

IN THE CONSTITUTIONAL COURT OF ZAMBIA APPEAL NO. 10 OF 2017  
AT THE CONSTITUTIONAL COURT REGISTRY 2016/CC/A46  
HOLDEN AT LUSAKA  
(CONSTITUTIONAL JURISDICTION)

IN THE MATTER OF AN ELECTION PETITION FOR MKUSHI SOUTH  
CONSTITUENCY PARLIAMENTARY ELECTION  
AND

IN THE MATTER OF ARTICLE 73 OF THE CONSTITUTION OF  
ZAMBIA CHAPTER 1 OF THE LAWS OF ZAMBIA  
AS AMENDED BY ACT NO. 2 OF 2016  
AND

IN THE MATTER OF SECTION 96 OF THE ELECTORAL PROCESS  
ACT NO. 35 OF 2016

BETWEEN:

SYDNEY CHISANGA

AND

DAVIES CHISOPA

ELECTORAL COMMISSION OF ZAMBIA

ATTORNEY GENERAL



APPELLANT

1<sup>ST</sup> RESPONDENT

2<sup>ND</sup> RESPONDENT

3<sup>RD</sup> RESPONDENT

CORAM: Chibomba, PC, Sitali, Mulenga, Mulembe and Mulonda JJC

On 5<sup>th</sup> October, 2017 and on 4<sup>th</sup> May, 2018

For the Appellant

Mr. J.P. Sangwa, SC, of Messrs Simeza Sangwa and Associates.

For the 1<sup>st</sup> Respondent

Mr. B.C Mutale, SC, and Mr. K. Kunda of Messrs Ellis and Company.

For the 2<sup>nd</sup> Respondent

Mr. R. Mukuka of Messrs Robert and Partners.

For the 3<sup>rd</sup> Respondent

Mrs. D.M. Shamabobo, Senior State Advocate, Attorney General's Chambers.

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## J U D G M E N T

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Mulenga, JC delivered the Judgment of the Court.



**Cases referred to:**

1. **Chisopa v Chisanga SCZ Appeal No. 179/2012**
2. **Stephen Katuka (suing as Secretary General of the UPND) and Law Association of Zambia v The Attorney General, Ngosa Simbyakula and 63 Others 2016/CC/0010 2016/CC/0011**
3. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172**
4. **Charlotte Scott v Margaret Mwanakatwe and Others 2016/HP/EP/0039 (unreported)**
5. **Reuben Mtolo v Lameck Mangani SCZ Judgment No. 2 of 2013**
6. **Mbowe v Eliufoo (1967) E.A. 240**
7. **Earp v Henderson [1876] 3 Ch. D. 254**
8. **Akashambatwa Mbikusita Lewanika, Evaristo Hichuunga Kambaila, Dean Namulya Mungómba, Sebastian Saizi Zulu and Jennipher Mwaba v Frederick Titus Chiluba (1998) Z.R. 79**
9. **Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Electoral Commission of Zambia (2005) Z.R. 138**
10. **Khalid Mohamed v the Attorney General, (1982) Z.R. 49 (SC)**
11. **Parkway Finance Directory Services v GDC Investments Limited SCZ Appeal No. 54 of 2002**
12. **Zambia Revenue Authority v Jayesh Shah SCZ Appeal No.182 of 2000**
13. **Steven Masumba v Elliot Kamwendo Selected Judgment No. 53 of 2017**
14. **Besigye v Museveni Uganda Election Petition No. 1 of 2001**
15. **Islighton v West Division (1901) 50'M and H 120**
16. **Re Kesington North Parliament Election [1960] 2 All E.R. 150**
17. **Sunday Chitungu Maluba v Rodgers Mwewa and Attorney General CCZ Appeal No. 4 of 2017**

**Statutes Referred to:**

1. **The Constitution of Zambia (Amendment) Act No. 2 of 2016**
2. **The Electoral Process Act No. 35 of 2016**
3. **High Court Act Cap 27, Order 3 rule 2 High Court Rules**
4. **Electoral Process (General) Regulations 2016**

**Works referred to:**

1. **The Rules of the Supreme Court of England, 1999 Edition (White Book)**
2. **Halsbury's Laws of England, 4<sup>th</sup> Edition, Vol. 15**

This is an Appeal against the decision of the High Court in the Parliamentary election petition which was filed by the Appellant, as Petitioner, to challenge the election results relating to



Mkushi South Constituency in which the 1<sup>st</sup> Respondent, sponsored by the Patriotic Front Party (PF), emerged as winner after polling 5,706 votes against the Appellant's 5,505 votes. The Appellant was sponsored by the United Party for National Development (UPND).

In his election petition, the Appellant prayed for a declaration that the election of the 1<sup>st</sup> Respondent as Member of Parliament for Mkushi South Constituency was invalid, null and void and that it be ordered instead that the Appellant was the duly elected Member of Parliament.

The Appellant also sought other orders that are not provided for in section 99 of the Electoral Process Act No. 35 of 2016 (the Act). He also prayed for costs against the Respondent.

The allegations against the 1<sup>st</sup> Respondent, who was the 2<sup>nd</sup> Respondent in the lower Court, were that his campaign was characterised by threats to abandon road works and not to disburse social cash transfer funds if he was not voted for. And that there was undue influence, through distribution of school uniforms to pupils and bicycles to headmen. It was added that the 1<sup>st</sup> Respondent illegally occupied the position of Central Province



#### **J4**

Minister and benefited from the use of state machinery and resources, in particular, the use of a government vehicle to ferry foodstuffs and campaign materials in Ching'ombe and Mboroma areas. Further, that the 1<sup>st</sup> Respondent benefited from the drilling of boreholes and distribution of relief maize in Mboshya and Ching'ombe areas which were government projects that had been pending for a long time but commenced during the campaign period.

The allegation against the 2<sup>nd</sup> Respondent, the Electoral Commission of Zambia, was that there were irregularities in the results for Kampoko polling centre which had 109 registered voters but the Electoral Commission of Zambia (ECZ) Form 9 had a total of 112 votes cast.

At the trial, the Appellant testified as PW11 and called ten (10) witnesses to attest to the misconduct alleged. In rebuttal, the 1<sup>st</sup> Respondent called six (6) witnesses and testified as RW7 while the 2<sup>nd</sup> Respondent called two (2) witnesses. The 3<sup>rd</sup> Respondent did not call any witness.

After considering the petition, the evidence adduced by the parties and the submissions made in aid of their respective cases,



the trial Court observed that for the petition to succeed, the Appellant bore the burden of proving his case against the Respondents to a fairly high degree of convincing clarity.

Further, that based on section 97 of the Act, the mere satisfactory proof of any one corrupt or illegal practice or misconduct was not sufficient to nullify an election. That a petitioner was also required to prove that such corrupt or illegal practice or misconduct prevented or may have prevented the majority of the voters from voting for their preferred candidate. Similarly, that in the case of non-compliance with the Act in relation to the conduct of an election it also had to be proved that the non-compliance affected the election result.

