

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

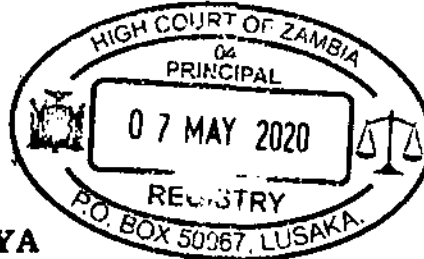
2013/HP/0397

BETWEEN:

ERNEST BWALYA

AND

LAWRENCE CHILUFYA
JONAS MULIPA
SQUATTERS (occupying Stand No. 36878)



PLAINTIFF

1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT

Before: *The Hon. Mr. Justice Charles Zulu.*

For the Plaintiff: Mr. G. Musonda, of Messrs Dzekedzeke and Company.

For the first Defendant: Mr. M. C. Kanga, of Messrs Makebi Zulu and Company.

Second Defendant: In Person.

Third Defendants: No Appearance.

JUDGMENT

Cases referred to:

1. *Eustace Bobo and Another v Commissioner of Lands and Another 2005/HP/1108.*

Legislation referred to:

1. *Rules of the Supreme Court 1965 England and Wales (White Book 1999 Edition).*
2. *The Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia.*
3. *The Land Survey Act, Chapter 188 of the Laws of Zambia*

Other works referred to:

- 1. Snell's Equity, 13th Edition (London, Sweet & Maxwell, 2000) page 47, para. 4-06.**

Plaintiff/Applicant, Ernest Bwalya took out an originating summons dated April 2, 2013 claiming for an order to recover possession of Stand No. 36878 Lusaka. The application was made pursuant to Order 113 of the **Rules of the Supreme Court (RSC) White Book 1999 Edition**. However, by ruling dated April 4, 2014, the matter was rendered inappropriate to be heard and determined under Order 113 RSC, because land title was in contention. Therefore the matter was deemed to have been commenced by way of a writ of summons and statement of claim. Ostensibly, formalities relating to discovery and inspection were observed and the matter was finally set down for trial.

The Plaintiff testified and started by alleging that the first Defendant grabbed his land, Stand No. 36878 Lusaka. He said he applied for land from the Ministry of Lands in 2006, and was allocated Stand No. LUS/36878 Lusaka in SOS area. He made reference to the letter of offer from the Ministry of Lands in his name dated October 16, 2006. He said he paid all the requisite fees at the Ministry of Lands and at the Lusaka City Council, and thereafter started to build a house. And his certificate of title was exhibited dated July 26, 2012.

He said on August, 28 2012, while at his plot, he was surprised to be approached by a violent group of people pelting stones. He said he and his family were forced to flee, and reported the matter to the Police. He said the Police advised him not to return to the plot. He said after one month, in September 2012, when he returned to check on his house, he discovered

his house was partially demolished and there was a new structure built on the plot by Lewis Chilufya, the first defendant.

In cross examination, the Plaintiff was shown another letter of offer from the Ministry of Lands for Stand No. LUS/36898 bearing the names of Albert Kongwa, dated August 2, 2006. He said between his letter of offer and that of Albert Kongwa, he did not know which one was valid.

The Plaintiff's witness was Kennedy Mulenga, a builder, who was basically called to confirm that he was the builder contracted by the Plaintiff to build a house at the subject stand for the Plaintiff.

In his defence, the first Defendant (DW1) testified and called one Defence Witness (DW). He testified that he purchased Stand No. 36898 in 2011, at the price of K50, 000.00 from Magistrate Kongwa. He said before the purchase of the plot, he verified with the Ministry of Lands, to confirm that the stand belonged to Mr. Albert Kongwa, and after purchase he started building. He said when he took possession of the plot and ascertained the real size of the plot; he discovered that the second Defendant, Mr. Jonas Mulipa, a ward Chairman of SOS area had built within his acquired plot. He said he approached the second defendant and offered to compensate him for the structure he had put up for him to vacate. However, he said, he did not compensate the second defendant because the second Defendant decided to join camp with the Plaintiff to drag him to court.

