IN THE CONSTITUTIONAL COURT OF ZAMBIA **2016/CC/A004**
HOLDEN AT LUSAKA **Appeal No. 2 of 2016**
(*Constitutional Jurisdiction*)

IN THE MATTER OF: **THE LOCAL GOVERNMENT ELECTIONS FOR ITEZHI TEZHI DISTRICT HELD IN ZAMBIA ON THE 11TH AUGUST, 2016**

AND

IN THE MATTER OF: **SECTIONS 83, 89(*1*) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016**

IN THE MATTER OF: **THE LOCAL GOVERNMENT ELECTIONS TRIBUNAL RULES 2016 (STATUTORY INSTRUMENT NO. 60 OF 2016)**

BETWEEN:

GIFT LUYAKO CHILOMBO **APPELLANT**
AND
BITON MANJE HAMALEKE **RESPONDENT**

CORAM: **SITALI, MULONDA AND MUNALULA, JJC ON 21ST NOVEMBER, 2016 AND ON 18TH JANUARY, 2018**

FOR THE APPELLANT: ***Mr. M.H. Haimbe of Malambo & Company***
Mr. Keith Mweemba of Keith Mweemba Advocates
Mr. Gilbert Phiri of PNP Advocates
Mrs. Nchimunya N. Mwenge of Muleza Mwiimbu & Company

FOR THE RESPONDENTS: ***Mr. L. Eyaa and Mr. Jonathan Tembo of KBF and Partners***

J U D G M E N T

Mulonda, JC, delivered the Judgment of the Court

Cases referred to:-

1. **Anderson Kambela Mazoka, Lt General Christon Tembo, Godfrey Kenneth Miyanda v Levy Patrick Mwanawasa, The Electoral Commission of Zambia, The Attorney General (2005) Z.R. 138**
2. **Nkhuwa v Lusaka Tyre Services Limited (1977) Z.R. 43**
3. **Matildah Mutale v Emmanuel Munaile (SCZ Judgment Number 14 of 2007)**

4. **NFC Africa Mining PLC v Techro Zambia Limited (S.C.Z Judgment No. 22 of 2009)**
5. **Michael Mabenga v Sikota Wina, Mafo Wallace Mafiyo and George Samulela SCZ Judgment (2005) Z.R 138**
6. **Webster Chipili v David Nyirenda (SCZ Judgment No. 35 of 2003).**
7. **Dimes v Proprietors of Ground Junction Canal, (1852) House of Lords (3HL) KAS, 759; also in 1852 English Reports, 789**
8. **Steven Katuka and Law Association of Zambia v Attorney-General, Ngosa Simbyakula and 62 others 2016/CC/0011.**
9. **Wilheim Roman Buchman v Attorney General (1994) S.J. 76 (S.C)**
10. **Mususu Kalenga Building Limited v Richmans Money Lenders Enterprises (1999) Z.R. 27**
11. **Glocom Marketing Limited v Contract Haulage Limited 1998/HP/787**
12. **The Attorney-General v Marcus Kampumba Achiume (1983) Z.R. 1.**
13. **Harrington v Siliya and Attorney-General (2011) Z.R. 253 Vol. 2**
14. **Hakainde Hichilema, Geoffrey Bwalya Mwamba v Edgar Chagwa Lungu, Inonge Mutukwa Wina and Attorney-General 2016/CC/31**
15. **Boyd Hamakwembo & Benson Mohammed Ndovu v The People CSZ 1997**
16. **Kambarage Mpundu Kaunda v The People (1990-92) Z.R. 215.**
17. **Nair v Teik [1995] 2 A11 ER 34**

Legislation referred to:

1. **The Constitution (Amendment) Act Number 2 of 2016, Articles 18(9), 269(3)**
2. **The Electoral Process Act Number 35 of 2016, sections, 2(1) 97(2), 98 100(3), 102 (2) (3), 103, 104(1) (2) 105**
3. **The Local Government Elections Tribunal Rules Statutory Instrument No. 35 of 2016, rules 9, 11, 13(5) (6), 15, 21(1) (2) (6)**

Works referred to:

1. **O. Hane and Browne, Civil Litigation 12th Edition (London, Thomson Suncet and Maxwell 2005)**
2. **Halsbury's Laws of England, 5th Edition, Volume 37.**

At the hearing of this matter, our sister Justice Sitali sat with us. However, she is currently indisposed and therefore this is a Judgment of the majority.

This is an appeal against the Judgment of the Local Government Elections Tribunal for Itezhi-Tezhi District dated 28th September, 2016. By that Judgment the Tribunal declared the election of the Appellant as Council Chairperson for Itezhi-Tezhi District void pursuant to section 97(2) of the **Electoral Process Act** (hereinafter referred to as the Act).

The facts of this matter are that the Appellant Gift Luyako Chilombo and Francis Lubasi and two others were candidates in the Local Government Elections held on 11th August, 2016 for Itezhi-Tezhi District. The Appellant stood on the United Party for National Development (the UPND) ticket while Francis Lubasi stood on the Patriotic Front (the PF) ticket. The other two candidates stood on the Rainbow Party and the Forum for Democracy and Development (FDD) party tickets, respectively. The Appellant was declared as duly elected Council Chairperson for the Itezhi-Tezhi District with 22,646 votes. Francis Lubasi polled 1,991 votes while the other two candidates shared the remaining votes. After the declaration of the election results, the election of the Appellant was challenged through a petition which was filed in the name of Francis Lubasi but was signed by the

Respondent Biton Manje. The Appellant did not file an answer to the petition.

