IN THE SUPREME COURT OF ZAMBIA **SCZ/8/382/2013**

HOLDEN AT LUSAKA **APPEAL NO. 29/2014**

(Civil Jurisdiction)

BETWEEN:

HANSON SINDOWE **APPELLANT**

AND

ANDREW BUNGONI **RESPONDENT**

Coram: **Mwanamwambwa, DCJ, Kaoma and Musonda, JJS on 1st November, 2016 and 21st December, 2016**

For the Appellant: Mr. M. H. Haimbe, Malambo & Co.

For the Respondent: Mr. N. Yalenga, Nganga Yalenga & Associates

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JUDGMENT

MUSONDA, JS, delivered the Judgment of the Court

Cases referred to:

1. **Muliwana -v- Lusaka City Council and Christopher Mulala SCZ No. 1 of 2002**
2. **Chikuta -v- Chipata Municipal Council (1974) Z.R. 241**
3. **Wilson Zulu -v- Avondale Housing Project Limited [1982] Z.R. 172**

Legislation referred to:

1. **The Rent Act, CAP. 206 of the Laws of Zambia**

This is an appeal by the Appellant arising from a Judgment of the High Court of Zambia whereby that Court declined to grant the

relief of possession which the Appellant had sought via an Originating Notice of Motion, following the collapse of a Sale and Purchase Agreement involving the Appellant's real property in Kitwe.

As crafted in its Memorandum of Appeal, the appeal only partially attacks or challenges the Judgment of the Court below in the sense that some of the reliefs that the Appellant was pursuing were, in fact, granted notwithstanding that the Appellant was not, in some respects, entirely happy or satisfied.

The history and background circumstances which led to the launching of this appeal are fairly simple and straightforward.

The Appellant, Hanson Sindowe, owns or is the lessee of a leasehold property known as Stand No. SS38 Chiwala Close, Nkana East, Kitwe ("the Property").

Sometime in 2009 (according to the Appellant) or 2010 (according to the Respondent), the Appellant leased the Property to the Respondent.

The record does not reveal what the legal nature of the lease was (i.e. whether oral or written) save that the agreed monthly rent was K4,500,000.00.

By a Sale and Purchase Agreement dated 1st February, 2011 (but apparently only signed by the Appellant on 30th May, 2011) the Appellant sold the Property to the Respondent upon the terms which were set out therein.

We must pause here to observe that the genesis of the differences which ensued between the Appellant and the Respondent appear to have been rooted in the imperspicuous manner in which the Sale and Purchase Agreement in question was crafted - apparently without the involvement of Counsel.

The opaque nature of the Sale and Purchase Agreement in question was not helped by the fact that there appears to have been no meeting of minds between the Appellant and the Respondent with respect to their legal relationship in so far as such relationship affected the Property. Not surprisingly, differences ensued between the two parties which culminated in the institution of legal proceedings by the Appellant.

The action which was instituted by the Appellant was by way of an Originating Notice of Motion, founded on the provisions of the Rent Act, Chapter 206 of the Laws of Zambia. In terms of that Motion the Appellant, then Applicant was seeking the following primary remedies, namely, recovery of possession of Stand No. SS38, Chiwala Close, Nkana East, Kitwe being the same Property which had been the subject of sale under the Sale and Purchase Agreement earlier referred to in this Judgment and recovery of rental arrears amounting to K63,000,000.00.

The Appellant's Motion was supported by an Affidavit which was sworn by the Appellant himself and whose material depositions were as follows:

> **"7. That I allowed the Respondent to take possession of the Property as a tenant in January, 2009. There is here now produced and shown to me marked "HS1" a copy of a letter evidencing the Respondent's occupation of the said Property as my tenant.**
>
> **8. That on the 30th day of May, 2011, I entered into a 'Sale and Purchase Agreement' with the Respondent for the sale to the Respondent of the Property at the price of K750,000,000.00. There is here now produced and shown to me marked 'HS2' a copy of the said Agreement.**
>
> **9. That pursuant to Clause 3.2 of the Agreement the Respondent agreed to pay the purchase price either in one block payment or in instalments over a period of not more than six months.**

10. **That I, in accordance with Clause 3.3 of the Agreement, allowed the Respondent to remain in possession of the Property as Tenant subject to the payment of K4,500,000.00 monthly rent during the pendency of the completion of the said sale.**

