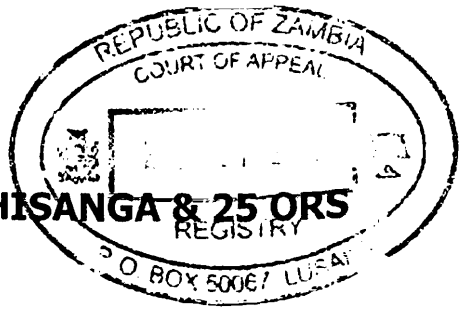
IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT KABWE
(Civil Jurisdiction)

APPEAL Nº 105 OF 2018



BETWEEN:

BERNARD MUKUPA CHISANGA & 25 ORS APPELLANTS

AND

KABWE MUNICIPAL COUNCIL RESPONDENT

CORAM: **Chashi, Lengalenga** and **Siavwapa, JJA**
On 16th October, 2018 and 22nd October, 2019.

For the Appellants: No appearance

For the Respondent: Mr. B. J. Abwino – Council Advocate (KMC)

J U D G M E N T

LENGALENGA, JA delivered the Judgment of the Court.

Cases referred to:

1. **AMERICAN CYANAMID COMPANY v ETHICON LIMITED (1975) AC 396**
2. **SHELL & BP ZAMBIA LTD v CONIDARIS & ORS (1975) ZR 174**
3. **LONDON AND BLACKWALL ROY v CROSS (1886) 31 CH. D 345**

3. **LONDON AND BLACKWALL ROY v CROSS (1886) 31 CH. D 345**
4. **HONDLING XING XING BUILDING CO LTD v ZAMCAPITAL ENTERPRISES LTD (2010) 3 ZR**
5. **ZINKA v ATTORNEY GENERAL (1990 – 92) ZR 73**
6. **NDOVI v NATIONAL EDUCATIONAL CO LTD (1980) ZR 184**
7. **MWENYA & ANOR v KAPINGA (1998) SJ 12 (SC)**
8. **HILARY BERNARD MUKOSA v MICHAEL RONALDSON (1993) SJ 25 (SC)**
9. **MOBIL ZAMBIA LTD v MSISKA (1983) ZR 86 (SC)**
10. **TITO v WADDEL (№ 2) (1977) CH. D 106 at p. 322**
11. **JULDAN MOTORS LTD & ANOR v NASSA IBRAHIM & ANOR – CAZ/08/209/2017**
12. **MICHAEL CHILUFYA SATA v CHANDA CHIMBA III & ORS (2011) 2 ZR 444**

Legislation referred to:

1. **THE LANDS AND DEEDS REGISTRY ACT, CHAPTER 185 OF THE LAWS OF ZAMBIA**
2. **THE RULES OF THE SUPREME COURT, 1999 EDITION**
3. **THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA**
4. **THE COURT OF APPEAL ACT, № 7 OF 2016**

1.0 INTRODUCTION

1.1 This is an appeal against the ruling of the High Court delivered on 8th December, 2017 by Hon Mr. Justice M. L. Zulu.

2.0 BACKGROUND TO THE APPEAL

2.1 The background to this appeal is that the Appellants herein commenced an action by way of Writ of Summons on 27th

September, 2017 against the Respondent herein claiming a number of reliefs, among them, an order of interim injunction to restrain the Respondent from clearing, developing, leasing, advertising, subdividing or selling the Appellants' plots until final determination of the matter.

2.2 The Appellants' application for an order of interim injunction was supported by an affidavit sworn by one Bernard Mukupa Chisanga on his own behalf and that of his co-Appellants. The gist of his averments therein is that in February, 2015 he and the other Appellants were offered commercial plots at Tushane in Lukanga township in the Kabwe District of the Central Province of the Republic of Zambia for which they paid the requisite fees for acceptance of the said plots and that the Respondent confirmed the offers. According to his further averments, the Respondent, however, started developments on the Appellants' plots on the pretext of creating a transit bus station and the said plots have since been repossessed through a re-entry. He further deposed that all efforts to challenge the said decision have failed as the Respondent's decision was final. The said deponent further attested to the fact that none of the

Appellants gave written consent to surrender their plots to the Respondent. He averred that they were neither given alternative plots nor compensated for the demolition of the partially constructed structures and building materials on the plots which he and other Appellants in their arguments state is indicative that damages may not be adequate to compensate them for the loss of the said land.