At the hearing of the matter the Respondent raised two preliminary issues. The first issue was that the matter was statute barred as sixteen (16) days had lapsed between the date of the declaration of the election result and the date of filing the petition contrary to section 100(3) of the Act. The second issue was that the petition which was in Francis Lubasi's name and was signed by Biton Manje was fraudulent as Francis Lubasi died on 27th August, 2016 and yet the petition was filed on 29th August, 2016. The Tribunal considered the first issue regarding whether or not the matter was statute barred and ruled that in terms of section 100(3) of the Act and Article 267 clause 3 of the Constitution, on computation of time, the petition was not statute barred. The Tribunal, however, did not rule on the second issue regarding whether the petition was properly before the Tribunal as it was signed by the Respondent and not the Petitioner, Francis Lubasi, as stipulated by section 100(3) of the Act.

At the trial of the petition, the Respondent as petitioner testified in support of his petition and called six other witnesses.

After the Petitioner closed his case and before the Appellant as Respondent in the Court below could open his case, Mr. Tembo, counsel for the Petitioner, sought the Tribunal's guidance as to whether the Appellant as Respondent could open his case without having filed an answer as ordered by the Tribunal on 21st September, 2016. Mr. Tembo drew the Tribunal's attention to *Rule 11* of the **Local Government Election Tribunal Rules, 2016** which provides that:

> **"The Respondent shall file an answer within seven days of receipt of an election petition"**

It was Mr. Tembo's submission that in proceedings such as those before the Tribunal, a petition and an answer play the role of pleadings and cited the case of **Anderson Kambela Mazoka & others v Levy Mwanawasa**[1] where the Supreme Court observed that:

> **"The function of pleadings, is to give fair notice of the case which has 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. Once the pleadings are closed, the parties are bound by their pleadings and the Court has to take them as such."**

It was counsel's submission that to allow the Respondent to proceed to open his case when no answer had been filed would be unfair and an ambush on the Petitioner. Mr. Tembo further

submitted that the Respondent had had ample time within which to file an answer and that disobeying a court order had consequences. In this respect the case of **Nkhuwa v Lusaka Tyre Services Ltd**[2] was cited where the Supreme Court said that:

> **"The Rules of Court must prima facie be observed and in order to justify a Court in extending the time during which some step in procedure was required to be taken there must be some material on which the Court can exercise its discretion.**
>
> **If the law were otherwise a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation."**

It was submitted that *rule 11* of the Rules was couched in mandatory terms and that since no answer was filed by the Respondent within time that meant the close of the petition. In response, the Respondent applied for extension of time to file an answer stating that he was not familiar with the Tribunal rules.

Mr. Tembo, in reply, while sympathizing with the Respondent stated that the time remaining to hear the petition would not allow for any further extension of time to file an answer and submitted that to do so would result in going beyond 30 days stipulated for concluding the petition. Counsel therefore strongly objected to the application.

The Tribunal in considering the application reviewed the record of proceedings which indicated that the Respondent had been accorded sufficient time within which to file an answer. The Tribunal also stated that under the circumstances of the matter, the time left for concluding the petition as provided for under *rule 23(1)* which rule is mandatory could not allow any further extension and on this basis denied the application.

The Tribunal proceeded to review the evidence adduced by the Respondent as petitioner in the court below and found that the conduct of the Appellant of proposing and encouraging violence through a radio interview that was aired in Itezhi Tezhi and surrounding areas during the campaign period led to the widespread violence that was experienced by PF members. The Tribunal further found that the violence led to a majority of voters in the constituency being prevented from electing their preferred candidate in the district. It went on to declare the election of the Appellant void pursuant to section 97(2) of the Act.

Dissatisfied with the judgment of the Tribunal, the Appellant has appealed to this Court advancing thirteen grounds.

The grounds of Appeal are as follows:-

1. That the Learned Members of the Tribunal misdirected themselves in fact and in law when they entered judgment against the Respondent in the absence of evidence that he was involved in any acts of violence during the campaigns preceding the 11th August, 2016 General Elections.

2. That the Learned Members of the Tribunal misdirected themselves in fact and in law when they did not allow the Respondent to argue his case.

3. The Learned Members of the Tribunal misdirected themselves in fact and in law when they entered judgment against the Respondent without considering the provisions of section 97(2) and (3) of the Electoral Process Act No. 35 of 2016.

4. The Learned Members of the Tribunal misdirected themselves in fact and in law when they attached due weight to the evidence of all the petitioner's witnesses who were witnesses with an interest to serve.

5. The Learned Members of the Tribunal misdirected themselves in fact and in law when they refused an application by the Respondent to have the petition dismissed on the basis that it was not signed by the petitioner therefore fraudulent.

6. The Learned Members of the Tribunal misdirected themselves in fact and in law when they allowed a withdrawal of the petition by the Advocates of petitioner when according to the provisions of Rule 15(2) (b) the Local Government Election Rules 2016 inter alia require that the petition can only be withdrawn by the petitioner who issued it.

7. The Learned Members of the Tribunal misdirected themselves in fact and in law when they allowed the substitution of the petitioner after a petition was withdrawn and then proceeded to hear the substituted petitioner without amending the petition and without giving the Respondent an opportunity to file an answer.

8. The Learned Members of Tribunal misdirected themselves in fact and in law when they denied the Respondent leave to file an Answer to the substituted petition.