Mr. Chilufya stated that the land was surveyed by Kayo Surveyors. He alleged that the site plan used by the Plaintiff from the Lusaka City Council to acquire the land was problematic. He made reference to a report that was compiled by Kayo Surveyors *inter alia* relating to the numbering of the subject stand, Stand No. 36898 and Stand No. 36878. The same reads here below:

22 September 2014

TO WHOM IT MAY CONCERN

Dear Sir

REF: NUMBERING OF STAND 36898 CITY OF LUSAKA-LUSAKA PROVINCE.

The numbering of the above mentioned stand was done at the Ministry of Lands, Natural Resources and Environmental Protection by the office of the Surveyor General.

Attached to this letter are copies of the Site Plans showing the same area. There is Site Plan Number 1 and Site Plan Number 2. Site Plan number 1 was numbered by the Surveyor General and Site Plan number 2 was copied and made from site plan number 1 by the Lusaka City Council.

As the coping of numbers was being made from site plan 1 to site plan 2, there were errors which were made on site plan 2. For instance stand 36897 was double copied as well as 36886, 36644 and 36645. On site plan number 2 the number 36898 was omitted and was wrongly replaced by number 36878 which is supposed to be where one of the 36897 is.

I would like to point out that thorough search when carrying out the survey of Stand 36878 was not done. Hence, the survey record numbered 218/2012 needs to be cancelled, which makes the current title deed of stand 36878 City of Lusaka to be invalid.

Yours faithfully
KAYO SURVEYORS

Chisala Raphael Kayombo
LAND SURVEYOR

C.C The Surveyor General

**The Director
City Planning Department
The Commissioner of Lands**

Owner of Stand 36878

In cross examination he reiterated that when he was first shown the plot, there was nothing, and when he was later shown the exact extent of his plot, it was discovered that it extended to where the second Defendant had encroached and had built a structure. He said there was no structure built by the Plaintiff on the said land. He said Kayo Surveyors were contracted by the Ministry of Lands to do survey works on the land. He added that the site plan which was correct was the one done by Kayo Surveyors. He maintained that Stand No. 36898 was his plot. He said Stand No. 36878 relied on by the Plaintiff was based on a site plan from the Council with mistakes. He explained that on the site plan by the Council where Stand No. 36878 was supposed to be, there was instead Stand No. 36897. He added that on the ground and as shown by the site plan from Kayo Surveyors, Stand No. 36878 was next to his, and that the same was occupied by another person who died in November 2018.

I will not immediately proceed to summarize the testimony of the "second Defendant", but for convenience proceed to summarize the testimony of DW3, Mr. Emmanuel Matasi, a Registered Land Surveyor, who also testified as an expert and previously worked for Kayo Surveyors.

DW3, Mr. Matasi said he worked for Kayo Surveyors from 2002 as an Assistant Land Surveyor up to 2013, when was he was registered by the Survey Control Board to set up his own practice. He said he had an opportunity to technically review documentation in respect of the subject

dispute. He explained that the dispute related to numbering of two plots, namely Plot Nos. 36878 and 36898 located in an area called SOS Lusaka. He said this information was obtainable from the site plan under the custody of the Surveyor General. He explained that when a local authority prepares a site plan, the same was submitted to the Surveyor General for the latter to number the site plan. He further explained that a site plan must contain: a title, reference to an area or proposed plots; the scale on which the map was drawn; approvals from the Lusaka City Council; approvals from the Ministry of Lands; and a stamp from the Surveyor General. And he stated that the numbering by the Surveyor General was hand written.

He said in the present case there were two site plans. He said the first he saw was derived from a big site plan (authentic) showing the whole area of SOS. He made reference to the copy at page 26 of the first Defendant's Bundle of Documents with hand written numbering of plots. He added that the second site plan shown to him was at page 24 of the first Defendant's Bundle of Documents with computer generated plot numbers. He noted that a computer generated site plan may contain some differences from the hand written one (original copy).

He made reference to a report exhibited at page 8 of the first Defendant's Bundle of Documents reproduced here-below:

3rd April, 2014

The Surveyor General

Mulungushi House

LUSAKA

Dear Sir

**REF: REPORT ON BOUNDARY VERIFICATION (sic) STAND 36878
AND STAND 36898, LUSAKA PROVINCE.**

The instructions to verify the boundaries of stand 36878 are as per Court order from The High Court dated 30th August, 2014.