11. **That the Respondent gave me a trailer in respect of settlement of rental arrears owed to me by him prior to the execution of the Agreement but has never paid the agreed rentals thereafter.**

12. **That I have demanded for payment of the said rentals currently amounting to K63,000,000.00 but the Respondent has failed to satisfy the demand. There is here now produced and shown to me collectively marked 'HS3' copies of letters of demand as aforesaid.**

13. **That the aforesaid Sale and Purchase Agreement has since fallen through by reason of total failure of consideration and the tenancy agreement has been rescinded by the failure of the Respondent to pay rent as consideration for occupying of the Property.**

14. **That I thus advised the Respondent to vacate the Property and settle his indebtedness on the 16th day of December 2011 and on a number of occasions thereafter, but the Respondent has not complied. There is here now produced and shown to me marked 'HS4' a copy of the letter advising the Respondent to vacate the Property and settle his indebtedness."**

The Respondent opposed the Appellant's Motion via an Affidavit which was sworn by himself and whose material depositions were expressed in the following terms:

"3. **That while it is true as asserted in paragraph 7 of the Applicant's Affidavit that I had entered into a lease agreement with him for the subject property, the year was 2010 and not 2009.**

4. **That the said lease was terminated by the decision of the Applicant herein to sell the said house to me on 1st February 2011 as evidenced by the Applicant exhibit "HS 2" as our relationship had changed from landlord and tenant to vendor and vendee.**

5. **That while it was expressly provided in clause 3.3 of the said agreement that the Applicant would charge me rent from 1st June 2010, it was also subsequently agreed that the said rent would only be effective if the delay to complete the sale was due to the buyer's fault and the said clause amended accordingly.**

6. **That it was an express provision of the said contract under clause 2.2 and 3.2 respectively that the Seller would avail the buyer a certified copy of the Certificate of Title whereupon the Buyer would be obliged to make the payment towards the purchase price.**

7. **That the Seller never provided me with the said copy as the same had been withheld by the bank.**

8. **That despite this failure by the Applicant to provide me with a certified copy of the Title and to proceed with the conveyance process, I paid him a down payment of ZMK80 million in the form of an articulated trailer worth that much.**

9. **That when the Applicant's Agent demanded the payment of purported outstanding rentals, my Advocates wrote to the Agent advising that there was no lease agreement between us and demanded that the Applicant in fact proceed with the completion of the sale agreement.**

10. **That in the premises, I deny that I owe the Applicant any outstanding rent."**

In his Reply to the Respondent's opposing Affidavit, the Appellant deposed as follows:

"5. That my recollection is that the Respondent herein took possession of my property at Stand No. SS38, Chiwala Close, Nkana East, Kitwe as my tenant in 2009 and not 2010 as per paragraph 5 of the Respondent's Affidavit in opposition filed herein.

6. That as deposed in paragraph 10 of my Affidavit in support of Originating Notice of Motion, the tenancy agreement continued even after I entered into the sale and purchase Agreement with the Respondent ("the Agreement") during the pendency of the completion of the sale. Clause 3.3 of the Agreement produced as exhibit "HS 2" in my said Affidavit evidences the foregoing.

7. That contrary to the Respondent's Affidavit in Opposition, I never agreed with him that after the execution of the agreement, rentals would only be paid if the delay to complete the sale was due to his fault.

8. That the agreement was that for as long as he remained in possession of the property before completion, he was to pay rent of K4,500,000.00 per month. Clause 3.3 of exhibit "HS 2" in my Affidavit in support of Originating Notice of Motion evidences the foregoing.

9. That the words appearing in pen under Clause 3.3 of the Agreement which is exhibited as "HS 2" in my aforesaid Affidavit were inserted into the Agreement after the execution thereof and I have never at any point in time agreed to the said insertion at all or to any amendment to the Agreement.

10. That the Agreement has never been amended contrary to the contents of paragraph 5 of the Respondent's Affidavit in Opposition and the purported amendment is not signed for by me as required in paragraph 10 of the Agreement.

11. That the trailer which the Respondent gave me was for the satisfaction of the rental arrears for the period 2009, when he took possession of the property as my tenant to May 2011 when we entered into the agreement as deposed in paragraph

11 of my Affidavit in support of the Originating Notice of Motion herein. The Respondent never paid me rentals in any other form for the said period.