9. The Learned Members of the Tribunal misdirected themselves in fact and in law when they allowed viva voce submissions of interlocutory applications from the petitioners Advocates contrary to the provisions of Rule

21(2) of the Local Government Election Rules 2016 which provisions are phrased in mandatory sense.

10. **The Learned Members of the Tribunal misdirected themselves in fact and in law when they proceeded to hear the petition without the payment of security for costs as required by section 102 of the Election Process Act No. 35 of 2016 and Rule 13 of the Local Government Election Rules 2016.**

11. **The Learned Members of the Tribunal misdirected themselves in fact and in law when they allowed the withdrawal of the petition when infact the Notice to withdraw was not served on the Respondent as required by Rule 15(3) of the Local Government Election Rules 2016.**

12. **The Learned Members of the Tribunal misdirected themselves in fact and in law when they did not refer to the Respondent's questions and answers of the petitioners witnesses in their writing and reading of their judgment.**

13. **The Learned Members misdirected themselves in fact and in law when they exhibited were bias throughout the proceedings and should have recused themselves in the interest of justice.**

The Appellant in the Memorandum of Appeal advances thirteen (13) grounds of appeal while the Heads of Argument filed argue out five grounds. We take it that to the extent that the other grounds are not argued, the same have been abandoned and in the circumstances we shall consider the five grounds argued which are as follows:-

1. **"The Tribunal erred in law and fact and was not on firm ground when it allowed a Petition which did not meet the minimum required standards at law and was therefore not properly before the Tribunal.**

2. **The Learned Members of the Tribunal misdirected themselves infact and in law when they allowed viva voce submissions of interlocutory applications from the**

Petitioners Advocates contrary to the provisions of Rule 21(2) of the Local Government Election Rules 2016 which provisions are phrased in mandatory sense.

3. **The Learned Members of the Tribunal misdirected themselves to hear the Petition without payment of security for costs as required by section 102 of the Electoral process Act No. 35 of 2016 and Rule 13 of the Local Government Election Rules 2016.**

4. **The Learned Members of the Tribunal misdirected themselves in fact and in law when they entered Judgment against the Respondent in the absence of evidence that he was directly involved in any acts of violence during the campaigns preceding the 11th August, 2016 General Election.**

5. **The Tribunal misdirected itself when it was clearly partial and biased in its application of the Electoral Process Act and Local Government Tribunal Rules when it ruled that the Appellant could not present his answer to the Petition as he had not filed in an answer and therefore the Petitioner's evidence went unchallenged".**

At the hearing of the appeal, Mrs. Mwange, counsel for the Appellant relied on the Heads of Argument filed on the 1st November, 2016 and the Heads of Argument in reply filed on 17th November, 2016, which she augmented with oral submissions.

On the first ground of appeal, Mrs. Mwange submitted that the Tribunal was not on firm ground when it allowed a defective petition to be heard. It was contended that a petition is a rare form of commencing an action and is used where it is required by statute which statute sets the minimum required standards to be met. It was submitted that the record shows that the petition

was in the name of Francis Lubasi but was signed by the Respondent Biton Manje Hamaleke.

Learned counsel referred the Court to r*ule 9* of the **Local Government Tribunal Rules, 2016** which provides that:-

> **"An election petition filed in under these rules shall be in the form set out in this First Schedule"**

Further reference was made to section 100(*3*) of the Act which provides that:

> **"An election petition shall be signed by the petitioner or by all the petitioners, if more than one, and shall be presented not later than fourteen days after the date on which the result of the election to which it relates is duly declared."**

Learned counsel argued that the above provisions are clear and unambiguous and do not give discretion to the petitioner to file a petition signed by another person, other than the petitioner.

The celebrated case of **Matilda Mutale v Emmanuel Munaile**[3] was cited, where preliminary issues arose as to whether a petition filed into court and not signed by the appellant herself, could be said to be properly before court and whether or not the court could entertain the petition and indeed allow an amendment.

The Supreme Court held inter alia that:-

(1) "A petition is a rare form of bringing proceedings and is used in cases where it is required by statute as rule"

(4) A petitioner is obliged to sign the petition and where there are more than one petitioner, all the petitioners are obliged to sign the petition before presenting it to the Court not later than thirty days after the date on which the result of the election was declared".

Mrs. Mwange submitted that the learned members of the Tribunal misdirected themselves when they allowed the substitution of the petitioner using a defective petition and a viva voce application without following the rules of procedure on withdrawal and amendment of petitions as provided for under *rule 15* of the Rules which stipulates that:-

"A notice of intention to withdraw an election petition shall be lodged with the Secretary ...and served on the Respondent."

Counsel submitted that the respondent did not file or serve any such notice on the appellant to afford him an opportunity to be heard. Counsel further argued that *rule 15* cited above does not give any discretion to the Tribunal to allow a petition to be withdrawn in any other manner, other than in the stipulated manner. It was further argued that the Tribunal fell into error when it allowed a defective petition to be withdrawn and to be amended by cancelling the initial petitioner's name and replacing it with that of the Respondent's.

