IN THE COURT OF APPEAL OF ZAMBIA **Appeal No. 133/2020**

HOLDEN AT LUSAKA **CAZ/08/182/2020**

(Civil Jurisdiction)

BETWEEN:

RAPID GLOBAL FREIGHT LIMITED **APPELLANT**

AND

BENJAMIN BWALYA **RESPONDENT**

Coram: ***Makungu, Sichinga and Ngulube, JJA***

On 16th June, 2022 and 16th August, 2022

For the Appellant: *Ms. N. Kapapula, Messrs SLM Legal Practitioners*

For the Respondent: *Mr. F. Chalenga, Messrs Freddie and company*

JUDGMENT

Sichinga, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Nkongolo Farms Limited v Zambia National Commercial Bank Limited and 2 others SCZ Judgment No. 19 of 2007*
2. *Cheshire County Council v Woodward [1962] 2 QB 126*
3. *Coleshill and District Investment Co. Limited v Minister of Housing and Local Government and Another [1968] 1 All ER 65*
4. *London Ngoma and Others v LCM Company Limited and United Bus Company of Zambia Limited (in liquidation) SCZ Judgment No. 22 of 1999*

5. *Anti-Corruption Commission v Barnnet Development Corporation Limited (2008) 1 ZR 69*
6. *Justin Chansa v Lusaka City Counsel SCZ Judgment No. 29 of 2007*
7. *Arnot Kabwe and Charity Mumba Kabwe v James Daka, The Attorney General, and Albert Mbazima (2006) ZR 12*
8. *Mopani Copper Mines Plc v Kitwe Tabernacle End Time Message Ministries, Commissioner of Lands and Attorney General (2013) ZR 281*

Legislation referred to:

1. *Lands Act, Chapter 184 of the Laws of Zambia*
2. *Urban and Regional Planning Act No. 3 of 2015*
3. *Lands And Deeds Registry Act, Chapter 85 of the Laws of Zambia*

1.0 Introduction

1.1 This appeal by the appellant, Rapid Global Freight Limited (the defendant in the court below), is against the decision of the High Court at Lusaka (Maka-Phiri J) delivered on 20th December, 2020 in which the court found substantially in favour of the plaintiff that he was the lawful owner of the property known as Stand No. LIV/1410 Livingstone.

2.0 The reliefs sought

2.1 In the court below, the plaintiff, Benjamin Bwalya, commenced the action by way of writ of summons and statement of claim filed into court on 28th January, 2018 against the defendant seeking the following reliefs:

i. A declaration that the plaintiff is entitled to ownership and possession of the property known as Stand No. LIV/1410, Livingstone;

ii. Damages for trespass by the defendant on Stand No. LIV/1410, Livingstone;

iii. An Order of Injunction restraining the defendant from trespassing and interfering with the quiet possession of Stand LIV/1410, Livingstone pending the final determination of the matter;

iv. Any other or further relief that the court may deem appropriate; and

v. Costs and interest.

2.2 The defendant had a counterclaim in which it sought the following reliefs:

i. A Declaration and Order that the defendant is the legal owner and legitimate beneficial owner of Stand No. LIV/1410, Livingstone;

ii. A Declaration that the plaintiff's interest in Stand No. 1410, Livingstone terminated upon his Certificate of Title being re-entered by the Commissioner of Lands;

iii. Damages for trespass by the plaintiff on Stand No. 1410, Livingstone;

iv. Damages for inconvenience and loss of use of the property from date of issue of title to date when the defendant shall have vacant possession of the same;

v. An Order of vacant possession to the defendant by the plaintiff;

vi. Interest on any amount found due;

vii. Any other relief that the court may deem fit; and

viii. Costs.

3.0 Background

3.1 The brief background to the action was that in 2017 the plaintiff acquired the land in dispute through the Commissioner of Lands. Upon satisfying all the legal processes he obtained Certificate of Title No. 14656 in respect of the said land. He subsequently submitted development plans to the Livingstone City Council for approval and paid the requisite fees in the sum of K654.00. The council approved his plans and gave him the go ahead to commence developments. He begun to bring building materials to the site and some construction works took off.

3.2 On or about 22nd January, 2018, the defendant through its agents entered on the property in question and allegedly harassed the plaintiff's workers by stopping them from constructing and tempering with building materials. In the process of this scuffle, the plaintiff lost some material and property including about 20 pockets of cement, 5 wheelbarrows and 7 shovels.