It was added that section 97(3) of the Act precludes a court from declaring an election void if the affected candidate proves that the corrupt or illegal practice or misconduct was not committed by him personally or by his election agent or with the knowledge and consent or approval of the candidate or his election agent. And if it is further proved that all reasonable means to prevent the commission of a corrupt practice or illegal practice were taken by the candidate. The caveat in section 97(4) of the Act is that even when the non-compliance is proved, the election will not be



declared void if it is shown that the election was conducted in substantial conformity with the Act and that the election result was not affected.

The trial Court considered the following specific allegations and made its findings.

The first concerned the alleged use of government resources and government personnel by the 1<sup>st</sup> Respondent. The Court below observed that evidence relating to two of the vehicles alleged to belong to the Government only came through PW1 who could not even give their complete registration numbers thereby raising doubt. The third alleged vehicle had a private number ALV 1931 and the trial Court stated that in the absence of contrary evidence, it could not ascertain whether it was indeed a government vehicle. In reference to the testimony of PW5, PW8 and PW9 who said they had seen the 1<sup>st</sup> Respondent alight from the vehicle registration number GRZ 598 CL, the trial Court found that the allegation was not proved as they were witnesses with a possible interest to serve and thus required corroboration. Further, that there was evidence in rebuttal by RW6, the election agent for the 1<sup>st</sup> Respondent, and RW8 the Permanent Secretary for Central Province, who was controller of government vehicles. It was the trial Court's further



finding that the Appellant failed to take the complaint to the Conflict Management Committee of the Electoral Commission of Zambia and further that there was no evidence that the 1<sup>st</sup> Respondent was illegally in office as Provincial Minister at the material time. The trial Court added that in any case, if the allegation had been proved, she would have to consider whether the majority of the electorate were prevented from electing a candidate of their choice. As regards the allegation that one Ngosa, a government driver, was delivering food stuffs, the Court below found that there was no proof regarding his mission as against the 1<sup>st</sup> Respondent or that the 1<sup>st</sup> Respondent and his election agent, RW6, consented to the use of the government vehicle.

On the alleged distribution of bicycles to headmen and chief's advisors, the trial Judge found that the bicycles had been distributed to PF foot soldiers for campaign purposes as well as to PW2, PW3 and PW4 from whom the bicycles were later repossessed. It was the trial Judge's further finding that the Appellant had not proved that there were many who got the bicycles or that they had been prevented from voting for the candidate they preferred.



Regarding the allegation that the 1<sup>st</sup> Respondent and his wife distributed school uniforms, the Court below found that there was insufficient evidence provided by PW2 in that no uniform was exhibited or any parent called to testify how the donation had influenced the electorate against voting for their preferred candidate.

As regards the alleged distribution of relief maize, after reviewing the evidence of PW6 and PW10, the Court below stated that the distribution of relief maize by the Disaster Management and Mitigation Unit (DMMU) in Mualala Ward could not be stopped even during the campaign period because it was a hunger stricken area and doing so would amount to starving the needy. On the aspect of the relief maize being distributed by PF officials, the Court below noted that PW6 was a UPND councillor candidate who named only one PF councillor candidate as being among the distributors while PW10's testimony was found not to be credible. The Court below further found that the relief maize distribution was done by the churches in conjunction with the chiefs and that the concerned churches were selected by the communities.

On the allegation relating to the social cash transfer, the evidence of PW6 was found to be hearsay and inadmissible while



that of PW10 as the UPND councillor candidate was uncorroborated. The Court below thus found that there was no proof that there was fear in the electorate of losing out on benefits under the programme or that fear prevented them from voting for their preferred candidate. The trial Court distinguished the case of **Chisopa v Chisanga**<sup>1</sup> from the case at hand by stating that the 1<sup>st</sup> Respondent was alleged to have made a promise as opposed to an actual donation. Further, that the people to whom the promise was made were not called as witnesses.

On the issue of threats regarding the drilling of boreholes and road projects, the trial Court held that the evidence showed that the borehole drilling and road projects were part of a five (5) year plan and were ongoing government projects.

The trial Court further noted that the UPND councillor candidates won elections in areas where the projects were undertaken showing that the said projects did not affect the electorate and the evidence therefore fell short of section 97(2) of the Act.

On the allegation of voting irregularities, the Court below found that the verified voters register had 117 registered voters as



opposed to the 109 voters on the provisional voters register relied on by the Appellant. As regards the irregularity that the two special voters only had their voters card numbers and not their national registration card numbers indicated on the Certificate of Authority to Vote, the Court below held that the Certificate of Authority to Vote was in substantial conformity with the Act in that the voters cards had the national registration card numbers endorsed on them. On the issue of allowing people on the exclusion list to vote, the Court below found that the only person who was allowed to vote met the requirements as evidenced by the document in the 2<sup>nd</sup> Respondent's notice to produce which only excluded the duplicated entry regarding one Joseph Mumba.

Further, relying on sections 97 (4) and 116 of the Act, the Court below found that the irregularities alleged could not be the basis of nullifying the election because the two votes did not affect the result of the election.

Based on all the above findings, the trial Judge held that the alleged corrupt and illegal practices were not proved in accordance with the standard of proof required in election petitions. Thus, the 1<sup>st</sup> Respondent was declared duly elected and consequently the petition was dismissed.



Dissatisfied with the Judgment, the Appellant advanced the following seven (7) grounds of Appeal:

1. **The Court below erred in fact and in law when it held that the 1<sup>st</sup> Respondent was not illegally in office as Provincial Minister for Central Province during the campaign period.**
2. **The Court below misdirected itself when it held that the use of government resources would only have been in issue if the Appellant had complained to the 2<sup>nd</sup> Respondent during the campaign period and the 1<sup>st</sup> Respondent had failed to comply with any resulting directives by the 2<sup>nd</sup> Respondent.**
3. **The Court below misdirected itself when it held that because the Minister could not stop government projects there was no undue influence on voters from threats to discontinue road projects**
4. **The Court misdirected itself in law and in fact when it held that the invalid votes cast at Kampoko Polling Station had no effect on the results of the election.**
5. **The Court below misdirected itself in law and in fact when it struck out paragraph 9 of the Petitioner's Reply and a flash disk containing a video of the Petitioner as not having been pleaded.**
6. **The Court below misdirected itself when it allowed evidence to be produced for the 2<sup>nd</sup> Respondent by way of Notice to Produce.**
7. **The Court below misdirected itself when it held that because a UPND councillor won the election in the area where threats to discontinue sinking of boreholes were made meant that the misconduct of the 1<sup>st</sup> Respondent had no undue influence on the electorate by making the said threats.**

Counsel for the Appellant, Mr. Sangwa, SC, relied on the Appellant's filed heads of argument. It was submitted under ground one that the finding of the Court below, that the 1<sup>st</sup> Respondent was not illegally in office during the election campaign period and that the case of **Stephen Katuka and Law Association of Zambia v The Attorney General, Ngosa Simbyakula and 63 Others**<sup>2</sup> did not so rule, was perverse and a misapprehension of the



decision of this Court. The Appellant made reference to High Court election petition decisions, now on appeal before us, where the said decision of this Court in **Stephen Katuka and Law Association of Zambia v The Attorney General, Ngosa Simbyakula and 63 Others**<sup>2</sup> was commented on by the respective High Court Judges, and maintained that the findings of the Court below in the current case were contrary to the clear decision of this Court. And that no trial Court acting correctly could reasonably have made a finding that the Judgment of this Court entailed that the 1<sup>st</sup> Respondent was not illegally in office as Provincial Minister for Central Province during the campaign period.