To reinforce the importance of the Rules, the Court's attention was drawn to the case of **NFC Africa Mining PLC V Techro Zambia Limited**[4] where the Court held that:-

> **".....Rules of the Court are intended to assist in the proper and orderly administration of justice. And as such, they must be strictly followed....."**

It was contended that the use of the word **"shall"** in section 100 (3) of the Act and *rules 9* and *15* of the Rules cited connotes that the requirement for a petitioner to sign the petition as well as the requirement to file a notice of intention to withdraw a petition are mandatory. Mrs. Mwange submitted that the petition that was filed in this matter was defective in content as it was not signed by the petitioner and therefore should not have been entertained. Counsel further argued that the manner in which it was withdrawn was in breach of the law. It was stated that no valid petition was before the Tribunal for determination.

In ground two the Appellant contended that the Tribunal was not on firm ground when it allowed the Respondent's advocates to make interlocutory applications viva voce contrary to *rule 21(1)* and *(2)* of the Rules. *Rule 21(2)* provides that:

"(2) An interlocutory application shall be made in writing and shall state the title of the proceedings and the ground upon which the application is made."

Mrs. Mwange contended that all interlocutory applications that were made should have conformed to *rule 21* including the application to withdraw the petition in ground one as the rule was couched in mandatory terms.

On ground three, Mrs. Mwange contended that the Tribunal misdirected itself in law when it proceeded to hear the petition without payment of security for costs as required by section 102 of the Act and *rule 13* of the Rules, which provide that security for costs be given after presentation of an election petition and where none is tendered to stop any further proceedings.

Learned counsel submitted that the record shows that the petition was heard on the 27th September, 2016 following which an order was issued that security for costs be paid within five days of the order. Learned counsel submitted that the provisions of section 102 of the Act relating to payment of security for costs is clear and unambiguous. The provision it was submitted, makes it mandatory to pay security for costs by the use of the word ***"shall"*** and that this money ought to be paid soon after the

presentation of the election petition, failure to which no proceedings can take place. The Supreme Court case of **NFC Africa Mining Plc v Techpro Zambia Limited**[4] was cited to underscore the mandatory nature of the word ***"shall".*** To further buttress the argument, learned counsel cited the case of **Matilda Mutale v Emmanuel Munaile**[3] in which the Supreme Court held, inter alia, that:

> **(2) The fundamental rule of construction of Acts of Parliament is that they must be construed according to the words expressed in the Acts themselves. If the words of a statute are precise and unambiguous, then no more can be necessary than to expound on those words in the ordinary and natural sense.**

On ground four, learned counsel contended that the Tribunal misdirected itself in fact and in law when it entered Judgment against the Appellant in the absence of evidence that he was directly involved in any acts of violence during the campaigns preceding the 2016 general elections.

In arguing this ground, learned counsel drew our attention to the case of **Michael Mabenga v Sikota Wina, Mato Wallace Mafiyo and George Samulela**[5] where the Supreme Court held that:-

> **"An election petition like any other civil claim depends on the pleadings and the burden of proof is on the challenger to that election to prove to a standard higher than on a mere balance of probability."**

We were further referred to the case of **Anderson Kambela Mazoka, Lt General Christon Tembo, Godfrey Kenneth Miyanda v Levy Patrick Mwanawasa, The Electoral Commission of Zambia and the Attorney General**[1] where it was held that:-

> **"As regards the burden of proof, the evidence adduced must establish the issues to a fairly high degree of convincing clarity".**

And the case of **Webster Chipili v David Nyirenda**[6] where the Supreme Court said that:-

> **"allegations of impropriety attributable to a Respondent in a parliamentary election petition before a High Court Judge required to be proved to a standard higher than a mere balance of probability."**

The learned counsel argued that the record does not show that the evidence of the petitioner met the set standard of proof in election petitions as the Tribunal did not refer to the Respondent's questions and answers of the Appellant's witnesses during cross examination in its writing and reading of its Judgment.

Learned counsel further contended that the Tribunal misapplied section 97(2) of the Act based on which it declared the election void as it could not establish the Appellant's direct involvement in the alleged violence and how exactly it affected the election.

Learned counsel submitted that to establish that the perpetrators of the said violence had the consent or approval of the Appellant, the Tribunal should have addressed itself to the principles of agency and shown in its Judgment that indeed the Appellant had consented or approved of the said acts of violence. Further that the Tribunal ought to have shown how these acts affected the other candidates in the election through the evidence of the Respondent.

Our attention was further drawn to Paragraph 250 of the **Halsbury's Laws of England, (Fifth Edition) volume 37** which provides that:

> **"If there are joint candidates as may happen at Local Government elections, the agents of one would not ..... become the agents of the others, unless it was made clear that an agent was acting on behalf of one candidate only. One candidate does not however become liable for the previously committed acts of an agent of the other where he was not aware of those acts"**

Counsel contended that the Judgment of the Tribunal merely mentions UPND members but does not go a step further to show that it satisfied itself that those members had the consent and approval of the Appellant and acted as his agents.

On ground five, counsel contended that the Tribunal was partial and biased in its application of the Act and the Rules when it

ruled that the Appellant could not file an answer resulting in the Appellant's evidence going unchallenged. Learned Counsel drew the Court's attention to the provisions of Article 18(9) of the Constitution which enjoins courts to give litigants a fair hearing within a reasonable time. Counsel argued that the Tribunal applied the above provision strictly in the Appellant's case concerning the filing of an answer but failed to do so with the Respondent when it received a defective petition, heard interlocutory applications made viva voce and ordered payment of security for costs after the proceedings had concluded.

