

**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

2017/HP/2193

BETWEEN:

**JONATHAN VAN BLERK****PLAINTIFF**

AND

**THE ATTORNEY GENERAL  
LUSAKA CITY COUNCIL  
KWIKBUILD CONSTRUCTION LIMITED  
BANTU CAPITAL CORPORATION LIMITED  
NATIONAL PENSION SCHEME AUTHORITY**



**1st DEFENDANT  
2nd DEFENDANT  
3rd DEFENDANT  
4th DEFENDANT  
5th DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 22<sup>nd</sup> DAY OF  
AUGUST, 2023.**

*For the Plaintiff* :Mr. Linus E. Eyaa, Messrs Linus Eyaa and Partners  
and Mr. Shadreck Mbewe and Mr. B. Mweemba, Messrs  
Keith Mweemba Advocates.

*For the 1<sup>st</sup> Defendant* :Mr. M Muchende SC, Solicitor General, Mr. P. Shambulo,  
Principal State Advocate, Ms A. Chisanga, Senior State  
Advocate & Ms S. Mulusa, State Advocate.

*For the 2<sup>nd</sup> Defendant* :Ms. K. Sikwibele, Legal Counsel, Lusaka City Council

*For the 3<sup>rd</sup> Defendant* :Mr. S. Sikota SC and Mr K. Kanda, Messrs Central  
Chambers.

*For the 4<sup>th</sup> Defendant* :Mr. R. Simeza SC, Mr .Z. Sampa & Mr. K. Kawana, Simeza  
Sangwa & Associates.

*For the 5<sup>th</sup> Defendant* :Mr. Elijah Banda SC, Mr. Harrison Zulu and Mr. Benny  
Kangwa, ECB Legal Practitioners.

---

## **J U D G M E N T**

---

CASES REFERRED TO:

1. *Jonesco v Beard* 1930 AC 298
2. *Briess and others v Woolley and others* 1954 1 ALL ER 909
3. *Sithole v The State Lotteries Board* 1975 ZR 106
4. *R v Secretary for State for Transport and others; Ex-parte De Rothchild* 1989 1 ALL ER 993
5. *William David Carlisle Wise v Attorney-General* 1990 - 1992 ZR 124

6. *Zambia National Holdings Limited and United National Independence Party (UNIP) v. The Attorney-General* 1994 SJ 22
7. *Niaz Mohammed v Commissioner of Lands & others* 1996 EKLK
8. *Development Bank of Zambia & Livingstone Sawmills Limited v Jet Cheer Development Co (Zambia) Limited* 2001 ZMSC 115
9. *Nkongolo Farms Limited v Zambia National Commercial Bank Limited Kent Choice Limited (In Receivership) Charles Huruperi* 2005 ZR 78
10. *Sablehand Zambia Limited v Zambia Revenue Authority* 2005 ZR 109
11. *Kelo et al v City of New London et al* 545 US 469 [2005]
12. *Societe National Deschemis De Purdu Congo (SNCC) v Joseph Nonde Kakonde* SCZ No. 19 of 2013.
13. *Bwalya Kalambo v Rock Limited and Meanwood Holdings Limited* Appeal No 140 of 2013
14. *Royal Bank of Scotland Plc v Highland Financial Partners LP & Ors* 2013 EWCA Civ 328 9012 April 2013
15. *Benedetti v Sawiris and others* 2013 UK SC 50
16. *Town Council of Awendo v Nelson Odur Onyango & 13 others* [2014] EKR
17. *Takhar v Gracefield Developments Limited and others* 2019 UKSC 13
18. *Bradford Third Equitable Benefit Building Society v Boarders*
19. *Joseph Constatine Steamship Limited v Imperial Smelting Corporation Limited*

LEGISLATION REFERRED TO:

1. *The Rules of the Supreme Court of England, 1999 Edition*

OTHER WORKS REFERRED TO:

1. *Black's Law Dictionary by Bryan A. Garner, 8<sup>th</sup> Edition Thomas Reuters*
2. *Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 16*
3. *Spencer Bower on Actionable Misrepresentation, 2<sup>nd</sup> Edition*

## 1. INTRODUCTION

- 1.1 In a quest to enforce the right to ownership to land, the Plaintiff, Jonathan Van Blerk, who was the initial owner of the entire land known Farm 4300 Lusaka in extent of 557.8759 hectares, saw the President of the Republic of

Zambia, compulsorily acquire 351.2142 hectares of that land pursuant to the **Lands Acquisition Act 1970**. Jonathan Van Blerk being dissatisfied with the decision, commenced an action before the High Court under cause number 1997/HP/272 against the Attorney General and the Lusaka City Council, challenging the compulsory acquisition.

- 1.2 In a Judgment, that was delivered on 22<sup>nd</sup> July, 2002, the High Court ruled that the compulsory acquisition of the land was in line with the **Lands Acquisition Act**. Disgruntled with that Judgment, Jonathan Van Blerk appealed to the Supreme Court, and he lost the appeal in a Judgment that was delivered on 5<sup>th</sup> May, 2005. Then in 2017, Jonathan Van Blerk commenced this action against the Attorney General, the Lusaka City Council, Legacy Holdings Limited, Kwikbuild Construction Limited, and Bantu Capital Corporation Limited, by Writ of Summons accompanied by a statement of claim in which he claims:

*(i) A declaration that the Judgment of the High Court of the Judicature for Zambia and the Supreme Court of Zambia under cause number 1997/HP/272 and SCZ/8/190/2002 respectively were procured by fraudulent misrepresentation.*

*(ii) A declaration that the acquisition of the portion of Farm 4300 Lusaka is null and void and ultra vires the provisions of the Lands Acquisition Act,*

1970 (Repealed) as read with the Lands Acquisition Act, Chapter 198 of the Laws of Zambia.

(iii) A declaration that the Plaintiff is the original and rightful owner of Farm 4300 Lusaka.

(iv) An Order that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants surrender their certificates of title to the Commissioner of Lands for rectification/cancellation under Section 11 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.

(v) An injunction, restraining the Defendants from:

1. Carrying on development,
2. Construction of buildings and other structures,
3. Digging,
4. Alienating,
5. Subdividing with a view to carrying out construction works and building on the property, which activities are likely to compromise the environmental quality of the said Farm No 433 Lusaka;

(vi) Costs;

(vii) And any other relief the Court may deem fit.

1.3 The National Pension Scheme Authority was joined to these proceedings by the Supreme Court on appeal on preliminary issues that were raised. Following the

Judgment of the Supreme Court that was delivered on appeal on the preliminary issues that were raised, which directed this Court to proceed to hear the matter, Jonathan Van Blerk on filed an amended Writ of Summons and statement of claim, in which Legacy Holdings Limited was no longer a party to these proceedings. Therefore, there are only Five (5) Defendants in this matter.

- 1.4 Further, in a Ruling dated 27<sup>th</sup> January, 2022, I did strike out Jonathan Van Blerk's claims that do not relate to the setting aside of the Judgment on the ground of fraud.

## **2. STATEMENT OF CLAIM**

- 2.1 Jonathan Van Blerk states that he is a farmer, and that prior to 1987, he was the registered owner of the property known as Farm No 4300 Lusaka. He avers that on 22<sup>nd</sup> April, 1987, the then Minister of Lands and Natural Resources, Ben Chitonda Kakoma, issued a Notice of Intention to acquire property and a Notice to yield up possession, purportedly pursuant to the provisions of ***Section 5 and 6 of the Lands Acquisition Act, 1970.***
- 2.2 His averment is that, in that Notice, it was stated that the President of the Republic of Zambia had acquired a portion of his Farm, No 4300 Lusaka in the extent of 351.2142 hectares, in the interest of the Republic and/or public purpose, having certified that the said portion of land was urgently required.
- 2.3 Jonathan Van Blerk states that the said land was used for farming purposes at the time of the Notice of Intention to

Acquire. He also contends that he was dissatisfied with the decision of the Government of the Republic of Zambia, and thus, he commenced proceedings in the High Court of Zambia using Originating Summons on 9<sup>th</sup> October, 1994 under cause number 1994/HP/5399.