Consequently, that the Court below neglected to consider and determine the Appellant's contention that the 1<sup>st</sup> Respondent used government resources in election campaigns and this amounted to a breach of the duty of courts, as enunciated in **Wilson Masauso Zulu v Avondale Housing Project Limited**<sup>3</sup>, to determine all issues in controversy in a matter. That the failure of the lower Court to discharge its duties amounted to a misdirection and a denial of justice which must form the basis of allowing the appeal.

In respect of ground two, the Appellant submitted that regulations 3(1) (b) and 4 of the Electoral Code of Conduct place no



obligation on a political party or candidate to report any breaches of the Electoral Code of Conduct to the Conflict Management Committee of the 2<sup>nd</sup> Respondent. It was argued that the lodging of complaints was not a mandatory requirement and cannot be construed to be a condition precedent to the enforcement of the provisions of the Electoral Code of Conduct which proscribe the use of government resources. And further that the law itself did not so state and therefore the Court below misdirected itself when it held that the use of government resources would only have been in issue if the Appellant had complained to the 2<sup>nd</sup> Respondent during the campaign period.

We were invited to indorse the interpretation of regulation 15(1) by the High Court Judge in the case of **Charlotte Scott v Margaret Mwanakatwe and Others**<sup>4</sup> that use of government resources for election campaign purpose was sufficient to render an election void if proved. In so arguing, the Appellant also relied on the Supreme Court decision in the case of **Reuben Mtolo Phiri v Lameck Mangani**<sup>5</sup> in which it was held that use of government resources for campaign purposes constituted an illegal practice and was a basis for nullification of an election.



Under grounds three and seven the Appellant argued that section 83 (1)(c) of the Act prohibits candidates from inducing or compelling any person, by way of threats, to support or not to support any registered party or candidate or to attend any political event. That the lower Court misdirected itself by holding that since the Minister could not stop the government projects, the electorate were not affected. In so holding, the Appellant argued, the lower Court fell short of its duty to adjudicate on the effect of the threats as what was for determination was whether or not there was wrong doing by the 1<sup>st</sup> Respondent when he made threats to discontinue government projects. In determining the issue, the Appellant contended that the material consideration which the Court below was to take into account was whether the 1<sup>st</sup> Respondent made the threats which were in breach of section 83(1) of the Act.

Arguments in respect of ground four revolved around the interpretation of section 97 (4) of the Act. The Appellant submitted that acts or omissions of election officers shall void an election unless the election was so conducted as to be substantially in accordance with the provisions of the Electoral Process Act and the acts and omissions did not affect the result. That the effect on the



result was as enunciated by the Tanzania High Court in the case of **Mbowe v Eliufoo**<sup>6</sup> which opined as follows:

**“Affected the result” means not only the result in the sense that a certain candidate won and another candidate lost. The result may be affected if, after making the right adjustments for the effect of the proved irregularities the contest seems much closer than it appeared when first determined.”**

The Appellant further argued that the failure by the election officers at Kampoko polling station to ensure that only authorised voters were allowed to vote and the omission by Returning Officer for Mkushi South Constituency to issue complete authorisations to vote amounted to a deviation from substantial conformity with the provisions of the Electoral Process Act. It was advanced that the proper interpretation of section 97(4) relates to instances where the act or omission of an election officer results in the casting of an illegitimate vote and that in this case, the number of total votes cast and results will be consequently affected because there will be a difference in the result notwithstanding that such a difference will not affect the outcome of the election. Hence, the lower Court misdirected itself when it held that the illegal votes could not have affected the result of the election.



In support of ground five, the Appellant argued that the lower Court erred in striking out paragraph 7 of the reply for raising new issues not pleaded in the petition. It was submitted that the contents of the said paragraph were raised in order to give the 1<sup>st</sup> Respondent fair notice of the particulars of the use of government resources alleged in the petition and was relating to the use of the ministerial vehicle. Further, that the issues in paragraph 7 were not a new ground or claim inconsistent with the claims in the petition but merely giving further particulars. In so arguing, the Appellant relied on Order 18 rule 10 (1) of the Rules of the Supreme Court of England 1999 Edition and the English decided case of **Earp v Henderson**<sup>7</sup>.

The Appellant further surmised that the expunging of the video evidence from the Appellant's bundle of documents on the basis that it related to the contents of the said paragraph 7 was a misdirection as it excluded vital evidence in respect of the abuse of government resources by the 1<sup>st</sup> Respondent.

On ground six, the Appellant argued that the lower Court erred by allowing evidence to be produced by the 2<sup>nd</sup> Respondent by way of notice to produce as the dictates of Order 27 rule 5 of the Rules of the Supreme Court of England (1999 Edition) were



flouted. The Appellant submitted that there was a grave dereliction of duty on the part of the lower Court when it allowed evidence to be produced by the 2<sup>nd</sup> Respondent by way of notice to produce, without considering the nature of the procedure and the relevant rules governing the said procedure.

The Appellant, thus, submitted that this Court should set aside the decision of the Court below and grant the Appellant the reliefs sought.

Learned State Counsel, Mr. Sangwa, augmented the heads of argument and submitted that the starting point as regards ground one, was the case of **Stephen Katuka and Law Association of Zambia v Attorney General, Ngosa Simbyakula and 63 Others**<sup>2</sup> where this Court found that the 1<sup>st</sup> Respondent was wrongly in office on the premise that the National Assembly had been dissolved. Therefore, that the continued stay in his ministerial position meant that the 1<sup>st</sup> Respondent did not campaign as an ordinary person. It was his further argument that the Court below did not seriously interrogate the three (3) grounds of nullification under section 97 (2) of the Act. And that since it is a settled fact that the 1<sup>st</sup> Respondent occupied the position of Provincial Minister, he was a public officer during the election period and thus his election was a



nullity under section 97 (2) (c) of the Act because he was a disqualified person by virtue of Article 70 (2) (b) as read together with Article 266 of the Constitution of Zambia as amended by Act number 2 of 2016. Mr. Sangwa, SC, added that his understanding was that the election period started on 16<sup>th</sup> May, 2016 when Parliament was dissolved up to 10<sup>th</sup> August, 2016 and that there was no provision for challenging the nomination of a disqualified person in relation to members of parliament. Mr. Sangwa, SC, maintained that proving that the government resources which the 1<sup>st</sup> Respondent acquired during this period were used in his campaign was inconsequential and that the mere fact that he maintained his ministerial position was enough as it placed him at an advantage over the Appellant. The learned State Counsel added that the marginal difference between the votes amassed by the 1<sup>st</sup> Respondent and the Appellant could only be attributed to the irregularities in the election.