I would like to inform you sir that as a Regional Office we have carried out the verification for LUS 36878 which is already surveyed and on title and LUS 36898 which is just on offer. The verification was based on the site plan from the City council and the approved survey records for LUS 36878 under record number 218/2010.

The geographical position and geometry of LUS 36878 is as per approved Survey Record and site plan from the City Council except the owners of LUS 36898 have since built on the same land where LUS 36878 is positioned according to the same site plan. It is also worth noting that, the position of LUS 36898 is not certain because its not shown on the same site plan from the City Council and according to our findings there is no relationship with LUS 36878 (see attached Site plan from City Council and Survey Diagram for LUS 36878 under record number 218/2010).

Therefore, the owners of LUS 36898 have been misplaced taking up the position for LUS 36878. It is further recommended that the owners of LUS 36878 revert to his position and allowed to enjoy the right to their property.

Yours Faithfully,

Mwambazi Lucas

Field Survey officer

For/Regional Surveyor

LUSAKA REGIONAL SURVEY OFFICE

He said this report was not based on the site plan with hand written numbering, but was based on the wrong site plan from the Lusaka City Council. He also discounted this report, he alleged it was not professionally done, because it was signed by an unqualified person.

He explained that upon study of the documents, he discovered that Plot Nos. 36878 and 36898 were seating on the same property. He said a analysis of the documents at pages 26 and 27 of the first Defendant's Bundle of Documents showed that Plot No. [36]878 had two numbers. He said with this situation, it was possible to have two conflicting owners. He said when he read the report hereinbefore reproduced dated September 22, 2014, by Kayo Surveyors; the problem was with numbering. According to him, the subject plot had two numbers (36878 and 36898)

According to the him, the site plan used by the Plaintiff was not the original site plan from the Ministry of Lands.

In cross examination he stated that the site plan that was authentic was the one shown at page 26 of the first Defendant's Bundle of Documents derived from the Ministry of Lands and from the said big lay out. He said he had been using the same site plan in similar works since 2004.

DW2 was Jonas Mulipa, "the second Defendant". It must be recorded that Mr. Mulipa inadvertently was still referred to as the second Defendant when in fact, previously the Plaintiff had filed a notice of discontinuance against him. This fact had escaped the attention of the parties, including the Court. He however, testified that in 2008, he was part of the group called "Ngombe Displaced People". He said, consequently, he was allocated Stand No. 36879, which was next to the Plaintiff's Stand No. 36878. He said his plot was encroaching in the Plaintiff's plot, and that the matter was resolved in such a way that he was given a portion of the Plaintiff's

plot to build. He said when he started to build, his building material was kept in the Plaintiff's house. He said after two years after building his house to roof level, the first Defendant demolished his house, including the Plaintiff's house. He added that a report was made to Matero Police, but no action was taken to arrest the first Defendant. He said the first Defendant built an up-stair building on the subject plot.

In cross examination, he stated that he never saw the first defendant physically demolish the Plaintiff's property.

The Plaintiff and the first Defendant respectively filed written submissions. For the Plaintiff, Mr. Musonda submitted that the first Defendant's manner of acquisition of the land was questionable. He observed that the vendor, Albert Kongwa had two letters of offer from the Ministry of Lands, one dated August 2, 2006, and the other was alleged to have been exhibited at page 21 of the first Defendant's Bundle of Pleadings filed on April 3, 2017. It was also stated that whereas the first Defendant alleged that he purchased the plot in 2011, the contract of sale was dated 2006.

It was argued that the first Defendant was not a bona fide purchaser for value without notice. It was also contended that, the Plaintiff was a holder of a certificate of title duly issued to him in relation to Stand No. LUS/36878. According to Counsel this was proof that the Plaintiff was the lawful owner of the said stand. Reference was made to the case of **Eustace Bobo and Another v Commissioner of Lands and Another 2005/HP/1108** wherein it was held that:

Once the certificate of title was issued to the Plaintiff, they became shielded under the provisions of section 33 of the Lands and Deeds Registry Act except in a case of fraud which in this case in casu was not pleaded nor proved and also

enjoyed protection against adverse possession as provided for under section 35 of the Lands and Deeds Registry Act.