In augmenting Mrs. Mwange's submissions Mr. Mweemba, co-counsel for the Appellant, submitted that the issue of bias is one not merely confined to an action taken by an adjudicator but is one of perception as well. Learned counsel argued that the appearance of bias alone was sufficient to establish an interest. In this respect, the case of **Dimes v Proprietors of Ground Junction Canal**[7] was cited. Counsel invited us to take judicial notice that the presence of Ms. Mubanga Kalimamukweto, as a member of the Tribunal raised a perception of bias, and was a conflict of interest, as she was part of the Attorney-General's defence team during the presidential petition proceedings of

2016. Mr. Mweemba submitted that there was an apparent conflict of interest demanding recusal of the advocate from the Tribunal. Counsel argued that the **Dimes Case**[7] was on all fours with the present case.

In opposing the appeal, Counsel for the Respondent relied on the heads of argument filed on 11th November, 2016 which they augmented with brief oral submissions. Mr. Eyaa, argued grounds 1, 2 and 4 while Mr. Tembo co-counsel argued grounds 3 and 5. In the written submissions, counsel submitted that the Tribunal was on firm ground in allowing the petition to be heard on the merits and in allowing the petition to be withdrawn in order to substitute Francis Lubasi with Biton Manje as petitioner in line with sections 103 and 104 of the Act.

Counsel drew our attention to the application to raise preliminary issue made by the Appellant before the Tribunal and argued that the only issue raised therein was similar to ground one of the appeal before this Court. It was counsel's submission that the Appellant is indirectly appealing against a ruling of the Tribunal on an interlocutory application contrary to *rule 21(6)* of the Rules.

Counsel argued that the petition was properly before the Tribunal as the provisions of section 103 were followed when the Respondent moved the Tribunal for leave to withdraw the petition and substitute the petitioner in the name of Francis Lubasi (deceased) with that of the Respondent. Our attention was drawn to section 103 of the Act which stipulates that leave of court ought to be obtained before withdrawing a petition, which leave requires that a notice of intention to withdraw the petition is filed prior to obtaining leave.

It was further submitted that section 104(1) of the Act allows the Tribunal to substitute a petitioner at the time that the Tribunal is hearing an application for leave to withdraw the petition notwithstanding the provisions of section 100 of the Act. And that section 104(2) places the substituted petitioner in the same position as the original petitioner. Learned counsel argued that there was nothing irregular in the manner the petition was withdrawn and the subsequent substitution of the petitioner made.

In his oral submissions, Mr. Eyaa, submitted that, the issue of the Petition not being signed by the petitioner was properly dealt with by the Tribunal through its ruling. Counsel stated that in

accordance with *rule 21(6)* of the Rules, an appeal shall not lie against the decision of the Tribunal on an interlocutory application. Mr. Eyaa submitted that since the issue was determined by the Tribunal, there was no further appeal open.

Counsel further argued that the case of **Matilda Mutale v Emmanuel Munaile**[3] which was relied on by the Appellant was distinguishable from the petition at hand as in the **Mutale case**[3], the petitioner did not sign the petition nor was she substituted. Counsel contended that in the petition at hand the Respondent properly made an application under sections 103 and 104 of the Act for withdrawal and substitution respectively which rectified the defect and placed the petition properly before the Tribunal.

In response to ground two, counsel submitted that the issue of allowing viva voce interlocutory applications from the Respondent contrary to *rule 21(2)* of the Rules was not raised before the Tribunal and therefore cannot be raised on appeal.

Counsel went on to submit that the Supreme Court of Zambia in a number of cases has emphasized that a party cannot raise as a ground of appeal in the appellate court any issue which that party had not raised in the Court below. In this regard the Court

was referred to the case of **Wilheim Roman Buchman v Attorney-General**[9] where the Supreme Court refused to consider a matter raised before it that had not been raised by counsel in the lower court. The Court was further referred to the case of **Mususu Kalenga Buildings Limited, Winnie Kalenga v Richmans Money Lenders Enterprises**[10] where the Supreme Court declined to entertain three out of four grounds of appeal on account of them not having been raised in the court below.

In responding to ground three, learned Counsel submitted that the issue of security for costs was equally not raised in the Court below and as such could not be raised as a ground of appeal. Counsel for the respondent relied on submissions made in ground two for his arguments under this ground.

In the alternative, Counsel submitted that security for costs was in fact paid into court as the record shows. Counsel stated that he was aware of the powers vested in the Chief Justice by section 102 of the Act and the provisions of *rule 13* of the Rules that govern security for costs. Counsel argued that section 102(2) of the Act makes it mandatory for the Appellant to pay security for costs but does not require the petitioner to pay immediately after the petition is filed.

Counsel further argued that such security for costs is paid within the time, manner and form as the Chief Justice may prescribe by rules passed under the Act and in the absence of the rules, as the Tribunal or High Court may order. Further, Counsel argued that, *rule 13(5)* of the Rules mandates the Secretary of the Tribunal to notify the petitioner of the amount of costs and the manner in which the costs ought to be paid. In addition *rule 13(6)* of the Rules mandates the petitioner to pay the costs not later than five days after notification by the Secretary.

Counsel contended that the Tribunal on the 27th September, 2016 ordered that security for costs be paid within 5 days, which money was paid within time. Counsel submitted that section 102(3) of the Act can only apply if there is a breach of *rule 13(6)* of the Rules which is not the case. Counsel further submitted that while section 102 requires that security for costs be paid, the late or non-payment thereof cannot be a ground of appeal against a judgment.