In opposing the appeal, the 1<sup>st</sup> Respondent's Counsel, Mr. Mutale, SC, relied on the 1<sup>st</sup> Respondent's filed amended heads of argument in which it was submitted that the Appellant had failed to meet the statutory pre-requisite for nullification of an election petition as set by section 97(2)(a) of the Act. After recounting the



evidence on record, the 1<sup>st</sup> Respondent argued that grounds one and two of the appeal were misconceived because there was nothing wrong about a Minister engaging in political activities so long as there was no use of government resources. It was added that the Court below was also on firm ground when it held that the 1<sup>st</sup> Respondent was not illegally in office and continued in occupation of office of Minister following the Ruling of this Court in the **Law Association of Zambia**<sup>2</sup> case. It was further argued that there was no proof before the Court below that either the 1<sup>st</sup> Respondent or his agents used government resources for his campaigns and hence there was nothing perverse in the lower Court's findings to warrant reversal by this Court.

As regards grounds three and seven, the 1<sup>st</sup> Respondent submitted that there was no evidence either in audio or video form of threats issued by the 1<sup>st</sup> Respondent in respect of the road and borehole sinking projects which had been undertaken by third parties, namely, Zambia National Service and the Government in collaboration with the People's Republic of China, respectively, over whom the 1<sup>st</sup> Respondent had no power. The 1<sup>st</sup> Respondent invited us to consider the evidence of RW8, the Central Province Permanent Secretary, on this aspect and argued that the victory of



UPND councillors in the Wards where the boreholes were sunk negates the Appellant's argument on undue influence.

On ground four, it was submitted that there were no irregularities at Kampoko polling station and that the elections were conducted in substantial conformity with the Electoral Process Act. That the Appellant had not demonstrated how many votes were affected by the purported irregularities and how they affected the results so as to warrant nullification. More so that the Appellant admitted that it was possible to lose an election by one vote and in this case he lost by 97 votes. Further, that the authorities cited by the Appellant on this point were not helpful as they could not override the express statutory provision in section 97(4) of the Act.

The 1<sup>st</sup> Respondent submitted that grounds five and six were incompetent as they emanated from Rulings of the Court below and not the Judgment. It was advanced that the Appellant had waived its right to appeal when it proceeded with the petition instead of appealing against the Rulings as and when they were rendered. In the alternative, it was argued that the fourteen (14) days within which to appeal against Rulings on interlocutory applications had long elapsed and this Court had no jurisdiction



any more to determine them on the merits. Further, that notwithstanding the time-lapse, the Court below was on firm ground when it expunged paragraph 7 of the Appellant's reply as it raised new allegations unlike the notice to produce whose contents were within the pleadings.

Relying on the cases of **Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Chiluba<sup>8</sup>**, **Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others<sup>9</sup>** and **Mohamed v The Attorney General<sup>10</sup>** regarding the burden and standard of proof, it was submitted that the Appellant had failed to prove his allegations to the required standard and thus the appeal was ill fated and ought to be dismissed with costs.

In augmenting the 1<sup>st</sup> Respondent's heads of argument, Mr. Mutale, SC, submitted that the appeal had no substance. He pointed out that no authority had been cited in support of the startling proposition that the burden of proof had shifted onto the 1<sup>st</sup> Respondent at some point during the trial of the election petition. It was surmised that at law, the burden lay on the one alleging and that a cursory examination of the record of appeal showed that the Appellant had failed to prove his allegation that



the income that the 1<sup>st</sup> Respondent got from the government as a minister was used in the campaign.

Mr. Kaunda, co-counsel for the 1<sup>st</sup> Respondent, added that this Court's Judgment in the case of **Steven Katuka and Law Association of Zambia V Ngosa Simbyakula and Others**<sup>2</sup> did not make any finding of fact that any of those ministers had used government resources in their campaigns. Thus the alleged use of government resources ought to have been proved by the Appellant. Counsel pointed out that the record of appeal indicated that the 1<sup>st</sup> Respondent's election agent gave the court the list of the private motor vehicles and the 1<sup>st</sup> Respondent's sources of income which he had used in his campaign. Therefore, that the 1<sup>st</sup> Respondent campaigned as a mere candidate and not as a minister. Further, and according to the record of appeal, the Permanent Secretary for Central Province testified that she did not allow the use of government resources in the campaigns.

It was Mr. Kaunda's position that the arguments under Article 70 of the Constitution are contradictory in that on one hand, the Appellant submitted that the 1<sup>st</sup> Respondent was illegally in office as minister and on another hand, the Appellant submitted that 1<sup>st</sup> Respondent was a public officer. Further, that Articles 70



and 72 were not pleaded and are also not mentioned in the grounds of appeal and were therefore an afterthought.

As regards grounds five and six, Mr. Kaunda submitted that the two grounds related to interlocutory rulings of the Court below and yet the notice of appeal clearly refers to the Judgment of the Court below. That the appeal thus lacked merit.

In opposing the appeal, the 2<sup>nd</sup> Respondent equally filed heads of argument in response to grounds four and six of the Appellant's grounds of appeal. On ground four, it was argued that section 48 (1) (c) of the Act and regulation 40 (1) and (2) of the Electoral Process (General) Regulations 2016 allows for special voters. That the omission of national registration card numbers on two of the four certificates for special voters could not invalidate the votes cast by the said officers or affect the validity of any other vote cast at Kampoko polling station because the four officers were duly registered voters within Mkushi South Constituency and their identities were not in question. In so arguing, the 2<sup>nd</sup> Respondent relied on section 121 of the Act. Thus, that there were no invalid or illegal votes cast at Kampoko polling station. Moreover, that the Appellant's agents never raised any objection against the four



officers voting in line with regulation 38 of the Electoral Process (General) Regulations 2016.

It was also advanced in the alternative that even assuming that there were improprieties with the four votes cast by the electoral officers, it made little difference to the result considering that the marginal difference in votes between the two candidates was 97 and that by virtue of the secret ballot, it was not known who the four electoral officers voted for.

Canvassing ground six, the 2<sup>nd</sup> Respondent submitted that the lower Court exercised its discretionary powers granted by Order 3 rule 2 of the High Court Rules when it allowed the 2<sup>nd</sup> Respondent to produce documents by way of Notice to Produce considering the difficulties the 2<sup>nd</sup> Respondent had in retrieving the subject documents from the part-time election officers as reflected on the record. That the said Order 3 rule 2 was the one relied on by the Appellant when raising the preliminary issue. It was further argued that the rules adopted in producing a document into evidence were regulatory and can be cured with the inherent jurisdiction that lies with the court. That the inherent right to produce any document in court cannot be extinguished by breach of a regulatory rule or procedure to produce such a document



before a competent Court as the right is enshrined and protected by legislative enactments.