12. **That contrary to the contents of paragraph 8 of the Respondent's Affidavit in opposition, the trailer was thus not given to me for the purpose of making a down payment for the property but for settlement of rental arrears.**

13. **That the Respondent still owes me rentals for the period 30th May 2011 todate at K4,500,000.00 per month in accordance with Clause 3.3 of the Agreement.**

14. **That I have received no consideration whatsoever for the respondent's continued occupation of my property."**

The advocates for the parties subsequently executed a Consent Order in terms of which they agreed not to have an oral hearing but to have the dealing Judge decide the Motion on the basis of the parties' respective Affidavit evidence and written submissions. The record reveals that only the Appellant's submissions in support of the originating Notice of Motion were filed into Court.

In her Judgment, the learned trial Judge reviewed the Affidavit evidence which had been deployed before her on behalf of the parties. Her Ladyship also examined the submissions which Counsel for the Appellant had filed into Court on behalf of the Appellant.

In reaching its decision upon the first primary relief which the Appellant was seeking, namely, recovery of possession of Stand No. SS38, Chiwala Close, Nkana East, Kitwe, the Court below opined that the Appellant had breached the Sale and Purchase Agreement in question, following his failure to avail the Respondent with a certified copy of the certificate of title relating to the Property within 30 days in accordance with Clause 2.2 of the said Agreement which, as drafted, provided as follows:

> **"2.2 If the SELLER is unable to give the BUYER a Certified copy of Title for Stand SS38 Chiwala for the purpose of verification of clearance of encumbrances by reason of existing caveats not having been lifted on the said stand the SELLER shall have no claim for damages for time exceed in the completion of the sale and purchase agreement and only the BUYER shall retain the rights to cancellation and termination of this agreement."**

Based on its interpretation of Clause 2.2, the Court below concluded that only the Respondent, as the designated buyer in the Agreement, had the right to cancel or terminate the Sale and Purchase Agreement and that, consequently, *"... the relief sought by the Applicant to recover possession of Stand No. SS38, Chiwala Close, Nkana East, Kitwe (could not) succeed."*

With regard to the Second Primary remedy, namely, recovery of the sum of K63,000,000.00 (unrebased) rental arrears, the Court

below granted the Appellant this relief together with interest at the average short term deposit rate from the date of the filing of the Originating Notice of Motion for the period 30th May, 2011 up to the date of judgment.

The Appellant has now appealed to this Court advancing 5 Grounds of Appeal as set out in the Memorandum of Appeal in the following terms:

1. **The Court below erred in law and in fact when it held that the Appellant was in breach of the sale and purchase agreement dated 30th May, 2011 ("the Agreement") relating to the Appellant's property known as Stand No. SS38, Chiwala Close, Nkana East, Kitwe ("the Property").**

2. **The Court below misdirected itself on point of law when it held at J13 of the Judgment that only the Respondent has the right to cancel or terminate the Agreement without having due regard to the following:**

   2.1 **The provisions of clause 2.3 of the Agreement which equally entitle the Appellant to cancel the Agreement; and**

   2.2 **Its own finding that the Respondent was in arrears of rentals due to the Appellant pursuant to the Agreement.**

3. **The Court below erred in law and in fact when it held further that the relief sought by the Appellant to recover possession of the Property from the Respondent could not succeed on the premise of the Court below's finding that only the Respondent has the right to cancel or terminate the Agreement.**

4. **The Court below erred in law and in fact when it held that the Appellant is not entitled to recover possession of the Property without having due regard to the provisions of Section 13 of the**

Rent Act Chapter 206 of the Laws of Zambia and in spite of its finding that the Appellant is entitled to recover rental arrears from the Respondent in respect of the Property.

5. **The Court below erred in law and in fact by determining that rental arrears shall be recoverable only until the date of Judgment without having regard to what is to occur in the event of the continued occupation of the Property by the Respondent after the date of the Judgment.**

Counsel for both parties filed written Heads of Argument to buttress the positions which they had taken in relation to the Appeal.

In relation to ground one, Counsel for the Appellant argued, in effect, that as the Appellant's failure to furnish the Respondent with a certified copy of the certificate of title relating to the property which had been the subject matter of the Sale and Purchase Agreement in question within the agreed time-frame constituted a failure to fulfill a condition-precedent to the materialisation of the transaction in question, the trial Court ought to have held that the performance of the contract had been rendered impracticable and that by reason of such impracticability, the parties had thereby been excused from the performance of the transaction.