- 2.4 However, by an Order dated 9<sup>th</sup> October, 1994, that action was dismissed, on account of a wrong mode of commencement having been employed. Jonathan Van Blerk stated that he thereafter, commenced an action under cause number 1997/HP/272 against the Attorney General and the Lusaka City Council, which was presided over by Hon Mr. Justice G. S Phiri. His contention is that in that matter, the Attorney General's witness testified that the land was acquired in the public interest.
- 2.5 Reliance is placed on the proceedings under cause number 1997/HP/272, with Jonathan Van Blerk contending that the Government of the Republic of Zambia did not have planned use for the property, contrary to the reasons that were advanced for the acquisition. He avers that Hon Mr. Justice G. S Phiri delivered the reserved Judgment on 22<sup>nd</sup> July, 2002, in which reliance was placed on the evidence that was adduced by the Attorney General and the Lusaka City Council.
- 2.6 Jonathan Van Blerk goes on to state that the Hon Judge found that the President of the Republic of Zambia acted in the public interest in making the acquisition. However, being dissatisfied with the decision of the High Court, he

appealed to the Supreme Court, on 12<sup>th</sup> August, 2002. Jonathan Van Blerk states that before the Supreme Court, the appeal was heard before Justices Chirwa, Mambilima and Chitengi, who in a Judgment dated 5<sup>th</sup> May, 2005, which was delivered by Hon Mr. Justice P. Chitengi, held that the President of the Republic of Zambia, acted reasonably and that the portion of land was acquired by the Lusaka City Council to establish a housing estate.

- 2.7 Jonathan Van Blerk's assertion is that in or around 2006, the Attorney General and the Lusaka City Council created Two (2) independent plots on a portion of Farm 4300 and numbered the same as Subdivision B of Farm 4300 (F/4300/B) in extent of 189.5160 hectares, and subdivision C of Farm 4300 (F/4300/C) in extent of 120.7995 hectares.
- 2.8 He goes on to contend that in or around July, 2006, the Attorney General gave a direct Ninety-Nine (99) year State lease relating to F/4300/B to a private entity namely; Royal Family Church of Lusaka under certificate of title No 54813 to develop the said piece of land, which developments were not at all related to the reasons advanced for the acquisition of the land from Jonathan Van Blerk, videlicet, public use.
- 2.9 Further in averment, Jonathan Van Blerk states that in or around 2010, the Attorney General repossessed F/4300/B. Then thereafter, in or around April, 2011, the State gave a direct Ninety-Nine (99) year lease relating to the said

F/4300/B, to another private entity, namely Bantu Capital Corporation Zambia Limited under certificate of title No 123988 to develop. He again alleges that the developments are not at all related to the reasons that were advanced for the acquisition of the land from Jonathan Van Blerk, videlicet; public use.

- 2.10 Still in averment, Jonathan Van Blerk states that in or around 2015, Bantu Capital Corporation subdivided F/4300/B into Thirteen (13) subdivisions, and transferred subdivisions 1 and 2 to another private entity called Nyimba Investments Limited to develop the area, again repeating that the developments are not all related to the reason of public use, which was advanced as the reason for the acquisition.
- 2.11 It is stated that in or around February, 2020, Bantu Capital Corporation Limited sold all the subdivisions, being 1-13 of F/4300/B to the National Pension Scheme Authority under certificates of title numbers 70753, 70754, 70755, 70756, 70757, 70758, 70759, 70760, 70761, 70762, 70763, 70764, 70765 and 70766.
- 2.12 Jonathan Van Blerk further states, that in or around August, 2006, the Attorney General also gave a direct Ninety-Nine (99) year State lease relating to 4300/C to yet another private entity, namely Kwikbuild Corporation Zambia Limited under certificate of title No 55065. He avers that Kwikbuild Zambia Corporation Limited also subdivided F/4300/C into several subdivisions, to develop privately

owned structures on the said land, again contending that the said development was not in line with the reason of public use, which was advanced for acquisition of the said land.

2.13 Thus, Jonathan Van Blerk's contention is that the land that was compulsorily acquired by the President of the Republic of Zambia, is now privately owned, contrary to the purpose for which it was acquired, pursuant to the provisions of the ***Lands Acquisition Act, 1970***.

2.14 Jonathan Van Blerk states that additionally, F/4300/B was later leased to private entities who have proceeded to sub divide portions of Farm No 4300 Lusaka, with the intention of offering them for sale to the public. Thus, his interest in the land was purportedly extinguished by the purported acquisition, and it was granted to Kwikbuild Construction Limited and Bantu Capital Corporation Limited, and the State has no interest in the land at all.

2.15 The allegation is that the Attorney General and the Lusaka City Council, in a bid to persuade the High Court of Zambia and the Supreme Court of Zambia, under cause numbers 1997/HP/272 and SCZ/8/190/2002 respectively to reach the Two (2) Judgments in their favour, fraudulently represented to Jonathan Van Blerk, and the Court, that a portion of Farm 4300 was acquired for public use. Jonathan Van Blerk states that the evidence that was adduced in cause number 1997/HP/272 is relied on.

2.16 The allegation made by Jonathan Van Blerk is that in truth, the Attorney General and the Lusaka City Council knew at all material times that the land that was acquired, was for public use, and it was not to be granted to private companies/entities, being Kwikbuild Construction Limited and Bantu Capital Corporation Limited, or any other private entity that would reduce the land to private use, rendering the acquisition as a tool calculated to deprive him of his land.

2.17 The particulars of fraud are alleged as:

- i. *The High Court and Supreme Court Judgments under cause number 1997/HP/272 respectively were to the effect that the said portion of Farm 4300 Lusaka was acquired for public use, but instead the Commissioner of Lands and the Lusaka City Council issued the said land to Kwikbuild Construction Limited and Bantu Capital Corporation Limited for private use.*
- ii. *Numbering of portions of the acquired piece of land with individual plots No F/4300/B and F/4300/C and giving them to private entities/companies.*
- iii. *Allocation of a portion of land that was compulsorily acquired and numbered as F/4300/B and F/4300/C to private companies who have since subdivided the same and sold subdivisions 1-13 of F/4300/B for their own benefit to the National Pension Scheme Authority.*
- iv. *Allocation of the portion of the land that was compulsorily acquired and numbered F/4300/C to a*

*private company which has since subdivided the same into several subdivisions.*

2.18 Jonathan Van Blerk states that he has in consequence, suffered loss and damage. It is Jonathan Van Blerk's contention that "*public purpose*" has to be within the following laws:

- 1. Section 2 of the Town and Country Planning Act, Chapter 283 of the Laws of Zambia**
- 2. Section 4 of the Lands Act, Chapter 184 of the Laws of Zambia**
- 3. Section 65 (2) of the Local Government Act, Chapter 281 of the Laws of Zambia.**
- 4. The Federation of Rhodesia and Nyasaland (Dissolution Act), 1963, Appendix 1 of the Laws of Zambia, and the Appendix title the Zambia (State Lands and Reserves) Orders 1928-1964 in particular, Section 2 (c)**
- 5. Statutory Instrument No 4 of 1964.**

2.19 Jonathan Van Blerk states that he caused to be filed, a Notice of Motion in the Supreme Court of Zambia for an Order that Appeal No 138 of 2002, whose cause number was SCZ/8/190/2002 be reopened, and that the Judgment of the Supreme Court which was delivered on 3<sup>rd</sup> June, 2005 be revisited. However, that Notice of Motion was withdrawn on the *ex-cathedrae vise* of the Honourable Court.