The 2<sup>nd</sup> Respondent referred to section 3(1) of the Evidence Act and argued that the lower Court did not misdirect itself when it allowed evidence to be produced by way of notice to produce as the order for directions did not specify when there would be discovery and inspection and in what form the paper documentation was to be presented to court. It was added that the orders for directions were served on the 2<sup>nd</sup> Respondent barely two days before commencement of the trial. Further, that the witness who tendered the said documents was the author and custodian of the documents.

Furthermore, that the impropriety as regards the production of the documents was regulatory in nature and, as decided in **Parkway Finance Directory Services v GDC Investments Limited**<sup>11</sup> and **Zambia Revenue Authority v Jayesh Shah**<sup>12</sup>, was not fatal but curable.

It was thus submitted that the appeal lacked merit and ought to be dismissed with costs.



Learned Counsel for the 2<sup>nd</sup> Respondent, Mr. Mukuka augmented the heads of argument and submitted on ground four that the appeal ought to fail as the 2<sup>nd</sup> Respondent did not misconduct the election to warrant the nullification of the election.

On the issue of the two special votes, Mr. Mukuka invited us to examine pages 175 to 176 of the amended record of appeal in the light of section 121 of the Act which provides that a misnomer or inaccurate description of a person in documents required by the Act will not affect the full operation of the same. Counsel stressed, on ground six, that the Appellant should have appealed against the lower Court's Ruling within 14 days. Further, that the Appellant did not contest the production of documents when they were tendered before the lower Court.

The 3<sup>rd</sup> Respondent did not file any heads of argument and Ms. Shamabobo stated that the 3<sup>rd</sup> Respondent would make no submissions since none of the grounds of appeal affected them.

In reply, Mr. Sangwa, SC, reiterated that it was sufficient for the Appellant to prove that the 1<sup>st</sup> Respondent received the money from the State coffers which he should not have received and not to further prove that the said money was used in the campaign.



That the State funds and ministerial office gave him undue advantage in the election and this was enough to challenge the election due to the uniqueness of the situation. He urged us to deem the 1<sup>st</sup> Respondent's receipt of State funds as misconduct under section 97(2) (a) of the Act.

Mr. Sangwa, SC, also submitted that his arguments on Article 70 were not contradictory in that despite the illegality of the 1<sup>st</sup> Respondent's action of remaining in his ministerial position, it did not change the fact that he was in the office. That this argument was not an afterthought and that the lower Court was mandated under Article 1 of the Constitution to take it into account even though it was not argued or brought to its attention. He concluded that this Court is duty bound to take into account the provisions of the Constitution.

We have duly considered the grounds of appeal, the Judgment of the Court below and the submissions made by the respective parties. Before we address the grounds of appeal, we wish to observe from the outset that the standard of proof required in election petitions is the fairly high degree of convincing clarity which standard is higher than the balance of probabilities.



For the parliamentary election to have been voided in the present case, the Appellant, as the Petitioner, needed to prove any of the three (3) grounds set out in section 97(2) of the Electoral Process Act (the Act). Section 97 (2) of the Act provides as follows:

- (2) The election of a candidate as a Member of Parliament, Mayor, Council Chairperson or Councillor 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;**
  - (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; or**
  - (c) The candidate was at the time of the election a person not qualified or a person disqualified for election.**

The Appellant's election petition hinged on the grounds in section 97(2)(a) and (b) of the Act concerning corrupt or illegal practices and misconduct on the part of the 1<sup>st</sup> Respondent or his



agents or with his knowledge and consent or approval and on the election not being conducted substantially in accordance with the Act and such non-compliance affected the result of the election. Sections 81 to 95 of the Act outline what constitutes an illegal practice or corrupt practice as well as misconduct.

We shall address the grounds of appeal as they were argued by the Appellant. Ground one challenges the holding of the Court below that the 1<sup>st</sup> Respondent was not illegally in office as Provincial Minister during the campaign period. This allegation was anchored on section 97(2) (a) of the Act. Therefore, the issues for determination are firstly, whether the Appellant proved that the 1<sup>st</sup> Respondent was illegally in office as Provincial Minister and secondly, that the illegal stay in office was a misconduct and that it affected the majority of the electorate.

In considering the first ground, we reproduce the relevant portion of the Judgment of the lower Court as indicated on pages 70 to 71 of the record of appeal (J61 to J62):

**“...going by the Constitutional Court’s Ruling referred to by the Petitioner, the case of LAZ v Simbyakula and 63 others, where an injunction was sought to stop the Ministers from operating and receiving their salaries and emoluments was not granted, that issue was referred to the main trial. I must hasten to say that final verdict came 2 days before the election day, 11<sup>th</sup> August 2016 as testified by the 2<sup>nd</sup> Respondent and by then he had ceased being a minister.**



**Going by the above facts, can one hold the 2<sup>nd</sup> Respondent to have used government resources? Or can it be said that the 2<sup>nd</sup> Respondent acted contrary to the Court's Order?**

**I find that the 2<sup>nd</sup> Respondent was not acting contrary to the holding of the Constitutional Court's Ruling. It was not ruled that he was illegally in office then. Further that there is no evidence how he spent the money."**

From this portion, the trial Court appears to be addressing the status of the 1<sup>st</sup> Respondent prior to this Court's Judgment in the **Stephen Katuka and Law Association of Zambia v Attorney General, Ngosa Simbyakula and 63 Others**<sup>2</sup>. This is clear from the use of the word 'then' and how the trial Judge alludes to the date of the said Judgment in reference to the campaign period. However, this is not the real issue here. The issue is whether or not, on the evidence adduced in this matter, the Appellant did prove to the applicable standard that the Respondent used government property as claimed. reiterate that the burden of proof was on the Appellant to prove his allegations against the 1<sup>st</sup> Respondent, which were grounded on section 97(2) (a) of the Act, to the required standard of convincing clarity.

In his oral arguments, counsel for the Appellant stated that based on the alleged illegal stay in office, the trial Judge should have nullified the election of the 1<sup>st</sup> Respondent based on section 97(2) (c) of the Act, which was not pleaded in the petition. The



reason advanced was that by virtue of Article 1 of the Constitution, the trial Court was bound to consider whether the said section 97(2) (c) of the Act was breached. Learned State Counsel, Mr. Sangwa, laboured to show that the 1<sup>st</sup> Respondent was a public officer and was disqualified to be elected as a Member of Parliament by virtue of Article 70 (2) of the Constitution.

We note from the Appellant's petition that the issue of the 1<sup>st</sup> Respondent being disqualified from being elected as a Member of Parliament based on Article 70 (2) of the Constitution and section 97 (2) (c) of the Act was never in contention. Even the Appellant's final submissions to the Court below did not raise the disqualification issue. In particular at page 370 of the record of appeal volume 2 where Article 70 (2) was cited and outlined, it was only argued with respect to the alleged use of government resources including the salary and allowances drawn by the 1<sup>st</sup> Respondent.