3.3 The defendant left a letter on the property alleging that the plaintiff was illegally constructing on the property and demanded an immediate cessation of further construction works.

3.4 On 10th October, 2019, the defendant filed a defence and counterclaim in which it asserted that it was the legal owner of Stand No. LIV/1410, Livingstone, and held Certificate of Title to the land.

3.5 In its counterclaim, the defendant alleged that it conducted a search on the Lands Register and confirmed that the subject property once belonged to the plaintiff but was re-entered by the Commissioner of Lands on 24th December, 2017 after issuance of a notice of intention to re-enter on 20th January, 2017. It averred that after the re-entry of the subject property, it was offered to the defendant on 24th January, 2018 upon payment of the consideration fees. It was issued with Certificate of Title No. 40634 on 2nd February, 2018.

3.6 It denied the authenticity of a letter purportedly under the hand of the Commissioner of Lands dated 26th February, 2018, and purporting to recommend cancellation of its title to the subject property.

4.0 Decision of the court below

4.1 Upon the trial of the matter, the lower court in its judgment of 20th May, 2020 found that the plaintiff was offered the subject property on 3rd May, 2013 by the Commissioner of Lands, and that he was issued a Certificate

of Title in respect of the subject land. She found that he applied for a building permit in December, 2017 and started developing the property in January, 2018.

4.2 That a notice of re-entry upon the land was entered on 24th December, 2017. That the report upon which the Commissioner of Lands re-entered the land was not produced in court. Therefore, she found that there was no inspection report forming the basis of the re-entry.

4.3 The learned Judge found that on 24th January, 2018, the Ministry of Lands wrote to the developer (respondent) of the land stating that the defendant was the bona fide owner of the land. That on 26th February, 2018 the Commissioner of Lands wrote to the defendant stating that it would recommend for cancellation of its title following an appeal by the plaintiff. The learned Judge formed the view that the Commissioner of Lands had rescinded his decision to re-enter.

4.4 Save for the claim in respect of damages for trespass, the court found in favour of the plaintiff, and dismissed the counterclaim.

5.0 Grounds of appeal

5.1 Aggrieved by the decision of the lower court, the appellant launched this appeal advancing four grounds of appeal couched as follows:

1. The trial Judge erred in law and in fact when she delved into the merits of the decision to re-enter Stand No. 1410,

Livingstone, against the respondent when the Commissioner of Lands (Attorney-General) was not party to the proceedings and the respondent did not formally challenge the re-entry in accordance with *section 13 (3) of the Lands Act*;

2. **The learned trial Judge erred in law and in fact when she held that it would be an academic exercise to challenge the re-entry of Stand No. 1410, Livingstone which the Commissioner of Lands allegedly accepted despite the overwhelming evidence that the respondent did not even meet the terms of the lease, and had to follow the appeal process in line with *section 13(3) of the Lands Act*;**
3. **The learned trial Judge erred in law and in fact when she determined that the unpleaded letter of 26th February, 2018 by the Commissioner of Lands was key to the resolution of the dispute between the parties despite the letter being a mere recommendation against which the appellant neither received nor was given opportunity to respond; and**
4. **The learned trial Judge erred in law and in fact when she ordered the cancellation of the appellant's Certificate of Title No. 40634 relating to Stand No. 1410, Livingstone and consequently held that the respondent is entitled to the ownership of the land in issue.**

6.0 Submissions by the appellant

6.1 At the hearing of this appeal, Ms. Kapapula, learned counsel for the appellant entirely relied on the appellant's heads of argument filed on 31st July, 2020.

6.2 Submitting in support of the first ground of appeal, Ms. Kapapula relied on ***section 13(3) of the Lands Act***[1]. She stated that the law required, as a first step before a certificate of re-entry is entered into the Lands Register, that it should be established that the lessee has breached any of the terms of the covenant of the lease in respect of the land. It was contended that this was done by DW2, who found that the property in question was underdeveloped. That he thereafter issued a report to the Ministry of Lands on his findings. It was submitted that a notice of intention to re-enter was registered on 20th January, 2017 and a certificate of re-entry was entered on 24th December, 2017.