In response to ground one, learned Counsel for the Respondent contended that the Appellant had totally

misapprehended the meaning and effect of Clause 2.2 of the Sale and Purchase Agreement in question which we reproduced earlier in this Judgment.

According to Counsel for the Respondent, Clause 2.2 did not constitute a condition-precedent, the non-performance of which could have operated to repudiate the contract as Counsel for the Appellant had contended; rather, the Clause merely gave the seller the right to recover damages in the event of completion being delayed on account of the seller's failure to furnish the Appellant with a certified copy of the title deeds.

We have carefully considered ground one of the appeal in relation to the arguments which have been advanced by Counsel for the two sides and have no difficulty whatsoever in expressing our agreement that Clause 2.2 of the Sale and Purchase Agreement in question did not have the meaning or effect which Counsel for the Appellant was assigning to it. Indeed, we can go so far as to say that we find Counsel for the Appellant's arguments around ground one rather astonishing and completely incongruous with the apparent purpose and meaning of that Clause of the Sale and Purchase Agreement in question. In truth, we do not consider that

Clause 2.2 could possibly carry the meaning and effect which the Appellant's Counsel was assigning to it.

Having said this, it is our considered view that although Clause 2.2 was not packaged or crafted in the best of terms, one meaning which is clearly discernible therefrom is that it gave the purchaser the liberty to cancel or terminate the Sale and Purchase Agreement in the event of the seller failing to avail a certified copy of the title deeds relating to the property which was the subject of the sale and purchase in question. The second meaning which is discernible from Clause 2.2 is that it operated to disentitle the seller from seeking to recover damages against the buyer in the event of completion being delayed on account of the seller's failure to avail a certified copy of the title deeds in question within the 30-day period which was stipulated in that Clause.

According to the undisputed evidence before the Court below, the seller completely failed to avail a copy of the title deeds in question to the buyer. This meant that the buyer became entitled to cancel or terminate the Sale and Purchase Agreement. It would appear, however, that the buyer did not exercise the option to terminate the Sale and Purchase Agreement and appears to have

been inclined to complete the transaction. To conclude on ground one, it is our considered view that the Appellant did, in fact, breach ***the term*** of the Sale and Purchase Agreement in question relating to what, in conveyancing parlance, is known as *deduction of title*, which, essentially, entails having a prospective seller demonstrate that he holds good title to the property that he is selling.

Accordingly, we have no difficulty in arriving at the conclusion that although the scope of ground one went beyond a mere breach of a term of the Agreement as opposed to the entire Agreement, the ground is, nevertheless, without merit. It fails.

With regard to ground two, Counsel for the Appellant contended that the trial Court misdirected itself when it held that only the Respondent had the right to cancel or terminate the Sale and Purchase Agreement in issue. To reinforce this ground, Counsel referred to Clause 2.3 of the Agreement in question and argued that the same (i.e. Clause 2.3) entitled the Appellant to cancel the Agreement. Counsel further contended that the Court's acknowledgement of the rental arrears which the Respondent owed demonstrated that the Appellant could cancel the Agreement on account of the Respondent's failure to settle the same.

According to the Appellant's Counsel, Clause 10 of the Agreement in question had enjoined the parties thereto to treat the whole Agreement as one adding that the Agreement had two elements, namely, the Sale and Purchase Agreement as exemplified in Clause 2 and the ancillary rental agreement which was evidenced by Clause 3.3.

Counsel for the Appellant went on to argue in support of ground two that the Agreement in question had been rescinded by operation of law following the Appellant's failure to fulfill the condition-precedent which we have discussed above in the context of the first ground of appeal. According to Counsel, following the collapse of the Sale and Purchase Agreement, the Respondent remained liable to pay rent adding that the Respondent's failure to pay the rent entitled the Appellant to exercise his right to cancel the Agreement. The Appellant's Counsel further contended that following the cancellation of the Sale and Purchase Agreement, the Appellant became entitled to recover possession of the property in question.

In response, Mr. Nganga Yalenga, the learned Counsel for the Respondent, supported the learned trial Judge's holding that Clause 2.2 of the Sale and Purchase Agreement only entitled the Respondent, as the designated buyer under that Agreement, to terminate the same.