The Court's attention was drawn to the case of **Glocom Marketing Limited v Contract Haulage Limited**[11] where Matibini J citing the learned authors O Hare and Browne[2], Civil Litigation 12th Edition at page 359 stated that:

"....an order for security of costs seeks to protect the party in whose favour it is made against being unable to enforce any costs order he may later obtain. The order if complied with will provide the party in whose favour it is made with funds normally held in court available for the payment of any costs the court later awards."

Augmenting ground three, Mr. Tembo co-counsel for the Respondent, argued that the Appellant's argument that the petitioner did not pay security for costs contradicted to the Appellant's reply filed on the 17th of November, 2016 where the Appellant admitted that security for costs was paid. Mr. Tembo submitted that *rule 13(5)* places a duty on the Secretary of the Tribunal to notify the petitioner of the amount of security for costs to be paid as well as the time within which such security for costs must be paid.

In response to ground four, counsel contended that the Tribunal did satisfy itself that the conduct of the Respondent in proposing and encouraging violence during a radio interview on Radio Itezhi-Tezhi led to the widespread violence that was experienced by the PF members. Counsel further argued that the violence witnessed and experienced prevented the majority of voters in the constituency from voting and electing their preferred candidate.

In support of the Tribunal's finding counsel cited the case of **Marcus Kampumba Achiume[12],** where the Supreme Court held

that a reversal of findings of fact by a trial judge can only be done under exceptional circumstances.

Counsel further submitted that the Supreme Court went on to hold in the case of **Michael Mabenga v Sikota Wina and Others**[5] that:

> **"Satisfactory proof of any one corrupt or illegal practice or misconduct in an election is sufficient to nullify an election."**

In his oral submissions, Mr. Eyaa, stated that the Appellant was actually implicated in violence. Counsel contended that the evidence of **PW1**, Royd Muzundu, showed how the Respondent was forced and threatened by the Appellant to denounce PF and publicly announce that he had joined UPND. Counsel further contended that **PW2**, Prisley Hoyo directly implicated the Appellant by producing the recorded radio interview. Mr. Eyaa submitted that **PW3**, Augustine Sombani was a victim of violence due to the announcement made by the Appellant on Itezhi-Tezhi Community Radio. Mr. Eyaa further submitted that **PW5, PW6,** and **PW7** all testified of the violence that arose following the announcement by the Appellant on Radio Itezhi-Tezhi.

In response to ground five, Mr. Tembo, submitted that the Appellant did not raise the issue of bias before the Tribunal and

therefore the alleged bias could not be a ground of appeal before this Court. Counsel argued that had it been raised in the Tribunal, a ruling would have been made and went on to submit that the record showed no bias in anyway on the part of Tribunal members. In this regard, Counsel referred to **Buchman v Attorney-General**[9] which we cited above.

He further cited the case of **Harrington v Siliya and Attorney-General**[13] in which the Supreme Court frowned upon litigants and advocates who make unwarranted personal imputations of bias against judges when they lose cases.

Mr. Tembo submitted that Ms. Mubanga Kalimamukweto who was singled out on the issue of bias, represented the Attorney-General in the case of **Hakainde Hichilema, Geoffrey Bwalya Mwamba v Edgar Chagwa Lungu, Inonge Mutukwa Wina and the Attorney-General**[14] and not the Respondent in this matter. We were referred to the majority decision in the **Hakainde Hichilema case**[14] in which this Court strongly condemned the behavior of some counsel for the petitioners for alleging bias against the Court. Counsel submitted in conclusion that there was no basis upon which the Appellant could allege bias.

In reply, counsel for the Appellant, contended that the argument by the Respondent that the issue of the petition being defective under section 100(3) was dealt with by the Tribunal is not accurate. Counsel argued that the Tribunal in its ruling did not fully address the requirements of section 100(3) as it only addressed the issue of computation of time and therefore the contention by the Respondent that ground one was an appeal against an issue already tackled by the Tribunal was a total misdirection and an attempt to deny the Appellant his right to appeal and to be heard by this Court.

In augmenting the Appellant's submission in reply, Mr. Mweemba argued that the Respondent had misunderstood the context in which an appeal does not lie on interlocutory applications. Counsel submitted that the rationale for *rule 21(6)* of the Rules is to prevent appeals on interlocutory matters delaying the hearing of the main petition. Counsel contended that an aggrieved party is allowed to raise a ground of appeal on an interlocutory application after the main matter in the lower court is concluded. He submitted that this principle is applied in criminal law and referred the Court to the cases of **Boyd Hamakwembo and Benson Mohammed Ndovu v The People**[15] and **Kambarage**

Mpundu Kaunda v The People[16]. Mr. Mweemba argued that the reason why this criminal law principle applies in election petitions is because the standard of proof is far much higher than in an ordinary civil suit though slightly below the criminal standard of beyond reasonable doubt. It was counsel's submission that the Respondent's argument, on this point, was a total misdirection and was unsustainable.

Counsel argued that the submission by the Respondent that the Tribunal was correct in allowing the substitution of Francis Lubasi with the Respondent as the petitioner pursuant to section 103 of the Act, was wrong as there was no valid petition to withdraw or substitute in the first place.