Additionally, reference was made to section 34(1) of the **Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia**, which provides:

No action for possession, or other action for the recovery of any land, shall lie or be sustained against the Registered Proprietor holding a Certificate of Title for the estate or interest in respect to which he is registered, except in any of the following cases, that is to say:

- (a) the case of a mortgage as against a mortgagor in default;***
- (b) the case of the President as against the holder of a State Lease in default;***
- (c) The case of a person deprived of any land by fraud, as against the person registered as proprietor of such land through fraud, or against a person deriving otherwise that as a transferee bona fide for value from or through a person so registered through fraud;***
- (d) the case of a person deprived of or claiming any land included in any certificate of Title of other land by misdescription of such other land, or of its boundaries, as against the Registered Proprietor of such other land, not being a transferee, or deriving from or through a transferee, thereof bona fide for value;***
- (e) the case of a Registered Proprietor claiming under a Certificate of Title prior in date in any case in which two or more Certificates of Title have been issued under the provisions of Parts III to VII in respect to the same land.***

It was observed that the first Defendant did not adduce evidence of fraud on the part of the Plaintiff as regards the manner in which the Plaintiff obtained the certificate of title.

It was argued that the provisional site plans that were exhibited by the first Defendant at pages 24, 26 and 27 of his bundle documents were not approved in line with the provisions of section 2 of the **Land Survey Act, Chapter 188 of the Laws of Zambia**, which state as follows:

'Approve' in relation to any plan or diagram means the signing of such plan or diagram by the Government Surveyor in order to signify that the requirements of this Act and any regulations made thereunder have been complied with to such plan or diagram.

The Plaintiff's Counsel submitted that the said site plans were not authentic, and were amenable to manipulation for self serving. The maxim: **"He that comes to equity must come with a clean hands"** was cited to stress the argument that: one who is guilty of improper conduct is barred attaining court remedies. I was therefore urged to discount the first Defendant's assertions, and instead allow the Plaintiff's claims.

Defence Counsel for the first defendant, Mr. Kanga in his submissions, argued that the Plaintiff's certificate of title was challengeable. He cited section 33 of the **Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia** which provides:

33. A Certificate of Title shall be conclusive as from the date of its issue and upon and after the issue thereof, notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the President or otherwise, which but for Parts III to VII might be held to be paramount or to have priority; the Registered Proprietor of the land comprised in such Certificate shall, except in case of fraud, hold the same subject only to such encumbrances, liens, estates or interests as may be shown by such Certificate of Title and any encumbrances, liens, estates or interests created after the issue of such Certificate as may be notified on the folium of the Register relating to such land but absolutely free from all other encumbrances, liens, estates or interests whatsoever:

(a) Except the estate or interest of a proprietor claiming the same land under a current prior Certificate of Title issued under the provisions of Parts III to VII; and

(b) Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and

(c) Except so far as regards any portion of land that may be erroneously included in the Certificate of Title, evidencing the title of such Registered Proprietor by wrong description of parcels or of boundaries. (emphasis theirs)

Mr. Kanga argued that, the Plaintiff's certificate of title for Stand No. 36878, was wrongly described, because the Plaintiff relied on site plans generated by the Lusaka City Council, as opposed to the original site plan kept at the Surveyor General's office. Counsel added that the first Defendant was not alleging fraud as alleged, but was contending that the property was wrongfully described in favour of the Plaintiff. Counsel recited section 18(1) of the **Land Survey Act, Chapter 188 of the Laws of Zambia** which provides:

18. (1) Whenever it is established to the satisfaction of the Surveyor-General that the diagram of any registered parcel of land or attached to any registered document (in this section referred to as the existing diagram) does not correctly represent the boundaries of such parcel of land-

(a) the owner thereof may apply to the Surveyor-General for the cancellation of the existing diagram and the approval in lieu thereof of a new diagram of such land for registration; or

(b) the Surveyor-General may in writing call upon the owner thereof to arrange within a specified period for a new approved diagram to be registered which shall supersede the existing diagram;

and, in the event of an owner failing to comply with any requirement mentioned in paragraph (b), the Surveyor-General may apply to the Court for orders to be made for the execution of such obligations by the said persons:

Provided that the provisions of section sixteen shall, mutatis mutandis, apply in regard to such new diagram and to all matters in connection therewith, or with the survey upon which it is based, and that it shall not be approved unless the said provisions have been complied with.