6.3 Counsel argued that the finding that the Commissioner of Lands rescinded his decision to re-enter did not reflect a true picture of the facts or the law. That the appeal process provided in ***section 13(3) of the Lands Act*** was not complied with. Reliance was placed on the case of ***Nkongolo Farms Limited v ZNCB Limited and 2 others***[1] in which the Supreme Court held as follows:

> ***"As a general rule an appellate court rarely interferes with the findings of fact by the lower court, unless such***

findings are not supported by evidence on record or the lower court erred in assessing and evaluating the evidence by taking into account matters which ought not to have been taken into account or failed to take into account some matters which ought to have been taken into account or mistakenly, the lower court failed to take advantage of having seen and heard the witnesses and this is obvious from the record or the established evidence demonstrates that the lower court erred in assessing the evidence."

6.4 It was submitted that the lower court's holding was not supported by any cogent evidence and ought to be reversed. That the lower court did not appreciate the provisions of ***section 13(3) of the Lands Act.***

6.5 Under ground two, the appellant stretched the argument in the first ground contending that ***section 13(3) of the Lands Act*** further provides a three (3) months period within which a lessee may make representations or if after making representations the President is not satisfied that a breach of a term or condition of a covenant by the lessee was not intentional or was beyond the control of the lessee, he may cause the certificate of re-entry to be entered in the register. It was submitted that it is usually a condition of the offer that a property owner develops the land within a stated period of time failing which the

Commissioner of Lands may enter a certificate of re-entry and repossess the property. In support of this submission reliance was placed on ***section 2 of the Urban and Regional Planning Act***[2], and the cases of ***Cheshire County Council v Woodward***[2] and ***Coleshill and District Investment Co. Limited v Minister of Housing and Local Government and Another***[3] on the meaning of 'development.'

6.6 The appellant placed reliance on ***section 33 of the Lands and Deeds Registry Act***[3] to the effect that a Certificate of Title is conclusive evidence of ownership. It was submitted that the appellant was issued with Certificate of Title No. 40634 making it the legal owner of the disputed property. ***Section 34(1) of the Lands and Deeds Registry Act*** *supra* was equally relied upon. It provides that:

> ***"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..."***

6.7 It was argued that a Certificate of Title is conclusive evidence of beneficial ownership of property and can only be cancelled in cases of fraud or mistake. That neither were pleaded by the respondent.

6.8 The contention in ground three is that the trial court erred when it anchored its judgment on the letter of 26th February, 2018 which letter

was not in existence at the time the respondent commenced his action in the court below. It is contended that the letter was a mere recommendation by the Commissioner of Lands. That a recommendation is not law but was only a key to the respondent invoking the provisions of ***section 13(3) of the Lands Act*** as the decision to re-enter had already been made and therefore to challenge the decision, the provisions of the law had to be followed.

6.9 Counsel argued that there was no proof that the appellant had been served the same letter. We were referred to the case of ***London Ngoma and Others v LCM Company Limited and United Bus Company of Zambia Limited (in liquidation)***[4] where the Supreme Court held as follows:

> ***"The appellants had interest in the matter and they should therefore have been notified of any action taking place concerning the properties on which they had paid deposits and which were subject of the contract."***

6.10 It was submitted that though the issue in the instant case does not arise from a contract, the principle cited is still applicable for the reason that the appellant has an interest in the property in dispute and should have been given an opportunity to respond to the letter as it recommended the cancellation of its Certificate of Title. It was also contended that the authenticity of the letter was never proved.

6.11 Under the last ground of appeal, counsel reiterated the kernel of ***sections 33*** and ***34 of the Lands and Deeds Registry Act*** *supra* and drew our attention to the case of ***Anti-Corruption Commission v Barnnet Development Corporation Limited***[5] wherein the Supreme Court upheld the said provisions of the law.

6.12 It was submitted that there was no basis for the lower court to have ordered the cancellation of Certificate of Title No. 40634 since the process of opposing re-entry had not been followed as provided by ***section 13(3) of the Lands Act.***

6.13 We were urged to uphold the appeal and to order that the appellant is the beneficial owner of Stand No. 1410 Livingstone. Counsel also prayed for costs.

7.0 Respondent's submissions

7.1 On behalf of the respondent, Mr. Chalenga, learned counsel, relied on the heads of argument filed on 5th November, 2020 in respect of all the grounds, save the third ground for which he made oral submissions.

