the Act which the lower Court applied in determining the allegation on violence relates to the conduct of elections by the Electoral Commission of Zambia.

Since the lower Court found that the allegation relating to violence fell to be determined under section 97 (2) (b) of the Act, the question we have to consider is, did the 1st Respondent's evidence

prove to the required standard that there was widespread violence in the Constituency during the campaign period, which violence affected the conduct of elections by the ECZ and ultimately the result of the election to justify the nullification of the election? To answer that question, we have carefully examined the evidence on record on the issue of violence. We note that the 1st Respondent's evidence reveals that there were two incidents of violence which were confined to the town centre. That the violence was quickly brought to an end and did not escalate beyond the town centre because the 1st Respondent and her team immediately abandoned their planned campaign and left the town centre. There is no cogent evidence on record that the two incidents of violence in the town centre had a widespread effect or that they affected the result of the election. Nor did the evidence link the Appellant or her agents to the alleged violence.

As a Court, we repeat our strong disapproval of violence as we have previously done, regardless of who the perpetrator is. In this case, however the 1st Respondent did not prove that the violence was widespread, as we have already said.

We, therefore, reverse the lower Court's finding that the allegation of violence was proved to the requisite standard of convincing clarity in accordance with section 97 (2) (b) of the Act. Grounds five, six and eleven of the appeal therefore succeed.

In ground eight, the Appellant attacks the learned trial Judge's finding that the statements by the Appellant that she was a Zambian born at the University Teaching Hospital and understood the Zambian culture amounted to racial discrimination. The 1st Respondent and PW4 testified in support of the allegation that the Appellant used racist arguments and uttered racist statements against the 1st Respondent.

In the main, the 1st Respondent alleged that the Appellant's remarks on the "Race to Manda Hill" programme on ZNBC television that she was a Zambian born at the University Teaching Hospital (UTH) where her umbilical cord was buried, that she understood the Zambian culture and that the electorate wanted their own person who would understand them were meant to inform the viewers that she (1st Respondent) was not a proper Zambian as her umbilical cord was not buried in Zambia.

PW4 on the other hand, testified that he heard the Appellant say during her campaign in Bauleni that the 1st Respondent was a white person who would not do anything just as the previous Member of Parliament who was white had failed to do anything. He further alleged that the Appellant said she was one of them as she was born at the UTH.

In rebuttal, the Appellant denied that her remarks that she was born at the UTH and that her umbilical cord was at the UTH were racist or discriminatory against the 1st Respondent.

The trial Judge analysed the evidence and stated that the words which were alleged to be discriminatory and racial and attributed to the Appellant on the televised programme, "Race to Manda Hill" were not disputed. That what was disputed was whether or not she made similar remarks during a campaign meeting in Bauleni and whether or not the words had a racial connotation.

The trial Judge stated that the issue to be determined was not what the Appellant intended to convey to the electorate by those words but what an ordinary person who watched the television

programme or heard the utterances would understand the words to mean.

The trial Judge held that the remarks targeted the 1st Respondent and were intended to appeal directly to the electorate against the 1st Respondent who failed the indigenous test as espoused by the Appellant. That the remarks appealed to the voters' sense of indigenousness rather than to the attributes that qualify a candidate for office as Member of Parliament.

The lower Court held that this offended clause 15 (1) (m) of the Code of Conduct and therefore fell within the contemplation of section 97 (2) (a) of the Act for which an election was liable to be voided. The trial Judge stated that in view of his observations, the Appellant was placed in a position where she would have no difficulties in using similar language in her campaigns within the Constituency. He, therefore, accepted PW4's evidence that the Appellant and her agents uttered racially discriminatory remarks during a campaign rally in Bauleni. He added that PW4's testimony was corroborated by the televised broadcast. He therefore found that the allegation was proved.

In considering this ground of appeal, the issue we have to determine is whether the lower Court was right in finding that the Appellant's comments on the television programme were racial and discriminatory against the 1st Respondent. We are alive to the plethora of authorities that guide appellate Courts on the parameters within which findings of fact made by a trial Judge must be dealt with. In **Examination Council of Zambia v. Reliance Technology Limited**[19] which we cited with approval in the case of **Sibongile Mwamba v Kelvin M. Sampa and Electoral Commission of Zambia**[20], the Supreme Court held that an appellate Court will not lightly interfere with findings of fact of the trial Judge who had the benefit of seeing and evaluating the witnesses unless it is shown that the findings of fact were either perverse or were made in the absence of any relevant evidence or were premised on a misapprehension of the facts.

As the lower Court found that the key evidence in support of the allegations was the Appellant's statements during the "Race to Manda Hill" television programme, we took time to view the DVD which was produced by the 1st Respondent before the lower Court

and was availed to us as part of the record of appeal. We note that the Appellant first referred to her birth place in her introductory statements at the beginning of the programme in response to the moderator's invitation to her to introduce herself and state where she was born as other aspiring candidates on the programme had done before her. Her response was that she was born and bred in Lusaka. She added in Chibemba language that her umbilical cord was at UTH. The second time she referred to her birth place was in response to the question, "understanding the demographics of the voters of Lusaka Central Constituency, why should the residents of Lusaka Central Constituency vote for you?" This question was asked by the moderator of the programme to all the five candidates. The Appellant then said, among other things, that she was a Zambian born at the UTH and understood the Zambian culture.