2.3 The Appellants were initially granted an *ex-parte* order of interim injunction on 4th October, 2017 which was later opposed by the Respondent in the affidavit in opposition filed on 9th October, 2017. In the said affidavit in opposition, the deponent one Mwandwe Mwamba, a Senior Legal Assistant employed by the Respondent in the Department of Legal Services, averred that the Respondent, having been bestowed with authority to plan, re-plan and monitor development within the municipality of Kabwe, did not at any given time, authorise any developments on the subject plots. He further averred that Stand № 2037 as claimed by the Appellants is under leasehold of the Respondent Council and is not State land. He further averred that the Respondent's decision to construct the Kabwe transit bus station at Stand № 2037 was a matter of public

policy that overrides the desires of selfish ambitions of a few disgruntled individuals and is meant to benefit the residents of Kabwe and Zambian citizenry.

2.4 The learned trial judge considered the affidavit evidence, submissions and authorities of **AMERICAN CYANAMID COMPANY v ETHICON LIMITED**[1] and **SHELL & BP ZAMBIA LTD v CONIDARIS & ORS**[2]**.** He acknowledged that the cited authorities brought out three main principles to be considered before a court can exercise its discretionary power to grant injunctive relief. He thus stated that according to the Supreme Court's decision in the celebrated Zambian case of **SHELL & BP ZAMBIA LTD v CONIDARIS & ORS,** a party seeking injunctive relief must demonstrate the following:

(a) A clear right to relief;

(b) Irreparable damage or injury that is likely to be suffered that cannot be atoned for by damages; and

(c) That the balance of convenience lies in that party's favour in granting the injunction.

2.5 In arriving at his final decision on whether or not to grant the injunctive relief sought, the learned trial judge considered whether or

not the Appellants had satisfied the requirements of being granted the said relief.

2.6 He firstly considered whether there was a serious question to be tried and whether the Appellants had established a clear right to the relief they were seeking. He noted that the dispute before him had emanated from the Appellants' claim that they had been offered pieces of land by the Respondent, for which they had paid the requisite fees but which pieces of land were repossessed before the conveyance process was completed. He further noted that the Appellants among other reliefs, were seeking a declaration that the purported re-entry on the subject pieces of land by the Respondent without following the laid down procedure is illegal, null and void. He considered that to be an issue that could be determined at trial.

2.7 With regard to the second issue of whether or not the Appellants are likely to suffer irreparable damage that cannot be atoned for by an award of damages, the learned trial judge acknowledged that whilst the Appellants were offered the pieces of land, the process for acquisition of title deeds for the said pieces of land was not completed and that they could not at that stage claim to be owners

of the said pieces of land in terms of section 33 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.

2.8 He stated that from the evidence on record, he did not see any irreparable damage that the Appellants would suffer, as any loss, if any, properly quantified can be atoned for in damages. He further noted that the Respondent in its affidavit in opposition had indicated its willingness to address the issue of alternative plots. Consequently, he found that any damages the Appellants were likely to suffer would clearly be atoned for in damages, if they proved their claims. To support his position, the learned trial judge relied on the case of **LONDON AND BLACKWALL ROY v CROSS[3],** where Lindley, L J, held:

> **"That the very first principle of injunctive law is that you do not obtain injunctions to restrain actionable wrongs for which damages are a proper remedy."**

2.9 Based on the principle espoused in the cited case, the learned trial judge dispensed with consideration of the third issue on the balance of convenience as he was of the view that it would serve no practical purpose to do so.

2.10 Thereafter, he proceeded to discharge the *ex-parte* order of interim injunction granted on 4th October, 2017 as he found that it lacked merit.