7.2 In response to ground one, it was submitted that the trial Judge was on firm ground when she delved into the merits of the decision to re-enter because her decision did not contravene the provisions of ***section 13(3) of the Lands Act.*** It was submitted that the merits of the decision of the Commissioner of Lands were key to determine the rightful owner of the subject property. That the facts that the Commissioner of Lands

acknowledged that he had erroneously made a re-entry on the property and later recommended the cancellation of the appellant's Certificate of Title are sufficient for the trial court to determine the property's ownership. In support of this submission reliance was placed on the case of ***Justin Chansa v Lusaka City Counsel***[6] wherein the Supreme Court held:

> ***"The authority to consider applications for land from members of the public is vested in the President of Zambia who has delegated this authority to the Commissioner of Lands..."***

7.3 It was submitted that the Commissioner of Lands is reposed with delegated powers to allocate and superintend the process of land allocation. That the decisions made by the Commissioner of Lands are valid until they are reversed.

7.4 Counsel submitted that the procedure to launch an appeal under ***section 13 (3) of the Lands Act*** was not necessary because the re-entry was erroneously done. It was submitted that ***section 13(3) of the Lands Act*** is intended to aid an aggrieved party who is in breach of a condition that may lead to re-entry of their property, to appeal against the re-entry and the said party ought to be given an opportunity to appeal upon service of the notice of the re-entry. Counsel argued that in the instant case, the respondent was never given an opportunity to appeal against

the notice of intention to re-enter his property. In support of this submission reliance was placed on the case of ***Arnot Kabwe and Charity Mumba Kabwe v James Daka, The Attorney General, and Albert Mbazima***[7] to the effect that ***section 13 of the Lands Act*** is meant to afford a lessee who is in default to dialogue with the Commissioner of Lands with the intention to extend the period within which he is required to develop the property.

7.5 With respect to service of notice of re-entry, it was submitted that although this is not provided for in the main body of the provisions of the ***Lands Act,*** it had to be in line with ***Rule 27 of the Lands Tribunal Rules of the Lands Act.*** That service had to be by registered post to the lessee's usual address of service. Further, it was submitted that the evidential burden was on the Commissioner of Lands, representing the President, to provide proof of such service.

7.6 It was submitted that in the instant case, the re-entry was not done in accordance with ***section 13(3) of the Lands Act*** as the respondent was never given an opportunity to appeal against the notice of re-entry filed on 24th January, 2017.

7.7 We were urged to dismiss ground one for lack of merit.

7.8 In response to ground two, it was submitted that in light of the submission made in the first ground of appeal, the same becomes otiose to argue because the learned Judge was on firm ground when she held

that it would become an academic exercise to challenge the re-entry. We were urged to dismiss this ground as well for lack of merit.

7.9 In response to ground three, Mr. Chalenga submitted that the focus of the argument is that the letter of 26th February, 2018 was unpleaded. Counsel referred us to pages 281 – 283 paragraph 4 to 7 of the record of appeal to show that the said letter was pleaded. It was contended that the respondent sought an order for cancellation of Certificate of Title No. 40634.

7.10 Counsel urged us to dismiss the third ground of appeal for lack of merit.

7.11 Turning to the fourth ground of appeal, it was submitted that the kernel of ***sections 33*** and ***34 of the Lands and Deeds Registry Act*** *supra* as was stressed in the ***Anti-Corruption Commission v Barnnet Development Corporation*** case is not in dispute. However the lower court was correct to order the cancellation of the appellant's Certificate of Title based on the totality of the evidence. Reliance was placed on the provisions of ***section 35 of the Lands and Deeds Registry Act*** *supra* which provides as follows:

> ***"After land has become the subject of a Certificate of Title, no title thereto, or to any right, privilege, or easement in, upon or over the same, shall be acquired by possession or user adversely to or in derogation of the title of the Registered Proprietor."***

7.12 It was submitted that the property in dispute never belonged to the appellant as his Certificate of Title was issued following an erroneous re-entry. That the learned Judge rightly held that the respondent is entitled to ownership of the property. Reliance was placed on the case of ***Mopani Copper Mines Plc v Kitwe Tabernacle End Time Message Ministries, Commissioner of Lands and Attorney General***[8] in which the Supreme Court held that:

> ***"A certificate of title may be ordered to be cancelled by the court on grounds other than fraud in the conventional sense. Illegality is one such ground upon which a certificate of title may be cancelled."***

7.13 It was submitted that *in casu*, the appellant's Certificate of Title was issued from a procedural impropriety which rendered it illegal, null and void.