Further, in augmenting the Appellant's submissions in reply, Mr. Haimbe, submitted that a reading of the Tribunal's ruling, on the preliminary issue raised by the Appellant, shows that the Tribunal was not on firm ground in proceeding with the hearing of the petition in the manner it did thereafter. Mr. Haimbe, submitted that the Tribunal found as a fact that the petitioner named on the face of the petition did not in fact file the petition nor sign it prior to his death. Counsel contended that, faced with these facts, the Tribunal ought not to have proceeded to hear the

petition in view of the provisions of section 100 of the Act which are couched in mandatory terms. It was therefore Counsel's submission that the defect in the petition went to the root of the proceedings before the Tribunal and that the Tribunal did not have the requisite jurisdiction to proceed in the manner it did.

In his oral submissions, Mr. Phiri, argued that a petition worthy of substitution should be one that is properly before the Court. Counsel contended that since in this case, the petition was not properly before the Tribunal, it could not be substituted. Counsel further contented that even the manner adopted to withdraw the petition is contrary to *rule 15* of the Rules.

In reply to ground three, Mrs. Mwenge argued that the Appellant's contention was not that security for costs was not paid but that proceedings were heard in the Tribunal before security for costs was paid which is contrary to section 102(2) of the Act.

In reply to ground four, counsel submitted that the Tribunal failed to establish the fact that the people who perpetrated violence were agents of the Appellant as provided for under section 2 of the Act, which 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."

It was submitted that the people the Tribunal constantly referred to as UPND members hence agents of the Appellant did not have any nomination paper to that effect. It was argued that the Act is very specific and makes the law very strict on the issue of agency. It was further submitted that section 97(3) of the Act provides that a candidate's election will not be declared void only on account of an illegal act if the election is free and fair. It was argued that this provision obliges the Tribunal, to not only, satisfy itself that there was an illegal act committed by the candidate or with his knowledge and approval or consent or that of his agents but also that the said act affected the results of an election so that voters were prevented from electing a candidate of their choice. It was counsel's contention that there was no proof of how the radio program affected the outcome of the elections or prevented people from voting as out of the about 39,000 registered voters, over 26,284 people voted and that the Respondent did not demonstrate how the radio interview affected the election results.

Lastly in reply to ground five, Mr. Mweemba co-counsel for the Appellant submitted that the Supreme Court in the **Harrington Case**[13] cited above did not say that an issue of apparent bias cannot be raised and that it does not in any way suggest that once raised counsel is deemed to be accusing adjudicators or attacking them. While agreeing that it is improper to accuse adjudicators of bias without strong grounds, counsel submitted that the issue of bias was a matter of law and a principle of natural justice and as such they were entitled to raise it. It was submitted that the case was distinguishable from the **Harrington Case.**[13] It was further submitted that one need not bring the issue of bias to the attention of the Tribunal as it was incumbent on the members of the Tribunal to recuse themselves when there was such an appearance.

We have carefully considered the arguments advanced in support of and in opposition to the appeal. We have also read the judgment and the authorities availed to us by counsel for which we are grateful. We note that ground one raises an issue that goes to the very root of the petition filed before the Tribunal below, which is that the petition was incompetent to be heard as

it was not signed by the petitioner Francis Lubasi who had passed away before the date when the petition was filed.

In the circumstances, we shall proceed by considering ground one of the appeal upon which all other grounds in our view stand or become otiose.

It was submitted by the Appellant that Local Government petitions are governed by among other laws, *Rule 9* of the **Local Government Tribunal Rules, 2016** and must be filed in accordance with the First Schedule thereto. It was argued that the form in the First Schedule requires that the petition must be signed by the petitioner and that in this case the petitioner did not sign the petition making the petition defective and incapable of being heard, amended or determined by the Tribunal. It was further submitted that the Tribunal misdirected itself when it allowed the substitution of the petitioner following an application to withdraw the petition made viva voce contrary to *rule 15* of the Rules which requires that a notice of intention to withdraw an election petition be filed before an election petition can be withdrawn.

In response, it was the Respondent's submission that the Tribunal was on firm ground in allowing the petition to be heard on the merits and by granting the application to withdraw the petition and subsequent substitution of the petitioner Francis Lubasi (Deceased) by Biton Manje, the Respondent in line with sections 103 and 104 of the Act.

It was further argued that the ground of appeal was similar to the preliminary issue raised in the Tribunal below and as such was an indirect appeal against a ruling of the Tribunal contrary to *rule 21(6)* of the Rules which stipulates that an appeal shall not lie against a decision of the Tribunal on an interlocutory application. This argument though, was opposed by the Appellant who argued that the ruling of the Tribunal did not address the requirements of section 100(3) of the Act as it only addressed the issue of computation of time and not the question of signature. Further Mr. Mweemba, counsel for the Appellant submitted that the Respondent misunderstood the context in which an appeal does not lie on interlocutory applications within the contemplation of *Rule 21(6)* of the Rules which is to prevent appeals on interlocutory matters delaying the hearing of the main matter. Mr. Phiri, co-counsel of the Appellant, in his

supplementary submission argued that a petition that is worthy of any substitution should be a petition that is properly before the Tribunal and contended that the petition having been improperly before the Tribunal could not therefore be substituted and that even the manner the substitution took flew in the very teeth of *rule 15.*

The issue we see as falling for our determination is whether the unsigned petition was properly before the Tribunal within the contemplation of section 100(3) of the Act.

Ground one in our view, revolves around the interpretation of section 100(3) of the Act. The Appellant argues that the Tribunal was not on firm ground when it allowed a petition which did not meet the requirements of section 100(3) of the Act to be heard. It was submitted that the Record shows the petition to be that of Francis Lubasi (Deceased) but signed by Biton Manje, the Respondent contrary to the provisions of section 100(3) of the Act. In rebuttal, the Respondent argues that the petition was properly before the Tribunal having been withdrawn and a substitution of Francis Lubasi (Deceased) by Biton Manje made.