3.0 APPELLANTS' GROUNDS OF APPEAL

3.1 Dissatisfied with the ruling rendered by Hon Mr. Justice M. L. Zulu, the Appellants have appealed to this Court and advanced the following grounds of appeal:

1. **The Court below erred in law and fact when it held that leave to appeal against the discharge, grant or refusal of injunction was required before an appeal could lie to the Court of Appeal when in fact not, and he fell in grave error when he embarked on a lengthy ruling justifying why he refused leave. The Court erred in refusing to grant the appellants leave to appeal by dealing with the matter as though it was determining an appeal against its own decision by holding that there was nothing capable of being enforced;**

2. **The Court below erred in law and fact when it discharged the Order of Interim Injunction and held that the plaintiffs would not suffer irreparable injury and that damages would be an adequate remedy for loss of land;**

3. **The Court below erred in law and fact when it held that there were no prospects of success in the appeal before any grounds of appeal were advanced, and in refusing to grant a stay of execution on grounds that the Court below had no jurisdiction to grant a stay of its own decision;**

4. **The learned Judge misdirected himself when he delved into the issues of ownership of the disputed plots and the powers of the Commissioner of Lands at injunction stage and pre-empted the essence of trial;**

5. **The Court below misdirected itself when it failed to critically analyze the evidence before it thereby holding that the plaintiffs were not owners of the plots because the Commissioner of Lands was not bound to accept the recommendations when there was no such evidence adduced by either party in the applications for injunction and this was a matter fit for consideration at trial;**

6. **The Court below misdirected itself by failing to notice that there was a serious question to be tried at trial and failed to follow the set guidelines for the grant of the relief of injunction;**

7. **The Court below erred in contradicting itself in holding that damages would be adequate for the loss of a piece of land and also when he stated that he did not see the need to discuss the issue of adequacy of damages and balance of convenience and thereby fell in grave error in the manner he handled the application for injunction;**

8. **The Court misdirected itself in law and fact when it failed to adjudicate upon each and every aspect raised before it and in respect of the guidelines upon which an injunction can be granted or refused, and failed to address the issues in controversy to finality on the aspect of the injunction thereby creating a situation where there are now a multiplicity of actions on the same facts; and**

9. **The Court below ignored the fact that the issue of allocation of plots to the plaintiffs by the defendants was admitted by the defendants, ceased being an issue**

and neither party was required to adduce further proof on it.

4.0 APPELLANTS' ARGUMENTS IN SUPPORT OF APPEAL

4.1 The Appellant's heads of argument were filed into Court on behalf of the Appellants.

4.2 Counsel for the Appellants argued grounds one, two and seven together.

4.3 In ground one Counsel for the Appellants' contention was that the learned judge erred in law and fact when he found that leave was required from the Court below before an appeal could be lodged to the Court of Appeal.

4.4 The gist of his arguments in support of grounds two and seven is that the subject matter of the injunction is land which is a unique subject and for which damages for its loss would not be adequate or easily quantifiable.

4.5 It was further submitted that the celebrated case of **AMERICAN CYANAMID COMPANY v ETHICON LIMITED** is the leading case that set out principles and guidelines for the test for the grant of

interlocutory injunctions. According to the test set out, a plaintiff must prove the following:

1. **That he has chances of succeeding at the main trial.**

2. **That he has a good arguable case.**

3. **That the injury to be suffered would be irreparable and cannot be atoned for in damages.**

4.6 He further submitted that the test has been re-affirmed in Order 29, Rule 1A/3 of the Rules of the Supreme Court, 1999 Edition.

4.7 Grounds three and four were also argued together. In support thereof, it was submitted that the affidavit in opposition has neither shown nor refuted the Appellants' allegations that they were not compensated or offered alternative plots before their land was encroached upon and developed without compensation being offered.

4.8 It was contended that the learned trial judge ignored the fact that the repossession procedures were not followed and that as such, the Respondent had no right to repossess the land.

4.9 It was further contended that the rules of natural justice were not followed by the Respondent in the repossession of the land.

4.10 In support of ground five, it was submitted that the Appellants have established a good arguable case and that the Respondents have not adduced any evidence in the affidavits to demonstrate the Appellants who have consented or been compensated and that they had a duty to act judicially and fairly towards the Appellants.

4.11 Counsel for the Appellants submitted that since the subject of the injunction is land, if the Respondent proceeds to develop the said land against the wishes of the Appellants, they would be prejudiced and likely to suffer irreparable injury.

4.12 With regard to ground six, it was submitted that the Respondents have raised issues that relate to budgeting and inconvenience, which are irrelevant as the land in issue does not belong to the Respondent as it has already been alienated to the Appellants.