Given the context in which the words were spoken and having heard her full response to the question asked, we do not agree that the words spoken by the Appellant had racial under tones or that they were discriminatory against the 1st Respondent. To borrow the trial Judge's words there was nothing sinister in the words the

Appellant spoke regarding her place of birth on both occasions. Neither do we find that the words were targeted at the 1st Respondent as the order in which the candidates spoke on the television programme was determined by the moderator.

In making a finding in favour of the 1st Respondent in relation to this allegation, the lower Court ought to have determined whether the uttering of the alleged racial and discriminatory remarks by the Appellant amounted to misconduct in terms of section 97 (2) (a) of the Act and if so, whether the remarks were so widespread that they influenced the electorate or may have influenced the electorate in the Constituency from voting for a candidate of their choice.

The lower Court, however, did not make any such connection between section 97 (2) (a) of the Act and clause 15 (1) (m) of the Code of Conduct. Further, since the lower Court said the issue was not what message the Appellant meant to convey by her words, but what she was understood to mean by an ordinary person who watched the programme and heard the utterances, in order for the Court to have got the answer to that question, there was need for

the 1st Respondent to have adduced evidence from independent witnesses that they heard the Appellant's remarks on the programme, that they understood the words to have been directed at the 1st Respondent and further, that they were swayed from voting for the 1st Respondent and voted instead for the Appellant because of her utterances.

Considering that the standard of proof in election petitions is above the balance of probabilities, it was incumbent upon the 1st Respondent to prove her allegations against the Appellant to that high standard. That she did not do. Instead, the lower Court resorted to making assumptions in order to fill out the gaps in the evidence in support of the allegation. The trial Judge stated with regard to RW4's evidence that the Appellant uttered racial remarks at the rally, that the Appellant was prone to do so because of her comments on the television programme. That approach was erroneous as by assuming that the Appellant repeated the alleged racial remarks, at the rally, the lower Court absolved the 1st Respondent of the burden to prove her case against the Appellant to the required standard. Further, PW4 whose evidence the lower

Court chose to believe was a partisan witness whose evidence required corroborating evidence to support it. In taking this position, we rely on the persuasive criminal case of **Boniface Chanda Chola and two others v The People** [21] wherein it was stated that:

> **"The critical consideration is not whether the witnesses did in fact have interests or purposes of their own to serve, but whether they were witnesses who, because of the category into which they fell or because of the particular circumstances of the case, may have had a motive to give false evidence."**

In this case, the lower Court found that the evidence of PW4 was corroborated by the televised broadcast. Having reviewed the evidence on this allegation in total, our view is that the allegation that the Appellant used racial arguments on the ZNBC Race to Manda Hill programme is not supported by the video or any other evidence on record. In our view, the evidence adduced fell far short of the requirements of section 97 (2) (a) of the Act as the 1st Respondent did not prove the commission of an electoral offence by the Appellant or her election agents or with their consent and

approval in relation to the remarks. Further, there was no evidence that the alleged offence had a widespread effect.

We accordingly reverse the lower Court's finding that the Appellant made racial remarks against the 1st Respondent during her campaign as it is not supported by any evidence on record to that effect. Ground eight of the appeal is meritorious and therefore succeeds.

In ground nine, the Appellant impugns the lower Court's finding that by her continued stay in office as Minister of Commerce, Trade and Industry, the Appellant abused Government resources during the campaign period and that the abuse of Government resources materially affected the result of the election. The issue we have to determine under this ground is whether the 1st Respondent proved the allegation to the required standard under section 97 (2) (a) of the Act.

In her evidence in support of the allegation, the 1st Respondent said that during the campaign period, the Appellant was presenting herself to the electorate as a Minister in contravention of the Constitution and thereby creating a perception in the electorate's

mind that she was a Minister. That the Appellant associated her ministerial position to the campaign on her Facebook page which was being constantly updated with the Appellant's current activities and her campaign programmes. She further said the Appellant used Government resources in her campaign. One incident she cited was that on the day of the recording of the Race to Manda Hill programme at the Mass Media Complex, the Appellant used a motor vehicle bearing a GRZ number and flying the Zambian flag as a Cabinet Minister. That she also introduced herself on the programme as the Minister of Commerce, Trade and Industry. The 1st Respondent said the status gave her undue advantage in her campaign.

She conceded that she did not know whether the vehicle the Appellant used during her campaign was offered to her by the Ministry of Works and Supply but said the vehicle flew the Zambian flag. The 1st Respondent insisted that the Appellant was not entitled to use a GRZ vehicle flying the flag as she was not a Minister at that time.