- 2.20 He goes on to aver that he instituted cause number 2010/HP/0749 before Hon Mrs. Justice E.P. Mwikisa with a view to challenge the Judgments in cause number 1997/HP/272 and SCZ/8/190/2002 on the ground of fraud. However, following the transfer of Mrs. Justice E.P Mwikisa to Kabwe while the proceedings were ongoing before the Deputy Registrar, the matter was re-allocated to Mrs. Justice N. A Sharpe Phiri, who dismissed the matter for want of prosecution.
- 2.21 After a bid to have the Order of dismissal reviewed failed, Jonathan Van Blerk instituted cause number 2016/HP/0607. He states that he instituted this cause to have matter determined on its merits, as cause number 2010/HP/0749 was not heard on its' merits, but rather, was dismissed on account of the absence of the parties.
- 2.22 It is Jonathan Van Blerk's averment, that efforts were made to resolve the matter in cause number 2016/HP/0607 excuria, and at a meeting, only Jonathan Van Blerk and representatives of the Attorney General and the Commissioner of Lands were present. He states that the rest of the Defendants refused to attend the meeting. However, it was resolved in that matter, that Jonathan Van Blerk discontinues cause number 2016/HP/0607 in a bid to pave way for an excuria settlement, and he did so.
- 2.23 It is Jonathan Van Blerk's averment, that following the discontinuance of the matter, the Attorney General on 17<sup>th</sup> April, 2017, wrote to the Commissioner of Lands advising

him to cancel the certificate of title that was issued to Kwikbuild Construction Limited and Bantu Capital Corporation Limited, as these were private entities who were issued the land that belonged to Jonathan Van Blerk contrary to the Judgment of the Supreme Court, which was that the land was compulsorily acquired for public use.

- 2.24 However, more than One Hundred and Twenty (120) days elapsed after Jonathan Van Blerk discontinued the matter and Kwikbuild Construction Limited and Bantu Capital Corporation Limited delayed/refused or ignored to surrender their certificates of title to the Commissioner of Lands for rectification or cancellation under **Section 11 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.**
- 2.25 The contention is further that Kwikbuild Construction Limited and Bantu Capital Corporation Limited frustrated the efforts of the Commissioner of Lands and all the parties' efforts, to explore an excuria settlement as agreed in the meeting of 2<sup>nd</sup> March, 2017. It is alleged that Legacy Holdings Limited, Kwikbuild Construction Limited and Bantu Capital Corporation Limited have occupied parts of the portion of Farm 4300, and have interfered with Jonathan Van Blerk's peaceable enjoyment of his farm, and have carried on development and construction of buildings.
- 2.26 It is further contended that in interfering with Jonathan Van Blerk's peaceable enjoyment of his farm, Kwikbuild Construction Limited and Bantu Capital Corporation
-

Limited have dug, alienated and subdivided the land with a view to selling it, which activities are likely to compromise the environmental quality of the said farm. Jonathan Van Blerk's assertion is that in consequence, he has suffered loss, damages and consequential loss.

### **3. THE ATTORNEY GENERAL'S DEFENCE**

- 3.1 The Attorney General in defence, states that Jonathan Van Blerk's assertion that prior to 1987, he was the registered proprietor of the entire lease hold known as Farm number 4300 Lusaka, is within his peculiar knowledge. The Attorney General admits that it has been sued as the Principal Legal Advisor of the Government, pursuant to ***Section 12 of the State Proceedings Act, Chapter 71 of the Laws of Zambia.***
- 3.2 Also admitted, is that the Lusaka City Council is a Local Authority that is constituted pursuant to ***Section 3 of the Local Government Act, Chapter 281 of the Laws of Zambia.*** The averments regarding the status of the rest of the Defendants, other than the National Pension Scheme Authority, is said to be within Jonathan Van Blerk's peculiar knowledge.
- 3.3 The assertion that a portion of Jonathan Van Blerk's farm No 4300 was compulsorily acquired is admitted, but the Attorney General states that Jonathan Van Blerk's contention that he used the portions of the land for farming is within his peculiar knowledge. Also said to be within Jonathan Van Blerk's peculiar knowledge, is his averment

that he instituted proceedings in the High Court to challenge the compulsory acquisition of the land in cause number 1994/HP/5399 which matter was dismissed, and thereafter, he instituted cause number 1997/HP/272.

- 3.4 The Attorney General does however, state that its' witness testified in cause number 1997/HP/272, that the President of the Republic of Zambia had acquired the land in the public interest. It is however, denied that the Attorney General did not have any planned use for the land that was compulsorily acquired from Jonathan Van Blerk.
- 3.5 The averments stating that the High Court delivered its' Judgment on 22<sup>nd</sup> July, 2002, in which it held that the President acted in the public interest in compulsorily acquiring the land, and that the Supreme Court agreed with the Judgment of the High Court on appeal, stating that the portion of the land was required for the Lusaka City Council to establish a housing estate, are admitted.
- 3.6 The assertion that a portion of the compulsorily acquired property F/4300/B was given as a direct lease from the State to the Royal Family Church is admitted, but the Attorney General denies that this was done outside the reasons that were advanced for the compulsory acquisition. It is also admitted that the land that was given to the Royal Family Church was re-possest, and was given to Bantu Capital Corporation Limited.
- 3.7 That Attorney General however, again denies that this was done contrary to the reasons that were advanced for the

compulsory acquisition. It is agreed that Bantu Capital Corporation Limited subdivided the land F/4300/B into Thirteen (13) subdivisions, and that subdivisions 1 and 2 were transferred to Nyimba Investments Limited. The Attorney General again denies that this was done outside the reasons that were advanced for the compulsory acquisition.

- 3.8 It is also agreed that Bantu Capital Corporation Limited sold the rest of the subdivisions to the National Pension Scheme Authority, and that in or around August, 2006, the Attorney General gave a direct Ninety-Nine (99) year State lease to Kwikbuild Construction Limited. What is denied, is that this was also done contrary to the reasons that were advanced for the compulsory acquisition of the land.
  - 3.9 The assertion that Kwikbuild Construction Limited subdivided the land F/4300/C into several subdivisions with a view to develop privately owned structures on the said land, which is not in line with the reasons that were advanced for the compulsory acquisition is said to be within Jonathan Van Blerk's peculiar knowledge.
  - 3.10 The allegation that the land that was compulsorily acquired is now privately-owned, contrary to the reason for which it was acquired is denied. The Attorney General's position is that the compulsory acquisition was done by the President of the Republic of Zambia within the confines of the Lands Acquisition Act. Further, that the private entities that were allocated the land, were in fact conduits of the State who
-

were to achieve the purpose for which the land was acquired, in accordance with the special leave conditions.

- 3.11 It is also stated that in terms of the law, the President is not obliged to give reasons for the compulsory acquisition, and it is within the discretion of the President to form an opinion on the desirability or expediency of the compulsory acquisition. The Attorney General also denies the assertion that the Attorney General and the Lusaka City Council fraudulently presented to the High Court and the Supreme Court, that the land was compulsorily acquired from Jonathan Van Blerk for public use.
- 3.12 It is also denied, that the Attorney General and the Lusaka City Council knew well that the land that was compulsorily acquired was for public use, and not for private entities, stating that the certificates of title that were issued to Bantu Capital Corporation Limited and the National Pension Scheme Authority, are very clear in the conditions contained in the certificates of title, as to the purpose for which the land was to be used, which purpose is in consonance with that for which the land was compulsorily acquired.
- 3.13 Thus, the allegations of fraud as pleaded by Jonathan Van Blerk are denied, and that he has suffered damage and loss. The law alleged to have been breached is denied, with the Attorney General contending that this is so far as the repealed laws are concerned. Further, that the relevant law pertaining to compulsory acquisition, does not refer to the
-

words "*public purpose*" but rather refers to the "*interests of the republic*".

- 3.14 The defence in the alternative, is that the purpose for which the land was acquired was within the provisions of **Section 4 (2) of the Lands Act, Chapter 184 of the Laws of Zambia**, which defines what amounts to "*public purpose*" under the Act. Jonathan Van Blerk's assertion that he caused to be filed a notice of motion in the Supreme Court in Order to have the Judgment that was delivered on 3<sup>rd</sup> June, 2005 re-opened, is said to be within his peculiar knowledge.
- 3.15 The same is said, with regard to his averment regarding his having withdrawn the Notice of Motion. It is denied that Jonathan Van Blerk commenced cause number 2010/HP/0749 to challenge the decisions of the High Court and the Supreme Court on the ground of fraud, but it is admitted that the matter was re-allocated to Mrs. Justice N.A Sharpe Phiri, who dismissed the action for want of prosecution.
- 3.16 No comment is made to the assertion that Jonathan Van Blerk through his lawyers sought to have the Order of dismissal reviewed, and that the matter was not heard on the merits, but was dismissed for non-attendance by the parties. The contention that Jonathan Van Blerk instituted this action to have the matter heard on the merits, is said to be within his peculiar knowledge, as well as his assertion

that he commenced a fresh action in cause number 2016/HP/607.