4.13 With regard to the Respondent's assertion that the decision to build a transit bus station is a matter of public policy, it was contended that the Respondent can build one anywhere in Kabwe since it is mandated to plan, re-plan and monitor development in Kabwe.

4.14 Counsel for the Appellants submitted that the Respondent's arguments are economic ones that should not be entertained by this

Court. He submitted that the Appellants would aver that there was a serious question to be tried which was whether the local authority can re-enter commercial plots belonging to the Appellants without following the provisions of Article 16 of the Republican Constitution or without adequate compensation. He relied on a number of authorities such as **HONDLING XING XING BUILDING CO LTD v ZAMCAPITAL ENTERPRISES LTD**[4], **ZINKA v ATTORNEY GENERAL**[5], **NDOVI v NATIONAL EDUCATIONAL CO LTD**[6] and **MWENYA & ANOR v KAPINGA**[7] where the Supreme Court held *inter alia* that:

> **"The law takes the view that damages cannot adequately compensate a party for breach of the contract for sale of an interest in a particular piece of land or of a particular house, however ordinary."**

4.15 Based on the Supreme Court decision in the **ZINKA** case, Counsel for the Appellants argued that whilst the Respondent has power to re-plan and re-develop bus stations or areas, which power emanates from statute, it is the Appellants' contention that it has a duty to act judiciously and with procedural fairness.

4.16 He submitted that the learned judge ignored the Supreme Court's decision in the **MWENYA** case that damages cannot adequately compensate a party for loss of interest in a particular piece of land. He further submitted that, that was a misdirection of the law on the learned judge's part.

4.17 In support of ground eight, Counsel for the Appellants argued that the Respondent had not exhibited the list of people who did not pay land charges as demanded, in the Court below. He further submitted that the Respondent had also not shown why all the Appellants should be punished for the failure by a few people to settle fees as alleged. He accordingly argued that liability for non-payment is not transferable.

4.18 In arguing that the Appellants have established a good arguable case and that they have shown that they are entitled to relief, Counsel for the Appellants relied on the case of **SHELL & BP ZAMBIA LTD v CONIDARIS & ORS.** He based his argument on the allegation that the Appellants were not consulted or compensated and that they were not given the right to be heard before the repossession of the plots. He submitted that their right to relief is clear.

4.19 He relied on a number of authorities such as **HILARY BERNARD MUKOSA v MICHAEL RONALDSON**[8], **MOBIL ZAMBIA LTD v MSISKA**[9] and **TITO v WADDEL (№ 2)**[10] where it was held that:

> **"The question is not simply whether damages are an "adequate" remedy but whether specific performance as it were will do more perfect and complete justice than award of damages. This is particularly so in all cases dealing with a unique subject matter such as land."**

4.20 In this case, Counsel for the Appellants submitted that the Court below did not analyze the requirements for the grant of injunction. He further submitted that the Court also ignored the issues of compensation for the land that the Respondent repossessed from the Appellants.

4.21 In support of ground nine, it was submitted that the Appellants have established that they are the owners of the plots and are entitled to an injunction restraining the Respondent from further development of the commercial plots until final determination of the matter.

4.22 Counsel for the Appellants argued that by the learned judge's refusal to stay the order that discharged the *ex-parte* order of interim injunction, further exposed the Appellants to serious irreparable

injury and harm. He submitted that unless the injunction is re-instated by way of injunction or stay of the ruling, the entire proceeding will be rendered academic. He relied on a few cases, such as **JULDAN MOTORS LTD & ANOR v NASSA IBRAHIM & ANOR**[11] where Judge Chashi granted an order to stay execution in order to ensure that the *status quo* was preserved pending the determination of the appeal.

4.23 In concluding his arguments in support of ground nine, Counsel for the Appellants submitted that this is a matter fit for stay of execution of the ruling of the Court below and reinstatement of the injunction.

5.0 THIS COURT'S CONSIDERATION OF THE APPEAL AND DECISION

5.1 Before we proceed to express our views on the Appellants' grounds of appeal and arguments in support thereof, we wish to point out that the Respondent neither filed arguments to oppose the appeal nor sent representatives to the hearing of the appeal. That being the position, we proceeded to consider the appeal on the grounds and Appellants' arguments before the Court.