7.14 In sum, it was submitted that the evidence on record supports the lower court's findings. We were urged to dismiss the appeal in its entirety for lack of merit.

8.0 Decision of this Court

8.1 We have considered the evidence on record, the submissions by counsel and the issues raised by the parties. The main contention in this appeal, as we see it, is basically, who between the appellant and the respondent is entitled to ownership of Stand No. LIV/1410. In other words, who is

the beneficial owner of the subject property? We shall deal with grounds one and two together as they are interrelated. Grounds three and four will be dealt with separately.

8.2 We are of the view that what has been raised in grounds one and two is the applicability of ***section 13(3) of the Lands Act*** *supra* to the facts of this case. The appellant's contention was that the procedure provided in ***section 13(3) of the Lands Act*** was not applied to the letter. Therefore, the learned Judge erred when she found as a fact that the Commissioner of Lands had rescinded his decision to re-enter the land. It was submitted that the said finding was not supported by the law which provides as follows:

> ***"(13)(3) A lessee aggrieved with the decision of the President to cause a certificate of re-entry to be entered in the register may within thirty days appeal to the Lands Tribunal for an order that the register be rectified.***

8.3 The kernel of ***Section 13 of The Lands Act*** is to afford the lessee to either make representations and/or amends for the alleged breach. It is therefore mandatory that the lessee is served with the notice of the intention to cause a Certificate of re-entry to be entered. This means that apart from ensuring that the notice is served on the lessee, there should be proof of such service. Further, that only after the expiration of

the three months' notice period should the President consider whether there has been any representation. If there are any representations, he should consider whether he is satisfied that the breach was not intentional or beyond the control of the lessee.

8.4 Essentially, natural justice requires that a person receives a fair and unbiased hearing before a decision is made that will negatively affect them. The three main requirements of natural justice that must be met in every case are: adequate notice, fair hearing; and no bias. This provision of the law would seem to be in tandem with the principles of natural justice in that the lessee ought to be afforded an opportunity to make representations.

8.5 As regards service of the notice, we accept Mr. Chalenga's submission that although this is not provided for in the main body of the provisions of ***The Lands Act***, it has come to be accepted that judicial notice should be taken to the effect that service of notices is in line with ***Rule 27 of The Lands Tribunal Rules*** of ***The Lands Act*** *supra.* Notice should therefore be by registered post to the lessee's usual address for service. It also follows that the evidential burden is on the Commissioner of Lands representing the President to provide proof of such service.

8.6 We refer to the case of ***Anort Kabwe and Charity Mumba Kabwe v James Daka, the Attorney-General and Albert Mbazima*** *supra* where

the Supreme Court wholesomely dealt with the conditions to be satisfied for a repossession to be valid. In the said case, it held as follows:

> ***"1. The mode of service of the notice to cause a Certificate of re-entry to be entered in the register for a breach of a covenant in the lease as provided for in Section 13 (2) of The Lands Act is cardinal to the validation of the subsequent acts of the Commissioner of Lands in disposing of the land to another person.***
>
> ***(2) If the notice is properly served, normally by providing proof that it was by registered post using the last known address of the lessee from whom the land is to be taken away, the registered owner will be able to make representations, under the law, to show why he could not develop the land within the period allowed under the lease.***
>
> ***(3) If the notice is not properly served and there is no evidence to that effect, there is no way the lessee would know so as to make meaningful representations.***
>
> ***(4) A repossession effected in circumstances where a lessee is not afforded an opportunity to dialogue with the Commissioner of Lands, with a view to having an extension of period in which to develop the land cannot be said to be valid repossession."***

8.7 In his evidence, the respondent told the trial court that he received his letter of offer for the subject property in May, 2013. In consideration of the same he made requisite payments to the Ministry of Lands. He

further applied for change of use of land from light industrial to residential use, and this was approved. He was subsequently issued with a Certificate of Title in 2015. He said after he commenced construction he encountered a number of people coming onto the property, purportedly on behalf of the appellant, telling him not to proceed with the construction. He said he even received a call out from the police after the appellant had reported the issue to them. The respondent said he wrote to the Commissioner of Lands to explain to him what was happening regarding the subject property because he was concerned that he had not received any letter regarding re-entry or repossession of the land.