- 3.17 The averment that after cause number 2016/HP/607 was commenced, the Attorney General and the Commissioner of Lands met Jonathan Van Blerk with a view to settling the matter excuria, and that it was agreed that he discontinues the said matter, in Order to facilitate the said excuria settlement is admitted.
  - 3.18 The Attorney General however, denies that it wrote to the Commissioner of Lands on 27<sup>th</sup> April, 2017, advising him to cancel the certificates of title that were issued to Kwikbuild Construction Limited and Bantu Capital Corporation Limited, as they were private entities who were issued the land contrary to the Judgment of the Supreme Court.
  - 3.19 Its' defence is that the said non-binding letter to the Commissioner of Lands, advised that the certificates of title for Kwikbuild Construction Limited and Bantu Capital Corporation Limited be cancelled, for failure to adhere to the conditions in the lease agreements, and not for the reasons stated by Jonathan Van Blerk.
  - 3.20 The defence is further that neither the Commissioner of Lands nor the Registrar of Lands and Deeds has power under **Section 11 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia** to cancel a certificate of title in the absence of a Court Order to that effect. The rest of the averments in the statement of claim are denied.
-

#### **4. LUSAKA CITY COUNCIL'S DEFENCE**

- 4.1 The Lusaka City Council's defence is that the capacity in which Jonathan Van Blerk states that he has sued, is within his peculiar knowledge. It admits the capacity in which the Attorney General has been sued. On its' part, the Lusaka City Council states that it is constituted pursuant to the ***Local Government Act No 2 of 2019***.
- 4.2 The averments relating to the capacities in which Kwikbuild Construction Limited and Bantu Capital Corporation Limited are sued, is stated as being within Jonathan Van Blerk's peculiar knowledge.
- 4.3 The Lusaka City Council however, admits that the National Pension Scheme Authority is a statutory body established under the ***National Pension Scheme Act No 40 of 1996***, and adds that the said National Pension Scheme Authority was joined to the proceedings by the Supreme Court on appeal.
- 4.4 Jonathan Van Blerk's averment regarding the compulsory acquisition of Farm 4300 is admitted, and the Lusaka City Council states that the reason for the same, was in Order to enable it create a housing complex and plots for civil servants in the public interest.
- 4.5 It is further stated that the land was urgently required, but the Lusaka City Council could not start development of the said land, as it was advised that Jonathan Van Blerk had not surrendered his certificate of title for marking off. The assertion that Jonathan Van Blerk challenged the

compulsory acquisition before the High Court is not denied, but it is contended that Jonathan Van Blerk's dissatisfaction is not clear, as he willfully received compensation from it for the expropriation.

- 4.6 The Judgment that was delivered by Hon Mr. Justice G.S Phiri, is said to have been based on the pleadings that were before him, and the testimony that was given. The Lusaka City Council contends that the said testimony remains true to date, that it was in dire need of land on which to construct housing.
- 4.7 Thus, the President of the Republic of Zambia saw it fit to acquire a portion of Farm 4300 at the expiry of the lease, in Order for the Lusaka City Council to provide housing, and the said Lusaka City Council duly compensated Jonathan Van Blerk through the Minister. The contents of the High Court Judgment in cause number 1997/HP/272 are not denied, as well as those in the Judgment that was delivered by the Supreme Court.
- 4.8 The Lusaka City Council adds that in the Judgment that was delivered by the Supreme Court, it was stated that the land was compulsory acquired for Two (2) purposes, the first being for construction of a housing estate, and the second, to avail plots to civil servants. In respect of the averment that after the compulsory acquisition, Two (2) independent plots, being F/4300/B and F/4300/C were created, this is not denied. The Lusaka City Council just

repeats the purpose for the creation of the properties, as stated above.

- 4.9 It goes on to state that after the dismissal of Jonathan Van Blerk's appeal on 5<sup>th</sup> May, 2005, it went ahead to advertise the land to the public. However, the Lusaka City Council lost its' agency with the Ministry of Lands, and it therefore, could not proceed with alienation of the land.
- 4.10 The averments regarding the Attorney General's alienation of the land to Royal Family Church of Lusaka which was later re-possessed, and that the land was thereafter alienated to Bantu Capital Corporation Limited, who subdivided the land and transferred Two (2) subdivisions to Nyimba Investments Limited is said to be within Jonathan Van Blerk's peculiar knowledge.
- 4.11 The same is said, in relation to the assertion that Bantu Capital Corporation Limited sold all the subdivisions to the National Pension Scheme Authority who obtained certificates of title for the properties. It is also said that it is within Jonathan Van Blerk's peculiar knowledge, that the Attorney General by a direct lease alienated F/4300/C to Kwikbuild Corporation Zambia Limited, who also acquired a certificate of title for the property, and that it subdivided the property into several subdivisions to develop privately owned structures on the said land.
- 4.12 The same is said as regard's Jonathan Van Blerk's contention, that the land that was compulsorily acquired is now privately-owned, contrary to the purpose for which it
-

was acquired. It is denied that the Attorney General and the Lusaka City Council fraudulently represented to Jonathan Van Blerk and the Court, that a portion of Farm 4300 was acquired for public use.

- 4.13 The Lusaka City Council contends that it is still in need of land to cushion the housing deficit in Lusaka. It goes on to state that the compulsory acquisition of a portion of Jonathan Van Blerk's land, was not the first, as the expansion of the City of Lusaka has required compulsory acquisition of the land, at a fair market value compensation that it has paid.
- 4.14 No comment is made to the assertion that the Attorney General and the Lusaka City Council knew very well that the land was not acquired for public use, but for use by private entities, save to state that the plots that would have been acquired by civil servants, would have been registered in private names, and that the local authority was at liberty to enter into Public Private Partnerships to achieve its' mandate.
- 4.15 The Lusaka City Council repeats that the Attorney General and itself, did not procure the Judgments of the High Court and the Supreme Court fraudulently. Therefore, the particulars of fraud that are alleged, are denied. The Lusaka City Council further contends that it did not issue the land to any party. It is denied that Jonathan Van Blerk has suffered loss and damage, stating that the said
-

Jonathan Van Blerk was compensated for the compulsory acquisition of the land as required by the law.

- 4.16 The Lusaka City Council states that in addition, Jonathan Van Blerk was allowed to harvest the crops for the 1987 and 1988 farming season. The law cited by Jonathan Van Blerk with regard to what amounts to public purpose is not denied. The Lusaka City Council, however states that in accordance with the law, the President should form the opinion that the land is desired for public use.
- 4.17 It is not disputed that Jonathan Van Blerk filed a Notice of Motion before the Supreme Court in a bid for that Court to re-visit its' decision. Also admitted, is that Jonathan Van Blerk commenced cause number 2016/HP/607. The contentions regarding the meetings that were held by Jonathan Van Blerk with the Attorney General and the Commissioner of Lands, with a view to settling the matter excuria, and that it was agreed that Jonathan Van Blerk discontinues cause number 2016/HP/607, in a bid to facilitate the excuria settlement, and he did so, is said to be within his peculiar knowledge.
- 4.18 The Lusaka City Council also avers, that it is within Jonathan Van Blerk's peculiar knowledge, that following his discontinuance of cause number 2016/HP/607, the Attorney General wrote to the Commissioner of Lands advising him to cancel the certificates of title for Kwikbuild Construction Limited and Bantu Capital Corporation
-

Limited, as they were private entities who were issued the land, contrary to the Judgment of the Supreme Court.

- 4.19 It is also said to be within Jonathan Van Blerk's peculiar knowledge, that Kwikbuild Construction Limited and Bantu Capital Corporation Limited delayed/refused or ignored to surrender the certificates of title to the Commissioner of Lands for rectification or cancellation, under **Section 11 of the Lands and Deeds Registry Act, Chapter 185 of the Lawsof Zambia** or that they frustrated the Commissioner of Lands and the other parties' efforts to settle the matter excuria.
- 4.20 The Lusaka City Council denies that Kwikbuild Construction Limited and Bantu Capital Corporation have interfered with Jonathan Van Blerk's peaceable enjoyment of his farm by carrying out development, construction of buildings and other structures, digging, alienation and subdivision, with a view to sell, which activities are likely to compromise the environmental quality of the said farm.
- 4.21 The Lusaka City Council further states that in a letter dated 6<sup>th</sup> April, 1998, which was referenced FAR/4300, the Lands Department gave it the market value of the land in contention as K540,000.00, after valuation. Its' position is that this money was paid to Jonathan Van Blerk through the Minister responsible for land. The defence is that should this Court grant Jonathan Van Blerk the claims, then the said Jonathan Van Blerk should reimburse the Lusaka City Council, the current market value of the land.