5.2 We have considered the grounds of appeal, arguments in support of the appeal, authorities cited, evidence on record and ruling appealed against.

5.3 As earlier indicated, grounds one, two and seven were argued together. With regard to ground one, Counsel for the Appellants faulted the learned judge's ruling where he held that leave to appeal against the discharge, grant or refusal of the injunction that was earlier granted *ex-parte* to the Appellants was required before an appeal could lie to the Court of Appeal.

5.4 We had occasion to look at section 23(1)(e)(ii) of the Court of Appeal Act № 7 of 2016 pertaining to restrictions on civil appeals. The said provision states that:

> **"An appeal shall not lie –**
> **(e) from an order made in chambers by a judge of the High Court or by a quasi-judicial body or from an interlocutory order or interlocutory judgment made or given by a judge of the High Court or by a quasi-judicial body, without the leave of that judge or quasi-judicial body or, if that has been refused, without the leave of the Court, except in the following cases:**
> **(ii) where an injunction or the appointment of a receiver is granted or refused;"**

5.5 From the foregoing, it is clear that injunctions do not fall within the category of civil appeals where leave to appeal is required.

5.6 In the circumstances, we find that ground one has merit and that the learned judge misdirected himself in finding that leave was required from the High Court for the appeal to lie to this Court.

5.7 With regard to grounds two and seven where the learned judge discharged the *ex-parte* order of interim injunction after finding that the Appellants had firstly not established a clear right to relief and that they would not suffer irreparable injury as damages would be an adequate remedy, we are of the considered view that the decision was arrived at after careful consideration of the affidavit evidence before him. We note from the averments of Bernard Mukupa Chisanga that the pieces of land that the Appellants are claiming were repossessed before the conveyancing process was completed. He had further averred that they were neither offered alternative plots nor compensated for the demolition of the partially-constructed structures and building materials.

5.8 We further note from the evidence on record, particularly, the affidavit in opposition that the Respondent had indicated its

willingness to address the issue of alternative plots. In the circumstances, the Court below could not be faulted for finding that the Appellants were not likely to suffer irreparable injury and that damages would be an adequate remedy. In this case the learned judge was on firm ground in finding that damages would be adequate to compensate the Appellants for the demolished structures. We are further of the view that he properly arrived at the finding that damages would be adequate compensation for loss of the pieces of land as the Appellants referred to lack of compensation and also in view of the Respondent's willingness to issue the Appellants alternative plots.

5.9 We, therefore, find no merit in grounds two and seven as the Appellants had not adequately demonstrated their right to relief and what irreparable damages they are likely to suffer in light of the Respondent's willingness to offer alternative plots. We, accordingly, disallow them.

5.10 We turn to grounds three and four which were also argued together.

5.11 In ground three the learned judge is faulted for holding that there were no prospects of success in the appeal before any grounds of

appeal were advanced and refusing to grant a stay of execution of its ruling.

5.12 On that issue of prospects of success, this Court is guided by the Supreme Court's observation in a plethora of cases that a judge is entitled to preview the prospects of success. In the case of **MICHAEL CHILUFYA SATA v CHANDA CHIMBA III & ORS**[12], the Supreme Court observed that:

> **"In exercising its discretion whether to grant a stay or not, the Court is entitled to preview the prospects of the proposed appeal."**

5.13 Therefore, we opine that the learned judge in this case was on firm ground in previewing the prospects of success as he did.

5.14 We, accordingly, find no merit in this ground and we disallow it.

5.15 With regard to ground four where it is contended that the learned judge misdirected himself by delving into issues of ownership of the disputed plots and powers of the Commissioner of Lands at the injunction stage thereby pre-empting the outcome of the trial, we agree with Counsel for the Appellants. We are of the considered view that the learned judge ought not to have delved into issues of ownership based on affidavit evidence alone and at that stage of the

proceedings before trial, as any evidence before him could only be tested by cross-examination of witnesses that were likely to be called at trial.