Our starting point is to consider whether the provisions of the law were met and if not to determine the effect of filing an election petition not signed by the petitioner in person.

In the case of **Mutale v Munaile**[3], the Supreme Court of Zambia quoting the Learned Authors **Odgers on Civil Court Actions, Practices and Precedents, 24th Edition** referred to by the trial judge below stated that a petition is:-

> **"a rare form of bringing proceedings...and is used in cases where it is required by a particular statute or rule...." The Court went on to state that "From the foregoing exposition of the law, we can say that a petition is a rare mode of commencing an action in this jurisdiction and its application is specially provided or authorized by an Act of Parliament. And as the learned trial judge rightly observed, it is that particular statute that gives authority to commence an action by petition that should give guidance on the type or form of petition to be filed with the Court."**

The authority cited above narrows our area of focus in establishing whether indeed the provisions of the law were met. We are fortified therefore to restrict ourselves to the relevant legislation for guidance, being the **Electoral Process Act No. 35 of 2016.**

The Act defines who a petitioner is and outlines the procedure for the presentation of election petitions.

Section 2(1) of the Act defines the word petitioner as follows:

"**Petitioner in relation to an election petition means a person who signs and presents an election petition under section 98 and includes a person substituted for a petitioner".**

Section 98 of the Act provides that:-

"An election petition may be presented to the High Court or a Tribunal by one or more than one of the following persons:-

(a) A person who lawfully voted or had a right to vote at the election to which the election petition relates.

(b) A person claiming to have had a right to be nominated as a candidate or elected at the election to which the election petition relates.

(c) A person claiming to have been a candidate at the election to which the election petition relates and

(d) The Attorney General"

Section 100(3) of the Act provides that:

"An election petition shall be signed by the petitioner or by all the petitioners, if more than one, and shall be presented not later than fourteen days after the date on which the result of the election to which it relates is duly declared." (Emphasis ours).

Having considered the provisions that guide the form of a petition to be filed with the Tribunal, we consider it important at this stage to state the principles governing the use of the word shall in legislative language in order to appreciate the true import of section 100(3) of the Act. In its ordinary usage, "**shall**" is a word of command and is normally given a compulsory meaning because it is intended to show obligation and is generally imperative or mandatory. It has a potential to exclude the idea of

discretion and impose an obligation which would be enforceable particularly if it is in the public interest.

In this respect we call to aid our own pronouncement on the fundamental rule of construction of statutes in the case of **Steven Katuka and The Law Association of Zambia v The Attorney-General and Ngosa Simbyakula and 62 Others**[8] where we stated that where the words of the Constitution or statute are precise and unambiguous in their ordinary and natural meaning, then no more is required to expound on them. We find the provisions on form and content for a local government election petition to be clear and as such not warranting a purposive approach to interpretation.

Considering the above authority and section 100(3) of the Act which is couched in mandatory terms, the issue we have to determine is whether the absence of the petitioner's signature on the petition in this case is fatal and incurable.

The Courts have had occasion to ascribe meaning to the word **shall** in the mandatory sense. In **Nair v Teik**[17] the petitioner filed an election petition within the stipulated time but served it on the

Respondent out of time. The provision under focus was *rule 15* which provided in part that:

> **"Notice of the presentation of a petition, accompanied by a copy thereof, shall, within ten days of the presentation of the petition, be served by the petitioner on the respondent."**

The Privy Council then held that:

> **"Rule 15 of the Election Petition Rules was mandatory, and as there had been no personal service and the service by advertisement was out of time, the election petition was a nullity."**

The Tribunal having had the opportunity of addressing a preliminary issue on the validity of the petition before it ought to have considered both limbs of section100(3) of the Act that is, the time within which a petition is to be filed which it did and who must sign the said petition. This in our view would have settled the matter of whether or not the petition was properly before the Tribunal. We must say at this point that it was a serious dereliction of duty for the Tribunal to have failed to determine the preliminary issue regarding the validity of the petition before it in view of abundant authorities that affirm the principle that courts must render judgments which deal concisely and conclusively with all matters before them.

We are of the view that due to the mandatory nature of section 100(3) of the Act, the absence of the petitioner's signature on the

petition was fatal. We take this view having considered the plain meaning of sections 2, 98 and 100(3) of the Act and in light of the persuasive authority of **Nair v Teik**[17] cited above.

The Respondent did submit that the defect in question was cured when an application was made to withdraw and subsequently substitute the petitioner Francis Lubasi (Deceased) with the Respondent.

We have difficulty in agreeing with the Respondent's argument in that section 103 of the Act can only be of help in a situation where a valid petition is in place and equally section 104 of the Act presupposes a valid petitioner as defined in section 2 of the Act being in place before a substitution can occur.

Having established that the election petition before the Tribunal did not meet the mandatory requirements of section 100(3) of the Act, there was, under these circumstance, no petition capable of being heard by the Tribunal. Ground one therefore succeeds. Since this ground of appeal succeeds all other grounds as earlier stated are otiose.

This appeal is allowed and the decision of the Tribunal below reversed.

As the matter raised important constitutional questions, each party shall bear its own costs.

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P. Mulonda

Judge

CONSTITUTIONAL COURT

.....

M.M. Munalula

Judge

CONSTITUTIONAL COURT