## 5. KWIKBUILD CONSTRUCTION LIMITED'S DEFENCE

- 5.1 No comment is made to the capacity in which Jonathan Van Blerk has sued, and the capacities in which he has sued the Attorney General and the Lusaka City Council. Kwikbuild Construction Limited admits that it is a company that is incorporated under the ***Companies Act***. It makes no comment on the capacities in which the Bantu Capital Corporation Limited and the National Pension Scheme Authority have been sued.
- 5.2 The averments made by Jonathan Blerk as regards how a portion of F/4300 was compulsorily acquired, and how he challenged the same before the High Court and the Supreme Court, and the Judgments that were delivered by the said Courts, are said to be within his peculiar knowledge.
- 5.3 The creation of F/4300/C after the compulsory acquisition is admitted. The assertion relating to the alienation of F/4300/B to Royal Family Church of Lusaka, and thereafter to Bantu Capital Corporation Limited on re-possession is said to be within Jonathan Van Blerk's peculiar knowledge. The same is said, as regards his averment that Bantu Capital Corporation Limited subdivided the land into Thirteen (13) subdivisions, and transferred Two (2) subdivisions to Nyimba Investments Limited, and sold the others to the National Pensions Scheme Authority.

- 5.4 The contention by Jonathan Van Blerk that Kwikbuild Construction Limited was given a Ninety-Nine (99) year direct lease from the State for F/4300/C in or around August, 2006 is admitted. It however, denies that the granting of the land was not in line with the reasons for the compulsory acquisition. It goes on to contend, that it was granted F/4300/C long after the Judgments of both the High Court and the Supreme Court.
- 5.5 Therefore, Jonathan Van Blerk has no reasonable cause of action against it, in relation to the fact that the Judgments were obtained by fraud.
- 5.6 The assertion that Kwikbuild Construction Limited subdivided F/4300/C into several subdivisions, with a view to developing privately owned structures on the land, in contradiction to the purpose for which the land was compulsorily acquired, and that the land that was compulsorily acquired by the President is now privately owned, is denied.
- 5.7 With regard to Jonathan Van Blerk's assertion that the Attorney General and the Lusaka City Council, procured the Judgments of the High Court and the Supreme Court by fraudulently presenting to Jonathan Van Blerk and the Court, that the land that was compulsorily acquired was for public use, Kwikbuild Construction Limited states that it is a principle of law, that a Judgment that is passed by a Court of competent jurisdiction, can only be set aside where it is proved that there was a conscious and

deliberate dishonesty, which was the causative of the impugned Judgment.

- 5.8 However, it contends that Jonathan Van Blerk has not established so. Kwikbuild Construction Limited further alleges that whether or not the compulsory acquisition was for a public purpose, was not material to the manner in which both the High Court and the Supreme Court Judgments were decided.
- 5.9 It is denied that both the Attorney General and the Lusaka City Council knew that the land that was compulsorily acquired was not for public use but for private use. Also denied, are the particulars of fraud that are alleged, with Kwikbuild Construction Limited, repeating the averment, as to when a Judgment of a Court of competent jurisdiction can be set aside.
- 5.10 It further states that the particulars of fraud as pleaded, do not satisfy a plea of fraud, as they do not provide a plausible assertion of dishonesty, and do not support a necessary inference of dishonesty, when they are taken together or separately.
- 5.11 Thus, Kwikbuild Construction Limited repeats that Jonathan Van Blerk has not disclosed a reasonable cause of action, that warrants the setting aside the Judgment on account of fraud. It is consequently denied that Jonathan Van Blerk has suffered any loss or damage.
- 5.12 The averments relating to Jonathan Van Blerk's contention on the law that is applicable to "*public purpose*" and that he

filed a Notice of Motion before the Supreme Court to have the Judgment under SC/8/190/2002 re-opened, is said to be within his peculiar knowledge. The same is said as regards Jonathan Van Blerk's contention that he instituted proceedings under cause number 2010/HP/0749 to challenge the Judgments of the High Court and the Supreme Court, on the ground of fraudulent misrepresentation, and they were dismissed.

- 5.13 Jonathan Van Blerk's assertion that his attempt to have the Order of dismissal reviewed proved futile, and that the matter was not heard on its' merits, as it was due to the non-attendance of the parties, is also said to be within his peculiar knowledge. The position is repeated as regards Jonathan Van Blerk's assertion that he has instituted these proceedings so that the matter can be heard on its' merits, and that he instituted cause number 2016/HP/607.
- 5.14 The averments made regarding the possibility of settling cause number 2016/HP/607 *excuria* are denied, on the basis that Kwikbuild Construction Limited was not aware of the same, and neither was it a party to the said discussions. The contention that Kwikbuild Construction Limited and Bantu Capital Corporation Limited are occupying the portions of F/4300 in violation of Jonathan Van Blerk's peaceable enjoyment of the said land is denied.
- 5.15 Kwikbuild Construction Limited contends that as legal owner of the land, it is entitled to possession and peaceful enjoyment of F/4300/C. The defence is further that

Jonathan Van Blerk cannot seek declaratory reliefs that the land was not compulsorily acquired, and that the said land be restored to him, in an action to set aside the Judgment on account of fraud.

## **6. BANTU CAPITAL CORPORATION LIMITED'S DEFENCE**

- 6.1 Bantu Capital Corporation Limited, admits that prior to 1987, Jonathan Van Blerk was the registered proprietor of Farm No 4300 Lusaka. It however, states that the averment that Jonathan Van Blerk is a framer, is within his peculiar knowledge. The capacities in which the Attorney General the Lusaka City Council and Bantu Capital Corporation Limited have been sued are admitted.
- 6.2 Bantu Capital Corporation Limited adds that at the material time, it carried on the business of construction and real estate. The averments relating to how a portion of Farm 4300 was compulsorily acquired, and how Jonathan Van Blerk challenged the same, as well as the Judgments of both the High Court and the Supreme Court are admitted. It is also admitted, that following the compulsory acquisition of a portion of Farm 4300, Two (2) independent properties, being F/4300/B and F/4300/C were created.
- 6.3 Bantu Capital Corporation Limited also admits that the Attorney General by a direct State lease gave F/4300/B to Royal Family Church of Lusaka. It adds that the compulsory acquisition was met with compensation being given to Jonathan Van Blerk. The contention that the land was re-possessioned from Royal Family Church of Lusaka is

admitted, and it is stated that Bantu Capital Corporation Limited was given the land over Two (2) decades after the land was compulsorily acquired.

- 6.4 It denies that it was granted the land outside the purposes for which the land was compulsorily acquired. Bantu Capital Corporation Limited contends that it is a bona fide purchaser for value, without any notice of Jonathan Van Blerk's interest in the said land F/4300/B. It states that it relies on the entries in the Lands Register.
- 6.5 The assertion that Bantu Capital Corporation Limited in or around 2015 subdivided F/4300/B into Thirteen (13) subdivisions and transferred subdivisions 1 and 2 to Nyimba Investments Limited is denied, stating that rather, in or about January, 2020, it sold subdivisions 3-13 of F/4300/B to the National Pension Scheme Authority.
- 6.6 It's defence is that being a registered and bona fide owner, it had the right to sell or transfer the subdivisions of F/4300/B for use that would ultimately benefit the public. Thus, it did not offend the reasons for which the land was compulsorily acquired.
- 6.7 The assertion that in or around June, 2016, Kwikbuild Construction Limited subdivided F/4300/C into several subdivisions with a view to develop privately owned properties on the land, contrary to the reasons for the compulsory acquisition of the land, and that the land which was compulsorily acquired is now owned by private

entities, is said to be within Jonathan Van Blerk's peculiar knowledge.