It was observed that the above provisions contemplated instances where a survey diagram did not correctly represent the boundaries of a parcel of land, and the Surveyor-General's office was mandated to correct the anomaly. Counsel thus urged the Court to compel the Surveyor General's office to perform the duties outlined in section of 18 (1) of the Land Survey Act.

Mr. Kanga observed that via submissions, the Plaintiff's Counsel sought to sneak in evidence purporting to say that two letters of offer were issued in favour of the Plaintiff, when at trial no such evidence was adduced.

Finally, it was contended that the Plaintiff had failed to prove his case. He noted that the issue in dispute was clearly about misdescription and numbering of properties as opposed to encroachment. He noted that the Plaintiff's and the first Defendant's stands are two distinct properties.

I have carefully considered the evidence adduced and the submissions made thereof. I am satisfied that Albert Kongwa the original owner of Stand No. LUS/36898 Lusaka was first offered the said plot on August 2, 2006, by the Ministry of Lands (as it was then), and I have no doubt that the offer was accepted. I agree with Mr. Kanga that, Albert Kongwa was only issued with one letter of offer; contrary to allegations made from the bar by the Plaintiff's Counsel that the letters were two. The letter of offer in the first Defendant's Bundle of Pleadings and Bundle of Document is one and the same.

Similarly, I am satisfied that the Plaintiff was offered Stand No. LUS/36878 Lusaka, and he duly accepted the offer from the Ministry of Lands, and in due course commenced building. In the meantime, Albert Kongwa sold his plot to the first Defendant, and when he went to take possession he found the Plaintiff and the second Defendants were in

occupation of the plot, and by force he made them to vacate. After taking full control of the plot, the first Defendant constructed a structure on the plot. This prompted the Plaintiff to take out this action.

It is clearly discernable that the primordial real issue to be determined is traceable from the time the letters of offer were respectively issued. The issue is not who has a certificate of title or who was the first to take occupation, but as earlier noted the primordial issue is whether the offer of Stand No 36878 to the Plaintiff, and the offer of Stand No. 36898 to Albert Kongwa respectively related to one and the same piece of land. From the evidence adduced the offer letters to the Plaintiff and Albert Kongwa related to the same piece of land. The survey diagrams respectively issued to the Plaintiff and the first Defendant exhibited at pages 10 of the Plaintiff's Bundle of Documents and at page 18 of the first Defendant's Bundle of Documents, clearly show that the piece of land is one and the same, but the site plans and survey records from which the survey diagrams were drawn bear different identity numbers. Ordinarily, this should not have been the case, but due to some irregularity on the part of some relevant authorities, possibly the Lusaka City Council in particular, mistakes were made, resulting in two people being allocated the same piece of land with distinct stand numbers.

When an offer for land is given to an applicant it must correlate with a distinct piece of land on the ground ready for possession by the applicant so offered. Certainly, this is what good administration of land entail, duplicity in numbering or mal-numbering, coupled with irreconcilable multiple site plans is a recipe for anarchy in land administrations. A "letter of offer" for land that does not grant practical access to land because the plot or stand is non-existent is worthless.

The Plaintiff said where Stand No. 36898 is shown on the site plan numbered by hand, that is where his plot, Stand 36878 should be, as shown by the site plan otherwise called computer generated. Remarkably, on the hand the numbered site plan, which I reasonably believe to be original, Stand 36/878 is clearly marked, which according to the first Defendant was occupied by another person. However, the Plaintiff does not claim that stand, instead anchors his claim on the computer generated site plan, which has Stand No. 36878 sitting on Stand No 36898.

I am in no doubt that other than the hand numbered site plan aforesaid exhibited at page 26 of the first Defendant's Bundle of Documents, which I believe is original, there was another site plan, which was computer generated exhibited at page 25 of the first Defendant's Bundle of Documents. According to this site plan, Stand No. 36/898 was shown as Stand No. 36/878, and Stand No. 36/898 was clearly omitted on this site plan. It was for this reason it was stated that the subject plot had the misfortune of double numbering; one number in the name of the Plaintiff and the other in the name of Albert Kongwa. This mistake of double numbering is the source of this dispute, occasioned by the existence of multiple site plans that are irreconcilable as regard the two stand numbers in dispute. The letter by Kayo Surveyors, who are believed to be the ones that carried survey works as regards the land in issue, reproduced herein before is quite helpful and objectively shades some light as to what transpired.