The Appellant is thus seeking to raise a new issue which was not raised in the Court below, which is ingenious. The firm position has always been that a party cannot raise new issues on appeal which were not raised in the Court below. This position holds true and cannot be disregarded under the guise of upholding



the provisions of the Constitution. The Appellant had opportunity to plead the same in his petition for it to have been considered by the trial Court and subsequently, this Court. It is also trite law that parties are bound by their pleadings and the Appellant cannot on appeal fault the trial Judge for not considering section 97(2) (c) of the Act, which was not in issue before her, in the name of judicial activism and upholding the Constitution. Parties should bear in mind that ours is an adversarial system and as such, the Court must not enter into the arena of the dispute but must adjudicate based on pleadings, the evidence adduced and the law.

The arguments by the Appellant on this aspect are therefore flawed and lack merit and they fail. We wish to add that contrary to the assertion by the Appellant's counsel, that there is no provision in the law to challenge the nomination of a candidate for a parliamentary election on the basis of being disqualified, Article 52 (4) of the Constitution provides for the challenging of a candidate's nomination within seven (7) days of the close of nominations and for the same to be heard within twenty one (21) days.

Further, Article 70 (2) (b) of the Constitution relied upon by the Appellant provides that:



**“(2) A person is disqualified from being elected as a Member of Parliament if that person –**

**(b) is a public officer or Constitutional office holder;”**

Article 266 of the Constitution outlines the following relevant definitions:

**“public officer” means a person holding or acting in a public office, but does not include a State officer, councillor, a Constitutional office holder, a judge and a judicial officer;**

**“State officer” means a person holding or acting in a State office;**

**“State office” includes the office of President, Vice – President, Speaker, Deputy Speaker, Member of Parliament, Minister and Provincial Minister;**

From the definitions above, it is expressly clear that the office of a Minister and Provincial Minister is not included in the definition of a public officer and therefore the Appellant’s argument on this point was misconceived. We note that the Appellant’s counsel drew his view from the definition of public office under Article 266, however, this was a misdirection as the term public officer has been clearly defined by the Constitution and it excluded the 1<sup>st</sup> Respondent as Minister at the time.

The Appellant stretched the argument on the status of the 1<sup>st</sup> Respondent as Provincial Minister by stating that the misdirection on the effect of the **Law Association of Zambia**<sup>2</sup> case led the Court



below to neglect to consider the allegation that the 1<sup>st</sup> Respondent used government resources in election campaigns and that this neglect amounted to breach of duty to determine all issues in controversy between the parties. We have thoroughly perused the Judgment on this aspect and are of the view that the Court below addressed its mind to this allegation as is apparent from pages J59 to J62 of its Judgment which are on pages 68 to 71 of the record of appeal. What is not clear is its specific finding on this aspect after it analysed the evidence of PW1, PW5, PW8 and PW9 as against the evidence of the 1<sup>st</sup> Respondent, RW6 and RW8, but it instead posed two questions in this manner:

**“Going by the above facts, can one hold the 2<sup>nd</sup> Respondent to have used the government resources? Or can it be said that the 2<sup>nd</sup> Respondent acted contrary to the Court’s Order?”**

The lower Court did not state its clear finding on the first question although it is apparent from the relevant portion of the Judgment that it was not satisfied with the evidence proffered by the Appellant and his witnesses on this allegation. In particular, the Court below found that the evidence of PW1 alleging that the 1<sup>st</sup> Respondent had used the vehicles GRZ 403 and ABJ, both being incomplete vehicle registration numbers, raised doubt on the vehicles allegedly used. That the Appellant’s testimony regarding



one Ngosa, a government worker, off loading food stuff at a Patriotic Front (PF) camp from a vehicle registration number ALB 1931 did not prove that the same was a government vehicle or that he was sent by the 1<sup>st</sup> Respondent. Regarding, the evidence of PW5, PW8 and PW9 that they saw the 1<sup>st</sup> Respondent alight from the vehicle GRZ 598 CL at a meeting attended by the community, government officials and Patriotic Front (PF) cadres, the trial Judge stated that PW5 and PW9 were witnesses with a possible interest to serve and their evidence should be received with caution. The trial Judge added that if she was to find that the 1<sup>st</sup> Respondent had used government vehicles, she would still have to consider whether the majority of the electorate was thereby prevented from voting for their preferred candidate. Despite the Court below not categorically stating so, it is apparent that it was not satisfied that the allegation was proved on both limbs of the commission of the act by the 1<sup>st</sup> Respondent or with his knowledge and consent or approval and that the majority of the electorate were affected as required by section 97 (2) (a) of the Act.

We have thus extensively examined the record which reveals that the testimonies of PW1, PW4, PW5, PW8 and PW9 were to the effect that the 1<sup>st</sup> Respondent was using a Government vehicle



Toyota Hilux registration number GRZ 598 CL as he conducted his campaign. PW8 produced before the trial Court a video showing a beige coloured twin cab.

In rebuttal, the 1<sup>st</sup> Respondent, RW6 and RW8 testified that no government vehicle was used during campaigns. The lower Court was thus faced with conflicting evidence on the issue and the need for a clear finding cannot be overstated. However, considering that the standard of proof in election petitions is that of a high degree of convincing clarity, the Appellant's evidence on this aspect cannot be said to have clearly established that the 1<sup>st</sup> Respondent used the alleged government motor vehicle as the supporting evidence in the form of the video recording which could have achieved this did little to convincingly show that the 1<sup>st</sup> Respondent used the motor vehicle in issue. The record of appeal is clear that the vehicle shown in the video recording had a different colour from the official or government vehicles assigned to the 1<sup>st</sup> Respondent and we also note that the 1<sup>st</sup> Respondent was not said to be in the video as there is no record of the same. Further, the Appellant's witnesses lamentably failed to give particulars of the other Government vehicles alleged to have been used by the 1<sup>st</sup> Respondent in his campaign, thus their evidence



did little to aid the Appellant's case. In addition, the Appellant's witnesses being either partisan or his employees, fall in the category of witnesses with a possible interest to serve and required corroboration. The trial Judge cannot therefore be faulted in her conclusion that the Appellant did not prove his allegations against the 1<sup>st</sup> Respondent to the required standard.

Having thus stated, the first ground of appeal fails for lack of merit.

Ground two was anchored on the interpretation of the Electoral Code of Conduct. The Appellant's argument was that the Court below had stated that the use of government resources would only have been in issue had the Appellant complained to the Electoral Commission of Zambia during the campaign period. The response by the 1<sup>st</sup> Respondent was that the Appellant did not adduce convincing evidence on the alleged use of government resources.