- 6.8 The allegations that the Judgments of the High Court and the Supreme Court were procured by fraud after the Attorney General and the Lusaka City Council fraudulently represented to Jonathan Van Blerk and the Courts, that the land was acquired for public use is denied. The same is said of the assertion that this was in spite of both the Attorney General and the Lusaka City Council being aware that the land was acquired for private and not public use.
- 6.9 To that end, the particulars of fraud that are alleged are denied. It is also denied that Jonathan Van Blerk has suffered damage and loss. The allegations relating to Jonathan Van Blerk commencing cause number 2010/HP/0749 and that it was dismissed without being heard on the merits, as the dismissal was on account of non-attendance by the parties, as well as the fact that this cause has been instituted with a view to have the matter heard on the merits, is said to be within Jonathan Van Blerk's peculiar knowledge.
- 6.10 The commencement of cause number 2016/HP/607, is also said to be within Jonathan Van Blerk's peculiar knowledge. The contentions relating to the attempt to have cause number 2016/HP/607 settled excuria is denied, with Bantu Capital Corporation Limited, contending that it was not a party to the same. It denies that it delayed/refused or ignored to surrender its' certificate of title to the

Commissioner of Lands for rectification or cancellation, or that it frustrated the Commissioner of Lands, and the other parties' efforts to resolve the matter.

6.11 The assertion that Bantu Capital Corporation Limited is in occupation of F/4300/B, in violation of Jonathan Van Blerk's peaceable enjoyment of the land, and that it has constructed, dug, alienated, subdivided the said land with a view to selling it, which activities are likely to compromise the environmental quality of the said farm is denied. That Jonathan Van Blerk has suffered loss, damage and consequential loss is denied.

6.12 The defence is that Jonathan Van Blerk is not entitled to any of the reliefs sought. Like Kwikbuild Construction Limited, Bantu Capital Corporation Limited, states that Jonathan Van Blerk cannot seek declaratory reliefs that the land that was compulsorily acquired be restored to him, in an action that principally seeks to set aside the Judgment on the ground of fraud.

6.13 It is stated in the alternative, that aside from denying that Jonathan Van Blerk has not suffered damage, loss and consequential damages, that Bantu Capital Corporation Limited claims indemnity from the Attorney General.

## **7. THE NATIONAL PENSION SCHEME AUTHORITY'S DEFENCE**

7.1 In its' defence, the National Pension Scheme Authority makes no comment on the capacity in which Jonathan Van Blerk has sued, or the capacities in which he has sued the Attorney General, the Lusaka City Council, Kwikbuild

Construction Limited and Bantu Capital Corporation Limited. The capacity in which the National Pension Scheme Authority has been sued is admitted.

- 7.2 Jonathan Van Blerk's averment on how a portion of F/4300, was compulsorily acquired, and how he challenged the same in both the High Court and the Supreme Court is said to be within his peculiar knowledge. The assertion that after the compulsory acquisition, Two (2) independent properties being F/4300/B and F/4300/C were created, is also said to be within Jonathan Van Blerk's peculiar knowledge.
- 7.3 The same is said with regard to how the land in question was alienated. The National Pension Scheme Authority however, agrees that in or around February, 2020, it bought the subdivisions 1 and 2 of F/4300/B from Nyimba Investments Limited, and that it bought subdivisions 3-13 of F/4300/B from Bantu Capital Corporation Limited.
- 7.4 Its' position is that, it is in possession of certificates of title for Thirteen (13) properties that it acquired from Nyimba Investments Limited and Bantu Capital Corporation Limited as stated in the statement of claim. The defence is also that at the time the National Pension Scheme Authority acquired the subdivisions in question, this Court, as well as the Supreme Court had already determined the matter between Jonathan Van Blerk on the one hand, and the Attorney General and the Lusaka City Council on the

other, to the effect that the compulsory acquisition was proper and legitimate.

- 7.5 It goes on to state that at the time that it acquired the land in question, there was already a decision by the Court of Appeal to the effect that Jonathan Van Blerk could not challenge the compulsory acquisition because the decision of the Supreme Court was final and conclusive as per ***Section 14 of the Lands Acquisition Act, Chapter 189 of the Laws of Zambia.***
- 7.6 It is stated that in any event, before the National Pension Scheme Authority acquired the Thirteen (13) pieces of land, it engaged its' advocates of record, ECB Legal Practitioners, to conduct due diligence, and the report showed that there were no encumbrances of any sort on the said pieces of land in question. Further, the report showed that the High Court, Supreme Court and the Court of Appeal had all dealt with Jonathan Van Blerk's claims in Court, to the conclusion that the compulsory acquisition was proper and legitimate and could not be challenged.
- 7.7 The National Pension Scheme Authority further avers that it is a bona fide purchaser for value of the Thirteen (13) properties. Therefore, it is a legitimate and legal owner of the said properties. It makes no comment on the rest of the assertions in the statement of claim, stating that they are within Jonathan Van Blerk's peculiar knowledge.
- 7.8 In conclusion, the National Pension Scheme Authority contends that Jonathan Van Blerk is not entitled to an
-

Order that it surrenders the certificates of title relating to the Thirteen (13) properties, as it is a bona fide and legitimate owner of the same as pleaded above.

## **8. EVIDENCE LED AT TRIAL**

8.1 At the trial of the matter, only Jonathan Van Blerk testified and he did not call any witnesses. None of the Defendants testified, and they informed the Court that they would file written submissions.

### **PW1-JONATHAN VAN BLERK**

8.2 In his testimony, Jonathan Van Blerk told the Court that he holds a certificate of title to the property known as Farm 4300. He identified pages 1-13 of his bundle of documents as the said certificate of title, and pages 14-29 of the said bundle of documents as the Lands Register for the said property. It was further Jonathan Van Blerk's testimony that on 22<sup>nd</sup> April, 1987, he received a Notice for land acquisition with an intention to acquire his property. His evidence was that the said Notice was at page 30 of his bundle of documents, adding that the Minister signed the said Notice.

8.3 Still on the Notice, Jonathan Van Blerk testified that it stated that the President had resolved that it was desirable or expedient in the interest of the Republic, and that the land was urgently required, in the extent of 351.2142 hectares. The continued testimony was that on receipt of the same, Jonathan Van Blerk appealed to organisations such as the Commercial Service Bureau, the Ministry of

Lands and the Lusaka City Council, to have the Notice reversed, to no avail.

- 8.4 He stated that from there, he appealed to the High Court to have the acquisition reversed. However, by the Judgment of the High Court, he lost the case, as the Judge agreed with the Attorney General and the Lusaka City Council, that the land was urgently required in the interest of the Republic. Pages 33-44 of Jonathan Van Blerk's bundle of documents was identified as the said Judgment of the High Court.
- 8.5 With reference to page 38 of the said bundle of documents, Jonathan Van Blerk's testimony was that in the second paragraph at that page, the evidence that was given by Fortune Kachamba, the then Senior Legal Officer in the Ministry of Lands was noted. It was stated that he had testified that the acquisition was in the public interest, but that the State had no plans for the land.
- 8.6 Then at page 42, in the second paragraph in line 6, the evidence that was given was that the land that was acquired was for a housing project for the Lusaka City Council that took time, which project was in the interest of the Republic. Jonathan Van Blerk further in his evidence, testified that at page 44, the High Court dismissed his claim, and Judgment was entered for the Attorney General and the Lusaka City Council.
- 8.7 His testimony was that being dissatisfied with the Judgment of the High Court, he appealed to the Supreme Court, which Court in a Judgment that was at pages 45-56

of his bundle of documents, agreed with the Judgment of the High Court. Jonathan Van Blerk referred to page 49, stating that on that page in paragraph 1 lines 1-4, it stated that the argument was that the land was acquired for a housing project for the benefit of the community.