The Appellant denied using Government resources in her campaign and produced a receipt for the purchase of the GRZ motor vehicle she used in her campaign and which she said had been offered to her by the Ministry of Works and Supply. She said she paid the full price for the motor vehicle and was only awaiting change of ownership. The Appellant, however, conceded in cross examination at page 442 of the record of appeal that she used a Government pool vehicle to get to ZNBC for the Race to Manda Hill programme.

The trial Judge considered the evidence and said that it was not disputed that Cabinet Ministers and other Ministers remained in office after the dissolution of Parliament. The trial Judge found as a fact that the Appellant used Government transport and facilities during the campaign period as demonstrated by her use of a Government vehicle to attend to a campaign programme Race to Manda Hill. He held that this was a violation of clause 15 (1) (k) of the Code of Conduct which prohibits the use of Government transportation or facilities for campaign purposes except for the

President and Vice-President. He further held that an election could be rendered void pursuant to this provision.

The trial Judge further held that the Appellant's holding of herself out as Minister of Commerce, Trade and Industry during the campaign period was not only illegal but was also influential to the voters. That she used her status to entice voters to vote for her and therefore disadvantaged other candidates and particularly, the 1st Respondent. He cited the case of **Michael Mabenga v Sikota Wina and 2 Others**[4] wherein the Supreme Court upheld the nullification of the Appellant's election for, among other reasons, use of Government transport during campaigns contrary to regulation 7 (1) (i) of the Electoral Code of Conduct 1996.

We have reviewed the evidence on record and the lower Court's judgment on this aspect. Paragraph 15 (1) (k) of the Code of Conduct provides that:

> **"(1) A person shall not-**
>
> **(k) use Government or parastatal transportation or facilities for campaign purposes, except that this paragraph shall not apply to the President and the Vice-President in connection with their respective offices."**

This provision clearly prohibits the use of Government transport and facilities for campaign purposes. In this case, the 1st Respondent alleged that the Appellant was using a Government motor vehicle throughout her campaign. She, however, cited only one incident when she said the Appellant used a Government motor vehicle with a Zambian flag on the day of the recording of the Race to Manda Hill programme.

The Appellant denied that she used a Government motor vehicle throughout her campaign and said the motor vehicle she used was her personal to holder motor vehicle which she purchased from the Ministry of Works and Supply. As we have already observed, she admitted that she used a Government pool vehicle to get to ZNBC for the Race to Manda Hill television programme.

It is settled law that allegations in election petitions must be proven to a higher standard than a balance of probabilities. In this case, the allegation was that the Appellant used a Government motor vehicle throughout her campaign. However, the 1st Respondent only proved the use of the Government vehicle on the day of the Race to Manda Hill programme.

Bearing in mind that section 97 (2) (a) of the Act requires that both the commission of the illegal practice by the candidate or the candidate's election agent or by someone else with their knowledge and consent or approval and the effect of the illegal practice on the electorate, that is, that it prevented or may have prevented the majority of voters from electing their preferred candidate, be proved, the question which we have to consider is, did the 1st Respondent's evidence (as Petitioner) in the lower Court satisfy these two requirements? In other words, did the 1st Respondent's evidence prove that the use of the Government pool vehicle by the Appellant to get to a campaign programme on ZNBC prevented or may have prevented the majority of voters from electing their preferred candidate to warrant the nullification of the election?

Our examination of the 1st Respondent's evidence on record reveals that apart from alleging that the Appellant used a Government motor vehicle to get to ZNBC for the Race to Manda Hill programme, the 1st Respondent did not adduce any evidence to prove that the prohibited act was widespread and affected the result of the election by preventing the majority of the electorate from

electing their preferred candidate and so rendered the election a nullity. Based on the evidence on record, we find that this allegation was not proven to the required high standard of convincing clarity in terms of section 97 (2) (a) of the Act.

Further, the 1st Respondent did not adduce any evidence to prove that the Appellant used Government resources in her campaign. The allegation was therefore not proved.

The finding by the lower Court that the Appellant used the salary she earned from her position as a Cabinet Minister in her campaign was not supported by any evidence. In the circumstances, the findings of fact to which this ground relates cannot stand. We accordingly reverse them. Ground nine has merit and succeeds.

As the Appellant has succeeded in ten of the eleven grounds she raised, the appeal succeeds. We set aside the lower Court's decision to nullify the election and declare that the Appellant, Margaret Dudu Mwanakatwe, was duly elected as Member of Parliament for Lusaka Central Constituency.

Each party shall bear their own costs of this appeal and before the lower Court.

.....
H. Chibomba
PRESIDENT
CONSTITUTIONAL COURT

.....
A.M. Sitali
CONSTITUTIONAL COURT JUDGE

.....
M.S. Mulenga
CONSTITUTIONAL COURT JUDGE

.....
E. Mulembe
CONSTITUTIONAL COURT JUDGE

.....
M. Musaluke
CONSTITUTIONAL COURT JUDGE