5.16 We, therefore, find merit in ground four and we, accordingly, allow it.

5.17 We turn to ground five which we consider to be a continuation of the Appellants' arguments in ground four relating to the issue of ownership. The gist of their contention was that the learned judge ought to have critically analyzed the evidence as opposed to delving into issues of ownership when there was no adduced evidence between the parties as that could only be considered at trial and not based on affidavit evidence. As we earlier observed in the preceding ground, the learned judge misdirected himself by delving into issues of ownership at the injunction stage before trial and thereby made an imbalanced analysis and evaluation of the affidavit evidence. We, therefore, equally find merit in ground five and we allow it.

5.18 Ground six faults the learned judge for failing to notice that there was a serious question to be tried and failing to follow the set guidelines for the grant of an injunction. From the ruling appealed

against, we noted that the learned judge considered principle guidelines for granting injunctions as he even cited the cases of **AMERICAN CYANAMID COMPANY v ETHICON LTD** in which the principles were espoused and **SHELL & BP ZAMBIA LTD v CONIDARIS & ORS** where the said principles were followed with approval by the Supreme Court. We opine that the fact that the learned judge found that damages would adequately compensate the Appellants does not necessarily mean that he failed to follow the guidelines. As rightly stated by Counsel for the Appellants, the cited cases merely provide guidelines to the Court and the court can decide based on the evidence before it as each case is different. The guidelines are not cast in concrete or stone such that one cannot deviate from them. We are of the view that it is possible for a court to arrive at a different decision so long as it gives a sound reasoning of how it arrived at such a dissenting decision.

5.19 For the reasons stated, we find no merit in ground six and we, accordingly, disallow it.

5.20 We turn to ground eight in which the Court below is alleged to have failed to adjudicate upon all the issues in controversy thereby creating a situation for multiplicity of actions. In the arguments in support of this ground we noted that Counsel for the Appellants submitted on the issue of compensation and the fact that the Appellants were not compensated or given a right to be heard before the repossession of the plots. The learned judge is alleged to have ignored those issues.

5.21 We considered the arguments advanced in support of this ground and we opined that the issues of compensation would have become clearer at the trial where the Respondent would have been interrogated on the matter through its witnesses and that, therefore, the learned judge was on firm ground by not addressing triable issues at the injunction stage. We, accordingly, find no merit in ground eight and we disallow it.

5.22 We finally turn to ground nine where Counsel for the Appellants contends that as the Appellants have established that they are owners of the subject plots, they are entitled to an injunction to

prevent them from suffering further irreparable injury; and to a stay of execution of the ruling in order to maintain the *status quo.*

5.23 Having considered the arguments advanced, we are, however, not persuaded that this is a proper case in which to grant the remedies sought. The learned judge in the Court below found that the right to relief had not been established and that the Appellants would not suffer irreparable injury if the injunction is not granted as the Respondent was agreable to allocating them alternative land and that they could be compensated for the demolished structures as their worth is quantifiable.

5.24 We find no merit in ground nine and we further find that the learned judge was on firm ground in discharging the *ex-parte* interim injunction as the right to relief was not clear.

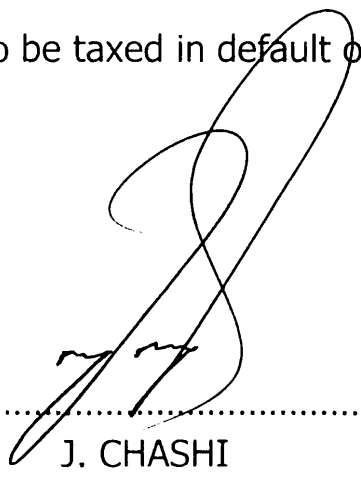
5.25 As for the stay of execution, we opined that granting of the same was also dependent on a few considerations, among them the likelihood of success which was rejected by the learned judge.

5.26 We equally find no merit in this argument for a stay of execution and we disallow it.

6.0 CONCLUSION

6.1 In conclusion, the Appellants having succeeded only in three grounds out of the nine grounds, the net result is that the appeal fails.

6.2 As costs follow the event, we order that the Appellants bear the costs of this appeal. Same to be taxed in default of agreement.



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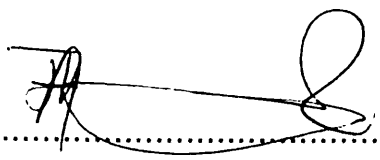
J. CHASHI

COURT OF APPEAL JUDGE



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F. M. LENGALENGA

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M. J. SIAVWAPA

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