- 8.8 Further line 13, stated that in the absence of mala fides, on the reasons why the land was acquired, the Judge was on firm ground. It was also testified that at page 51 in the last paragraph, the Supreme Court stated that Jonathan Van Blerk was informed that the land was acquired for establishing a housing complex.
- 8.9 Then at page 56, the appeal was dismissed in the Judgment that was delivered in 2005. It was Jonathan Van Blerk's continued testimony that in 2011, he discovered that the land that had been compulsorily acquired had been split into Two (2) portions, being F/4300/B and F/4300/C, and had been allocated to privately owned companies, being Kwikbuild Construction Limited and Bantu Capital Corporation Limited.
- 8.10 Pages 57-64 of Jonathan Van Blerk's bundle of documents, was identified as the title deed for Kwikbuild Construction Limited, stating that it was issued on 26<sup>th</sup> September, 2006. Pages 65-68 of the said bundle of documents was identified as the Lands Register for the land. It was also testified that Kwikbuild Construction Limited subdivided the property into roughly Four Hundred (400) plots, as seen at pages 70-117 of the said bundle of documents.

- 8.11 Jonathan Van Blerk identified pages 118-120 of his bundle of documents, as the Patents and Companies Registry Agency (PACRA) documents for Kwikbuild Construction Limited. He went on to identify pages 128-140 of his bundle of documents, as the certificate of title for Bantu Capital Corporation Limited, adding that it was issued on 1<sup>st</sup> July, 2011. The Lands Register for the said land was said to be at pages 142-150 of the said bundle of documents.
- 8.12 The PACRA documents for Bantu Capital Corporation Limited were identified as being at pages 152-155 of Jonathan Van Blerk's bundle of documents. It was also testified that Bantu Capital Corporation Limited gave Nyimba Investments Limited the land, as evidenced at pages 161-163, and that page 156 was the application to assign the property from Bantu Capital Corporation Limited to Nyimba Investments Limited.
- 8.13 Jonathan Van Blerk told the Court that Nyimba Investments Limited was issued the certificate of title for the land on 30<sup>th</sup> February, 2015, which was at page 164. The PACRA documents for Nyimba Investments Limited were identified as those at pages 167-171. The testimony that was also given, as that thereafter, Nyimba Investments Limited sold the land to the National Pension Scheme Authority, who obtained the title deeds, which were at pages 222-233, 237, 251, 279, 293, 304, 318, 332, 346, 360, 374 and 388 of Jonathan Van Blerk's bundle of documents and were dated 6<sup>th</sup> February, 2020.

- 8.14 It was stated that pages 235, 248, 266, 276, 290, 301, 315, 329, 343, 357, 372, 386, and 399 were the Lands Registers for the land that Bantu Capital Corporation Limited sold to the National Pension Scheme Authority.
- 8.15 In his continued testimony, Jonathan Van Blerk testified that he sued the Attorney General, the Lusaka City Council, Kwikbuild Construction Limited, Bantu Capital Corporation Limited and the National Pension Scheme Authority. That was how in 2017, the Attorney General organised a round table meeting for all the stakeholders, as seen at pages 177-178 of his bundle of documents, being the letter that invited all the stakeholders to the meeting.
- 8.16 Jonathan Van Blerk went on to testify that the object of that meeting, was to consent to the application to dismiss the matter on a point of law. His further evidence was that at page 179 of his bundle of documents, was a letter that was authored by the Attorney General to the Commissioner of Lands on 27<sup>th</sup> April, 2017, which directed cancellation of the certificates of title that were issued to Kwikbuild Construction Limited and Bantu Capital Corporation Limited. However, the Commissioner of Lands did not cancel the title deeds, and Jonathan Van Blerk sued again.
- 8.17 On what is prevailing on the land in issue, Jonathan Van Blerk's testimony was that Lamasat is developing a shopping mall, as seen at pages 416-418 of his bundle of documents. He presumed that the land belongs to Bantu Capital Corporation, as he had not seen any documentation

for the same. Jonathan Van Blerk asked the Court to set aside the High Court and Supreme Court Judgments of 2002 and 2005, as they were decided on wrongful information being provided.

**CROSS EXAMINATION BY THE ATTORNEY GENERAL**

- 8.18 The Attorney General through the Solicitor General, cross examined Jonathan Van Blerk, who stated that the urban population in Lusaka had increased since independence. He also testified that he was aware that this had caused strain on accommodation for the people. Jonathan Van Blerk agreed that the strain was noticeable in Lusaka, particularly the urban population.
- 8.19 On how far away from the Central Business District does Jonathan Van Blerk live, his testimony was that it is Twelve (12) kilometers, which is where the disputed land is. In respect of how much land he owned before the compulsory acquisition, Jonathan Van Blerk testified that it was Seven Hundred and Forty (740) hectares. He agreed that it was a huge piece of land, but stated that it was not vast.
- 8.20 He testified that Three Hundred and Fifty-One (351) hectares of that land was compulsorily acquired, leaving about Three Hundred and Ninety (390) hectares. Jonathan Van Blerk agreed that he had sold part of his land, stating that it was between Forty (40) to Sixty (60) hectares, after he had divided it into Fifty (50) plots, of about Two (2) hectares each. On being cross examined further, Jonathan
-

Van Blerk's evidence was that he had therefore sold off about Eighty (80) hectares of his land.

- 8.21 He agreed that all those pieces of land had been sold, and were occupied. On the reasons that he was informed for the compulsory acquisition, Jonathan Van Blerk stated that he was told that it was to build a housing estate on Mode 1 of the Lusaka City Council. When referred to the Notice of Intention to Acquire Property and Notice to Yield up Possession at page 30 of his bundle of documents, Jonathan Van Blerk testified that it stated that the land was compulsorily acquired in the interest of the Republic.
- 8.22 His evidence was that the Republic is the country, but he denied that the interest of the Republic is the Government. Jonathan Van Blerk still in cross examination, testified that the delivery method of the housing project was not stated at page 30. He told the Court that he had never heard of build on transfer. It was also his testimony in cross examination, that the High Court was informed that he was the stumbling block for the housing project, and that the Court found so.
- 8.23 On being referred to the portion of the High Court Judgment at page 44 of his bundle of documents, Jonathan Van Blerk testified that the Court at that page, found that he was the stumbling block for the project. He denied that he declined to surrender his certificate of title to the State. Jonathan Van Blerk was not sure whether he obtained an
-

Order of injunction over the land, stating that it had been a long time.

- 8.24 In respect of the Supreme Court Judgment, Jonathan Van Blerk when referred to page 45 of his bundle of documents, agreed that it was delivered in May 2005. His testimony was that he had locked out the State from the land from 1987 to 2005, but his position was that it depended, whether that was an impediment.
- 8.25 Jonathan Van Blerk agreed that at pages 51-52 of his bundle of documents, the Judgment of the Supreme Court stated that the housing project could not be carried out, as he had refused to surrender the certificate of title, and there were Court actions and an Order of injunction. It was his contention that at that stage, the fraud had not happened, but agreed that he was alleging that the Judgments of the High Court and the Supreme Court were obtained by fraud.
- 8.26 Still on the fraud, Jonathan Van Blerk's evidence was that it happened after 2005, and he stated that the portions of the Supreme Court Judgment that he had read out, at pages 51-52 of his bundle of documents, did not happen by fraudulent misrepresentation. His continued testimony in cross examination, was that he was unhappy with what happened after 2011.
- 8.27 Jonathan Van Blerk, took the view that if the State was desperate to put up the housing project, it would still have the money from 1987 to date. He stated that the State only

went ahead to do something about the land after the Supreme Court Judgment in 2005. Jonathan Van Blerk agreed that when the land was compulsorily acquired in 1987, UNIP was in power, under President Kenneth Kaunda.