The issue for determination is whether or not the Electoral Code of Conduct places an obligation on a candidate to report complaints such as the use of government resources to the Conflict Management Committee before such a candidate can raise it in an



election petition. A perusal of the Electoral Code of Conduct in its entirety shows that it does not place an obligation on a party to complain to the Electoral Commission of Zambia or to the Conflict Management Committee of the alleged misconduct prior to commencing an election petition. Regulation 12 (2) of the Electoral Code of Conduct states that:

**Complaints arising during election campaigns and elections may be made to an election officer or to a conflict management committee at the place where the conduct complained against occurred.**

What can clearly be gathered from the provision is that where there is misconduct during election campaigns or the election, it is only prudent that the complaint avenues available during both the campaign period and the election are used. This provision also serves to ensure that complaints are quickly addressed as they arise so as to maintain a conducive environment for the campaigns and elections leading to free and fair elections. We are of the considered view that the trial Court's comment at page J61 of the Judgment over this issue was apparently a mere attempt to underscore this fact. In particular, the trial Judge made the comment after citing regulation 3(1) and (6) of the Electoral Code of Conduct relied upon by the Appellant and which provides that the Electoral Commission of Zambia had a duty to ensure that political



parties did not use state resources for the benefit of any political party or candidate.

The said comment by the learned trial Judge cannot be taken to mean that a complaint to the electoral Conflict Management Committee was a condition precedent to filing an election petition challenging the conduct complained against. Had the Legislature so intended, it would have been expressed clearly.

The Appellant thus misconstrued the trial Judge's comments because she then proceeded to consider the Appellant's evidence on the alleged use of government resources by the 1<sup>st</sup> Respondent. This ground lacks merit and therefore fails.

Grounds three and seven hinge on the lower Court's findings of fact regarding undue influence based on the alleged threats to discontinue government projects in some areas of the constituency. The Appellant's contention is that the Court below fell short of its duty to adjudicate on the threats of discontinuing government projects and that the Court below needed to consider first, whether the 1<sup>st</sup> Respondent made the threats in issue and second, whether these threats were made in breach of section 83 (1) of the Act. The Appellant argued that both these questions can



be answered in the affirmative. The position of the 1<sup>st</sup> Respondent is that the Court below was on firm ground as no such threats to discontinue government projects were proved against him or his agents. In particular, that the road that was being constructed by the Zambia National Service had already reached Ching'ombe prior to the commencement of the campaign period and that UPND councillor candidates won in the five named wards where boreholes were sunk.

What falls to be determined is whether the Appellant had proved that the 1<sup>st</sup> Respondent had threatened to discontinue government projects, namely, the construction of the road in Ching'ombe and the sinking of boreholes contrary to section 83 (1) of the Act and whether the said act affected or might have affected the majority of the electorate from electing a candidate of their choice. The Appellant's evidence was that the 1<sup>st</sup> Respondent had threatened to halt the road construction and borehole drilling in the area if the electorate voted for the Appellant. The 1<sup>st</sup> Respondent on the other hand denied having done so and called witnesses to attest to this. Thorough examination of the Judgment of the lower Court reveals that it did not address the conflicting evidence before it as regards the alleged threats nor did it make a



specific finding on this issue but merely stated as follows at pages J66 to J67 of the Judgment appearing on pages 75 to 76 of the record of appeal:

**“I must state here that there is evidence which has clarified the issues of boreholes and road projects. These are projects which were part of the 5 years plan and are ongoing projects. It was testified by the Petitioner’s witnesses that where boreholes were sunk, it was the UPND Councillor candidates who won the elections.**

**The road project was being carried out by ZNS over whom the 2<sup>nd</sup> Respondent even as a Minister could not tell to stop the government projects. Even if the matter has to be brought back to section 97(2) in order for the Court to hold otherwise. Even the slogan “sonta apo wabomba” did not in my view affect the electorate where the boreholes were sunk and where the road was being constructed. None of the witnesses called by the Petitioner testified that they were prevented from voting for their preferred candidate.”**

Section 83(1) (c ) proscribes the inducing or compelling of any person, by way of threats, to support or not to support any registered political party or candidate, or to vote or not to vote for any political party or candidate, among others.

The record shows that the Appellant and PW10, the UPND councillor candidate and employee of the Appellant’s company called Alpha and Omega, testified that at a rally held on 8<sup>th</sup> August, 2016, the 1<sup>st</sup> Respondent had threatened not to finish the construction of the road from Mboroma to Ching’ombe if the people did not vote for him. The Appellant stated that PW10 reported this allegation to him. The 1<sup>st</sup> Respondent and his witnesses,



particularly, RW3 and RW6 all testified that the 1<sup>st</sup> Respondent did not issue such threats. The question then is whether the Appellant availed enough evidence to establish with convincing clarity that the 1<sup>st</sup> Respondent uttered the alleged threats. It is clear that the Appellant's evidence did not so establish. We stated in case of **Stephen Masumba v Elliot Kamwendo**<sup>13</sup> that the evidence of one's partisan witnesses required something more to prove an allegation to the required standard. It is hence apparent that the hearsay evidence of the Appellant and the lone evidence of PW10 did not prove the alleged threats over the road construction to the required standard.

As regards the borehole drilling, the Appellant in his petition alleged that boreholes were drilled in four mentioned areas at the instance of the 1<sup>st</sup> Respondent. However, in his testimony, the Appellant only stated that the drilling of boreholes in four wards disadvantaged him because the people believed that the 1<sup>st</sup> Respondent had initiated the projects. This evidence amounted to speculation and at the very least was hearsay as no one attested to this belief. The only other witness for the Appellant who mentioned the boreholes was PW7 whose evidence was that when the 1<sup>st</sup> Respondent was addressing a meeting at Kasonka, he was



informed that the borehole which was drilled had no water and the 1<sup>st</sup> Respondent then promised that the Chinese who had drilled it would be instructed to return and drill where there was water.

The Appellant, thus, never proffered any evidence in support of the alleged threats by the 1<sup>st</sup> Respondent over the boreholes hence the learned trial Judge, did not specifically address it apart from making a general comment which was based on the evidence adduced by the 1<sup>st</sup> Respondent. Thus, these two grounds equally fail despite the lower Court's omission to categorically state that the evidence proffered by the Appellant did not prove the allegations against the 1<sup>st</sup> Respondent.

Ground four challenges the trial Court's holding that the invalid votes cast at Kampoko polling station had no effect on the result of the election. The Appellant invites us to consider the meaning of a phrase in section 97 (4) of the Act. Section 97(4) provides as follows:

**“An election shall not be declared void by reason of any act or omission by an election officer in breach of that officer's official duty in connection with an election 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.”(our emphasis)**



The Appellant contends that the underlined phrase ought to be construed in line with the Tanzanian High Court decision in **Mbowe v Eliufoo**<sup>6</sup>, where it was held that:

**“Affected the result means not only the result in the sense that a certain candidate won and another candidate lost. The result may be affected if, after making the right adjustments for the effect of the proved irregularities the contest seems much closer than it appeared when first determined.”**

The Appellant thus argued that there was substantial deviation from the proper conduct of the elections and the said deviation affected the result in the meaning adopted in **Mbowe v Eliufoo**<sup>6</sup>.

The 1<sup>st</sup> Respondent argued that there were no irregularities at Kampoko polling station and that the Appellant had not demonstrated how many ballots or votes were the subject of the purported irregularities and how these affected the result. Further, that the authorities cited by the Appellant cannot override section 97(4) which was the express statutory provision.