The Respondent's Counsel further argued that the Appellant's arguments pointed to a total misapprehension as to what the legal nature of the relationship was between the two following the execution of the Sale and Purchase Agreement on 30th May, 2011. To reinforce his argument that the legal relationship between the Appellant and the Respondent changed when the duo executed the Sale and Purchase Agreement on 30th May 2011, Counsel cited the case of **Muliwana -v- Lusaka City Council and Christopher Mulala**[1] in which we said:

> **"Above all, when an offer to purchase the house was made, the relationship between the Council and the Appellant was no longer that of Landlord and Tenant, but Vendor and Purchaser. The two relationships are totally different and are governed by different principles of law in the event of any breach of the terms.**
>
> **In our view, the Respondent's case in the Court below was argued from a wrong premise...".**

The Respondent's Counsel went on to attack the institution of the action in the Court below by way of Originating Notice of Motion pursuant to the Rent Act, Chapter 206 of the Laws of Zambia.

Counsel contended that what was in issue in the Court below was a breach of a Sale and Purchase Agreement and that a Court action founded on such a breach could only be properly instituted via a writ of summons. Counsel further contended that, on the basis of the principle which was enunciated by our predecessor Court in **Chikuta -v- Chipata Municipal Council,**[2] the Court below had no jurisdiction to grant any relief in this irregularly instituted action. The Respondent's Counsel further argued that the trial Court was right when it held that the Respondent was only liable to settle rental arrears on the basis that even the Sale Agreement envisaged that the Respondent was to continue paying rent until the full purchase price for the property was paid. Counsel also made the short final point around ground two that the non-payment of rent by the Respondent did not operate to terminate the Sale and Purchase Agreement in question.

We have carefully considered the second ground of appeal and the arguments which were canvassed before us on behalf of both parties to this appeal.

In its Judgment now being assailed, the Court below said the following at page J13:

> **"The seller who is the Applicant in this case did not disclose to the Court his reason for failing to avail the Buyer, who is the Respondent, a certified copy of his certificate of title. Based on the foregoing and in line with Clause 2.2, only the Buyer, who is the Respondent has the right to cancel or terminate the Sale and Purchase Agreement and therefore the relief sought by the Applicant to recover possession of Stand No. SS38 Chiwala Close, Nkana East, Kitwe, cannot succeed."**

Earlier in the same Judgment, the trial Court observed thus (at page J12):

> **"Further, it is very clear that the Applicant and the Respondent entered into a contract as evidenced by "HS2", which fact has also been confirmed by both parties. The contract was for the Sale and Purchase of Stand No. SS38, Chiwala Close, Nkana East, Kitwe, which contract was breached by the Applicant's failure to avail the Respondent with a certified copy of his certificate of title within 30 days of signing the Agreement as per Clause 2.2."**

Our reading of the portion of the Judgment of the Court below which is being assailed in ground two is that it dealt with the meaning and effect of Clause 2.2 of the Sale and Purchase Agreement which we have already examined in the context of the

first ground of appeal. In this regard, we would agree with Counsel for the Appellant that Clause 2.3 of the Sale and Purchase Agreement did, in fact, entitle the Appellant, as seller, to cancel or terminate the transaction in question in the event of the buyer (the Respondent herein) being in default of his obligations under the Sale and Purchase Agreement.

For the avoidance of doubt, Clause 2.3 provided that:

> **"2.3 If the buyer is unable to conclude his part of this agreement at no fault of the seller then the seller retains the right to cancel the Sale and Purchase Agreement at the end of the period agreed and all costs incurred be refunded to the parties according to the terms and conditions of this Agreement."**

Having regard to the finding of the trial Court in the context of Clause 2.2 of the Sale and Purchase Agreement that the seller was in breach, Clause 2.3 could not have been properly invoked by the Appellant. Needless to say, the invocation of Clause 2.3 by the Appellant was primarily premised on the buyer (the Respondent herein) failing to honour his side of the transaction without the seller (the Appellant) being himself at fault. As things happened, it was the Appellant who was seriously at fault by failing to honour that crucial conveyancing procedure known as *'deduction of title.'*

Having regard to the foregoing, it is our considered view that the first limb of ground two was totally misapprehended and has no bearing on the outcome of this appeal.