In the light of the mistake that was created practically resulting in one stand being offered to two people, the question that follows is which offer should prevail in order to resolve the dispute. Prior to the issuance of a certificate of title in favour of the Plaintiff, the two interested parties had equitable interest in the subject plot. This calls for the application of the

doctrine or rule that states: ***First in Time is First in Right***". Accordingly, recourse is had to the learned authors of ***Snell's Equity***, at page 47, paragraph 4-06 wherein it is recorded as follows:

At law, as in equity, the basic rule is that estates and interests primarily rank in order in which they are created. In equity, the result is expressed more directly in terms of temporal priority. Qui prior est tempore potior est jure: he who is earlier in time is stronger in law...where there are two competing equitable interests, the general rule of equity is that the person whose equity attached to the property first will be entitled to priority over the other. Where equities are equal, and neither claimant has legal estate, the first in time prevails, since: "every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity possess only that which he is justly entitled to and no more.

The offer of the subject land identified as Stand No. 36898 in favour of Albert Kongwa and subsequently passed on to the first Defendant must prevail. The argument by the Plaintiff that the contract of sale between Albert Kongwa and the first Defendant is questionable as to when it was executed does not alter what I have just stated above. The first Defendant was entitled to take possession of Stand No. 36898. And since the certificate of title issued to the Plaintiff dated July 26, 2012 together with its survey diagram drawn by Land Surveyor R.M. Moyo, founded on Plan No. 218/2010 was based on mistake, it follows the Plaintiff's certificate of title is indeed invalid for misdescription, and amenable to cancellation anchored on section 33 (c) and 34(1)(d) of the ***Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia***. Concomitantly, the argument that the hand numbered site plan relied on by the first Defendant was not approved by a Government Surveyor is in my considered view argumentative, without factual basis. Plausibly, it appears to me that the

two site plans relied on by the Plaintiff and the first Defendant respectively were approved as required by the Lands Survey Act. However, as earlier noted, the first conveyance that was created in the name of Albert Kongwa, and in a *bona fide* manner transferred to the first Defendant must prevail.

All in all, the Plaintiff's claims against the Defendants fails. First, the allocation of Stand No. 36878 to the Plaintiff was erroneous because the actual or physical plot being Stand No. 36898 was already allocated to Albert Kongwa, based on the original site plan. Second, the Plaintiff's allocation was irregular because it was based on an altered site plan otherwise called a "computer generated site plan", which I reasonably believe mistakenly erased Stand No. 36898, thereby leading to the replacement of Stand No. 36898 with Stand No. 36878. Fortunately, the said alteration is unenforceable because equitable rights in the land had already accrued to Albert Kongwa, and later transferred to the first Defendant.

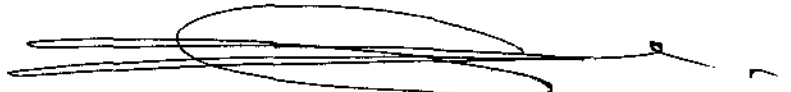
Consequently, the Plaintiff's claims are dismissed, and no compensation whatsoever against the first Defendant is due to the Plaintiff arising from improvements done by him on the plot, neither is the "second Defendant" entitled to compensation from the first Defendant. The certificate of title issued to the Plaintiff is accordingly cancelled for want of propriety, by purporting to be in respect of Stand No. 36898 when in fact not. And, therefore, Stand No. 36898 in terms of documentation and physical reality on the ground lawfully belongs to the first Defendant and he is entitled to retain possession.

The Plaintiff is not culpable for the mistake which gave him false title and occupation of Stand No. 36898, as such he will not be condemned in costs

as against the first Defendant. And since the matter against the “second Defendant” was discontinued, I make no order as to costs.

Leave to appeal granted.

DATED THIS 7TH DAY OF MAY, 2020.


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THE HON. MR. JUSTICE CHARLES ZULU