8.8 On 26th February, 2018, the Commissioner of Lands replied to the appellant stating in part that he would recommend cancellation of the appellant's title with respect to the subject property. In his testimony, George Sindila, the Acting Commissioner of Lands confirmed the contents of the letter to the appellant as follows:

> ***"From the letter, it is clear that a decision was made that plot 1410 Livingstone which at the time was registered in the name of the Rapid Global Freight Limited, was to be reverted to the original owner, the name of Bwalya and that Rapid Global Freight Limited were to be offered two alternative plots within Livingstone.***

It is clear that a decision was reached after the former Commissioner had received an inspection report from our Choma office which confirmed that the original owner had commenced some development on the plot.

Therefore, the Title for Rapid Global Freight Limited was supposed to be cancelled in order to effect that decision."

8.9 The Commissioner of Lands was called as a witness at trial and he acknowledged that he rescinded his decision to allocate the land to the appellant. We are of the view that he was entitled to deal with the matter administratively because as the evidence shows, he had not complied with the provisions of law by initially serving the respondent with a notice of intention to re-enter, by registered mail, which would have enabled the respondent to launch the process under ***section 13 of the Lands Act.***

8.10 In our view, the learned Judge was entitled to make findings of fact after considering the evidence as presented. She rightly found that the letter of 26th February, 2018, authored by the Commissioner of Lands and his oral evidence confirmed that he had rescinded the decision to allocate the subject property to the appellant. The court found that the report upon which the Commissioner of Lands re-entered the subject land was not produced in court. She therefore found that there was no inspection report forming the basis of the re-entry of the land. It was on the basis of

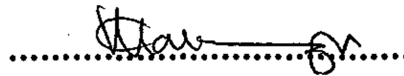
the evidence presented that the lower court gave the declaratory orders sought by the respondent. Thus grounds one and two are bound to fail.

8.11 The appellant's argument in ground three is that the letter of 26th February, 2018 was unpleaded by the respondent. Mr. Chalenga referred us to the appellant's reply and defence to the appellant's counterclaim at pages 281 to 283 of the record of appeal. In paragraph 4, the respondent alleged procedural impropriety in the re-entry process conducted by the Commissioner of Lands. That the law regarding re-entry had not been adhered to. We have found this to be so when dealing with the previous grounds. In paragraph 5, the respondent averred that the Commissioner of Lands had offered the appellant two alternative plots numbered LIVIN/LN-47624/234 and LIVIN/LN-47624/235 to atone for the irregular re-entry on the subject property and purported allocation of the plot in issue to the appellant. The Commissioner of Lands confirmed this in his testimony at page 366 of the record. And in paragraph 7 the respondent referred to the letter of 26th February, 2018. We find as a fact that the said letter was pleaded. Thus ground three is also bound to fail for lack of merit.

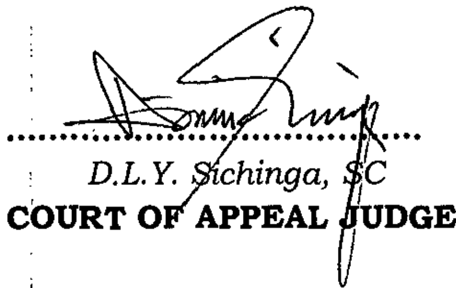
8.12 Turning to the last ground, the appellant's argument is that the order of cancellation of the appellant's title was erroneous. In light of our findings in the previous grounds, we find this ground otiose.

9.0 Conclusion

9.1 For the reasons we have stated above, we uphold the lower court's findings. This whole appeal lacks merit. It is therefore dismissed with costs to the respondent to be taxed in default of agreement.



C.K. Makungu
COURT OF JUDGE



D.L.Y. Sichinga, SC
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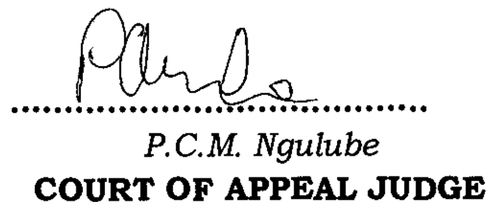

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