With regard to the second limb of ground two relating to rental arrears, our view is that termination of the Sale and Purchase Agreement on account of non-payment of the same was also misapprehended. Indeed, and as earlier noted, the Appellant would only have been in a position to take advantage, if at all, of the Respondent's default if the Appellant had not been in breach of his primary obligation and duty to deduce title.

With respect to ground three, the Appellant contended that the Court below erred in law and in fact when it held that the relief of possession which the Appellant had sought against the Respondent could not succeed on the basis that only the Respondent had the right, under the Sale and Purchase Agreement, to avail himself of the right to cancel or terminate the same.

In arguing this ground, Counsel contended that following the collapse of the sale and purchase transaction, no lawful basis

existed to warrant the continued possession and occupation of the property in question by the Respondent. Counsel accordingly argued that the Court below erred when it refused to grant the remedy of possession in favour of the Appellant.

Counsel for the Respondent did not advance any arguments worth of note by way of opposing the third ground of appeal beyond lending his support to the position which the trial Court took.

We have considered this ground of appeal and are of the considered view that the Judgment of the Court below remained indeterminate to the extent that the Court failed to pronounce itself fully or in finality upon all the issues which had been deployed before it or upon the legal positions and legal rights of the two parties to what turned out to have been a still-born or failed sale and purchase transaction. In reaching this conclusion, we have borne in mind the fact that evidence had been laid before the trial Court which demonstrated that the Sale and Purchase transaction between the Appellant and the Respondent had collapsed; that the purchase price for the property had not been paid or, at any rate, had not been paid in full; and that the Respondent had remained in occupation or possession of the property in question in

the Respondent, opposed this appeal in his written Heads of Argument, he was gracious enough to concede at the hearing of the appeal that possession of the property in question, that is, Stand No. SS38, Chiwala Close, Nkana East, Kitwe should be restored to the Appellant and we order accordingly. Ground three of the appeal has, consequently, succeeded.

Having regard to our exertions in respect of ground three, we find it unnecessary to consider grounds four and five in detail suffice it to confirm our agreement with Counsel for the Respondent that the Appellant's reference to and reliance upon the provisions of the Rent Act, Chapter 206 of the Laws of Zambia was a complete misapprehension given the change in the legal relationship from landlord and tenant to seller and buyer which had ensued and subsisted between the Appellant and the Respondent following the execution of the Sale and Purchase Agreement between the two on 30th May, 2011.

Notwithstanding the foregoing, it is our considered view that the Sale and Purchase Agreement in question acknowledged, via Clause 3.3 thereof, the Appellant's right to recover rent at the rate of K4,500,000.00 per month with effect from 1st June, 2011.

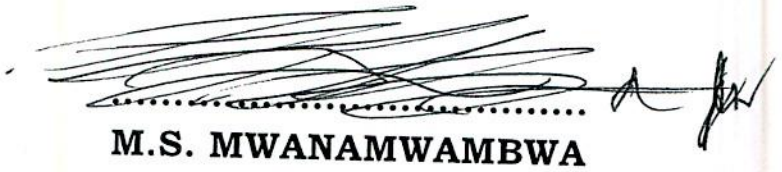
However, the Court below held that the Appellant should recover rent for the period 30th May, 2011 up to the date of the judgment in the Court below. This holding displeased the Appellant who reacted through ground five in terms of which he attacked the trial Court's decision to restrict the recovery of rent by the Appellant up to the date of the judgment below.

Although Mr. Yalenga Nganga, the Respondent's Counsel, opposed the Appellant's recovery of rental arrears beyond the date of the Judgment below, he did, at trial, concede that it was in the interest of justice and fairness that the Appellant should recover rent for the entire period that the Respondent has remained in occupation of the property in question and we so order.

The net effect of our exertions is that the appeal has succeeded in some respects and failed in others.

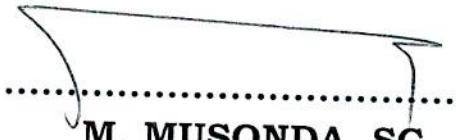
Having regard to the history of this matter and all the

surrounding circumstances, we consider that it would only be fair if each party picked up their own costs.



M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

R.M.C. KAOMA
SUPREME COURT JUDGE



M. MUSONDA, SC
SUPREME COURT JUDGE