The 2<sup>nd</sup> Respondent's position was that the four (4) special votes cast at Kampoko polling station were provided for in section 48(1) (c) of the Act and Regulation 40(1) and (2) of the Electoral Process (General) Regulations 2016, to allow election officers to cast their votes in the polling stations where they are carrying out their duties. It was added that although two of the four certificates



of authority to vote were not endorsed with the national registration card numbers of the bearers, this did not make their votes illegal or invalid as guided by section 121 of the Act. Moreover, that had the four votes been invalid, they would not have affected the result as the difference in votes between the Appellant and Respondent was 97 votes.

The question is whether the Appellant had proved that invalid votes were cast at Kampoko polling station and that those votes affected the result of the election.

We have considered the record of proceedings and the Judgment of the Court below which show that the trial Judge correctly found that the certificates of authority to vote for two of the four special voters had irregularities in form of the omission of the national registration card numbers. This calls for more diligence on the part of election officers to avoid such needless irregularities. The trial Judge, in this case, subsequently considered section 121 of the Act and held that the two certificates of authority were in substantial conformity with the Act because the voters card numbers were endorsed on them and that the voters cards in turn had the national registration numbers endorsed on them. We cannot fault this finding by the trial Judge.



The Court below further held that based on sections 97(4) and 116 of the Act, the irregularities in issue did not affect the result. The Appellant has challenged this holding that the election result was not affected and has heavily relied on the case of **Mbowe v Eluifoo**<sup>6</sup> as stating that where, as a result of the irregularities, the contest seems closer than it appeared at first, then it follows that the result was affected.

We have perused the case of **Mbowe v Eluifoo**<sup>6</sup> and note that despite defining the phrase “affected the result” in the manner advanced by the Appellant, the Tanzanian High Court in that case went on to add as follows:

**“But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules.”**

The Appellant’s argument is thus flawed. The phrase affect the result has been a subject of interpretation in many jurisdictions. In England, it was considered in the case of **Islighton v West Division**<sup>15</sup> cited at page 356 of **Halsbury’s Laws of England**, Fourth Edition, Volume 15, where it was held that “result” means “the success of one candidate over another and not merely an alteration in the number of votes given to each candidate”.



Therefore, to affect the result in this particular case entailed that the result is changed in such a manner that another person emerges as winner. This position was echoed in the case of **Re Kesington North Parliament Election**<sup>16</sup> where it was held that although there was a breach of the statutory rules involving three or four people who voted without a mark being placed against their names on the register, the breach could not have had any effect on the result of the election. It was noted that the winner would also not have changed had those votes been discounted.

In the appeal at hand, the two irregularities only pertain to one polling station which had a total number of 117 registered voters. Numbers of votes are important in assessing the effect of irregularities as indicated in the Uganda Presidential petition of **Besigye v Museveni**<sup>14</sup> where Odoki, CJ, at page 159 of the Judgment said:

**“In order to assess the effect, the court has to evaluate the whole process of election to determine how it affected the result, and then assess the degree of the effect. In this process of evaluation, it cannot be said that numbers are not important just as the conditions, which produced those numbers, are useful in making adjustment for the irregularities.”**

In the current case, the difference in votes between the two parties was 97 and even if the two votes that were the subject of



irregularities on the certificate of authority were to be subtracted, the result would not be affected as the 1<sup>st</sup> Respondent would still emerge as winner.

Nullification of the election results based on the irregularities in issue as argued by the Appellant will be deviating from the spirit of section 97 (4) of the Act. Further, the holding in the case of **Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Electoral Commission of Zambia**<sup>9</sup> in which the Supreme Court considered a similar provision is sound when it was stated that:

**“...the effect of the irregularities have to result in the election being so flawed that the defects seriously affected the result which could no longer reasonably be said to present the true free choice and will of the majority of voters.”**

It would defy logic to accede to the Appellant's position that on account of the irregularities relating to two special votes in respect of Kampoko polling station, the election result could no longer reasonably be said to present the true free choice and will of the majority of voters when it is clear that not only was the election result not affected but the two votes in issue were in substantial conformity with the Act and were actually valid in terms of section 116 of the Act. Thus this ground equally fails for lack of merit.



Grounds five and six will be considered together as they both challenge the interlocutory decisions of the trial Judge.

In particular, ground five challenges the trial Court's decision to strike out paragraph 7 of the Appellant's reply on the basis that it addressed an issue which was not stated in the petition. In so deciding, the trial Court relied on the accepted practice of cross examination limiting the questions that can, in turn, be asked in re-examination. We note from the record that the Appellant sought to appeal against the lower Court's decision on this aspect right before the commencement of the trial of the petition but was denied leave and advised to raise the issue in the main appeal.

Ground six equally arose from an interlocutory objection against the 2<sup>nd</sup> Respondent's notice to produce which is at pages 150 to 172 of the record of appeal. The record of appeal indicates the extensive arguments by Counsel for the respective parties. In raising the objection, the Appellant relied on Order 3 rule 2 of the High Court Rules Cap 27 which gives the High Court discretion to make any appropriate order in the interest of justice. The lower Court ruled that the documents which the 2<sup>nd</sup> Respondent sought to produce were of relevance in arriving at the just decision and



that the parties had not cited any rule which proscribed against the production of documents vide a notice to produce.

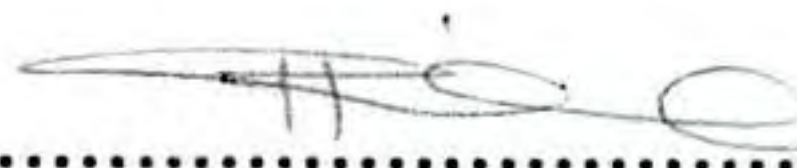
The question, as we see it, is whether these two grounds are competently before us in this appeal as they challenge interlocutory rulings by the trial Judge. We have guided in the case of **Sunday Chitungu Maluba v Rodgers Mwewa and Attorney General**<sup>17</sup> that such issues should be raised as interlocutory appeals as soon as the impugned decisions are made. Therefore, we shall not delve into the merits of grounds five and six at this stage as they were raised belatedly.

We further note that as regards ground five, the trial Court stated that the issue could be raised on appeal. This was not the correct way to proceed. In line with the rules of procedure, the Appellant had the right to file an appropriate application for leave to appeal in this Court when the trial Court denied him leave to appeal. The Appellant thus sat on his rights and cannot cry foul at this late hour.

All the grounds of appeal having failed, it follows that this appeal lacks merits in its entirety and is accordingly dismissed.



Each party is to bear its own costs.

  
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**H. CHIBOMBA**

**CONSTITUTIONAL COURT PRESIDENT**

  
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**A.M. SITALI**

**CONSTITUTIONAL COURT JUDGE**

  
.....

**M.S. MULENGA**

**CONSTITUTIONAL COURT JUDGE**

  
.....

**E. MULEMBE**

**CONSTITUTIONAL COURT JUDGE**

  
.....

**P. MULONDA**

**CONSTITUTIONAL COURT JUDGE**