- 8.28 His evidence was that in 2005, the MMD under President Rupiah Banda was in power. It was however, Jonathan Van Blerk's testimony, that his expectation was that the delivery method of 1987 would still be the same in 2005, being a period of Eighteen (18) years later. He testified that this was on the basis that the law is still the same.
- 8.29 Jonathan Van Blerk agreed that page 129 of his bundle of documents was the certificate of title that was issued to Bantu Capital Corporation Limited in 2011. He stated that the said certificate of title was one of the reasons that he was before Court, as it was a deviation from the housing project. It was further Jonathan Van Blerk's testimony that he alleged that the State had acted dishonestly.
- 8.30 On being referred to the lease for Bantu Capital Corporation Limited, which is at pages 133-140 of his bundle of documents, Jonathan Van Blerk's evidence was that one of the conditions in the lease at page 135, in Clause 5, was that it was to build residential houses. Jonathan Van Blerk agreed that this condition was evidence of the Government's intention to build housing units.
-

- 8.31 However, his position was that what was on ground showed that Bantu Capital Corporations Limited had not lived up to the conditions, and had breached them. He went on to testify that the intention of the Government was supposed to have been carried out by the Council, but was now being undertaken by Bantu Capital Corporation Limited, which was not service to the people.
- 8.32 It was agreed that Jonathan Van Blerk was compensated for the acquisition, in the sum of Five Hundred and Forty-Seven Thousand Kwacha (K547, 000.00) in 1987. He further agreed that he used the money, and he did not reject it. Jonathan Van Blerk also agreed that he was not given alternative land, and that the rate of the United States Dollar at the time to the Zambia Kwacha was Twenty-Five (25). His evidence was also that while he did not accept the money that he was paid as compensation, he had complained bitterly on a number of occasions.

**CROSS EXAMINATION BY COUNSEL FOR THE LUSAKA CITY COUNCIL**

- 8.33 There was no cross examination.

**CROSS EXAMINATION BY COUNSEL FOR KWIKBUILD CONSTRUCTION LIMITED**

- 8.34 In cross examination by Mr. Simeza SC, Jonathan Van Blerk testified that he claimed an Order to set aside the Judgments of the High Court and the Supreme Court on the ground of fraud. He stated that fraud was committed which induced the High Court and the Supreme Court.

Jonathan Van Blerk when cross examined further, however testified that the fraud happened after the Judgment of the High Court. His contention was that he lost the case in the High Court because of Fortune Kachamba's testimony.

- 8.35 It was further Jonathan Van Blerk's evidence, that he did not deem it necessary to produce the entire transcript of Fortune Kachamba's testimony as contained in the Judgment, stating that he was only asked to read the relevant portion of the Judgment that contained Fortune Kachamba's evidence.
- 8.36 On being referred to the Judgment of the High Court at pages 38 and 43 of his bundle of documents, Jonathan Van Blerk testified that those pages revealed that at the time, the intention of acquiring the land, was to put up a housing estate.
- 8.37 When referred to the letter at page 2 of the Lusaka City Council's bundle of documents, Jonathan Van Blerk stated that it was a letter that the Commissioner of Lands wrote to the Lusaka Urban District Council on 8<sup>th</sup> September, 1987, informing them that the land that was compulsorily acquired was to be planned into a housing estate, and that the Stands would be offered to members of the public.
- 8.38 The letter at page 4 of the Lusaka City Council's bundle of documents dated 11<sup>th</sup> April, 1988, that was authored to the District Executive Secretary by the Development Secretary, was also testified as stating that the land that was acquired
-

was for the purpose of putting up a housing estate, and that a lay out plan for the area had even been developed.

- 8.39 Jonathan Van Blerk agreed that the letter was dated before the High Court Judgment of 2002. Based on that, he stated that Fortune Kachamba's testimony regarding the use of the land was correct, and that he did not misinform the Court. Still in cross examination, Jonathan Van Blerk's evidence was that the High Court found that his failure to surrender the certificate of title affected the determination of whether the property was acquired in the public interest.
- 8.40 He also agreed that the High Court's decision was based on his actions. As to what his complaint is, Jonathan Van Blerk testified that it is that the land was acquired for a public purpose but it was given to private entities. When he was referred to the Judgment of the Supreme Court at page 52 of his bundle of documents, Jonathan Van Blerk stated that the decision of the Supreme Court was inspired by his conduct, and not by Mr. Ngulube's submissions that the land was acquired for public use.
- 8.41 Jonathan Van Blerk agreed that Kwikbuild Construction Limited was not in existence at the time, and that the electronic printout from PACRA, which was at page 118 of his bundle of documents, showed that Kwikbuild Construction Limited was only incorporated on 1<sup>st</sup> June, 2006. He thus agreed that the said company had no bearing on both the High Court and Supreme Court Judgments.

8.42 Jonathan Van Blerk further agreed that if lies were told to the High Court, then it was not on account of Kwikbuild Construction Limited. It was also agreed that on that account, Kwikbuild Construction Limited could not have influenced Fortune Kachamba's evidence or the decision of the High Court.

8.43 With reference to pages 151-152 of his bundle of documents, Jonathan Van Blerk testified that Bantu Capital Corporation Limited was incorporated on 11<sup>th</sup> February, 2011. He agreed that it could not be attributed to any claims for misrepresentation that the land was acquired for a public purpose. He agreed that Fortune Kachamba testified that the land was acquired for a housing project for the Council and that there was a plan to that effect.

**CROSS EXAMINATION BY COUNSEL FOR BANTU CAPITAL CORPORATION LIMITED**

8.44 There was no cross examination.

**CROSS EXAMINATION BY COUNSEL FOR THE NATIONAL PENSION SCHEME AUTHORITY**

8.45 In cross examination by Counsel for the National Pension Scheme Authority, Jonathan Van Blerk's testimony was that he agreed that the National Pension Scheme Authority was not involved in the litigation before the High Court and the Supreme Court. Therefore, on that score, the National Pension Scheme Authority did not make any representations in those proceedings.

- 8.46 Jonathan Van Blerk denied having placed a caveat on the properties that the National Pension Scheme Authority bought. He did however, agree that he did not sue the National Pension Scheme Authority, but rather, the said National Pension Scheme Authority joined the proceedings in the Supreme Court on appeal.
- 8.47 It was agreed that Jonathan Van Blerk resides at Farm 4300 whose title deed was at page 1 of his bundle of documents. Jonathan Van Blerk testified that he is in possession of the remaining extent of Farm 4300 which is 557.8759 hectares. He testified that he had created the subdivisions on the land, as seen at pages 3 and 5 of his bundle of documents, and that he was compensated Twenty-Five Thousand (K25, 000.00).
- 8.48 It was Jonathan Van Blerk's evidence, when referred to Entry No 31 on the Lands Register for Farm 4300, at page 23 of his bundle of documents, that he sold land to Caboya Investment Limited in extent of 5.5910 hectares at Four Hundred and Twenty Thousand United States Dollars (US\$420, 000.00).
- 8.49 He also agreed that as shown at entry No 32, he sold land in extent of 5.8830 hectares to Kozo Lodge at Three Hundred and Sixty Thousand United States Dollars (US\$360, 000.00) in 2009.
- 8.50 That marked the close of Jonathan Van Blerk's case.

## **9. ANALYSIS AND DECISION**

### **FACTS NOT IN CONTENTION**

- 9.1 I have considered the evidence and the submissions. It is common cause that Jonathan Van Blerk was the initial owner of the entire Farm No 4300 Lusaka, which he held on certificate of title no 136248 from 1<sup>st</sup> July, 1975, for land in extent of 557.8759 hectares. The facts that are further not in dispute, are that the then Minister of Lands and Natural Resources, Ben Chitundu Kakoma on 22<sup>nd</sup> June, 1987, issued a notice of intention to acquire 351.2142 hectares of Jonathan Van Blerk's Farm No 4300.
- 9.2 It is further common cause that Jonathan Van Blerk challenged the compulsory acquisition, before the High Court in cause number 1997/HP/272, which Court on 22<sup>nd</sup> July, 2002, dismissed Jonathan Van Blerk's claim that the President of the Republic of Zambia's compulsory acquisition of a portion of his Farm 4300 was ultra vires the ***Lands Acquisition Act, Chapter 189 of the Laws of Zambia.***
- 9.3 It is not in contention that Jonathan Van Blerk, being dissatisfied with the Judgment of the High Court, appealed to the Supreme Court, which Court upheld the Judgment of the High Court.

### **FACTS IN DISPUTE**

- 9.4 The facts in dispute are whether the Judgments of both the High Court and the Supreme Court were fraudulently obtained, and are bound to be set aside on that basis?

**WHETHER THE JUDGMENTS OF THE HIGH COURT AND THE SUPREME COURT WERE FRAUDULENTLY OBTAINED?**

- 9.5 Jonathan Van Blerk was the sole witness in this matter. His evidence was essentially that when he challenged the compulsory acquisition of a portion of his land before the High Court, whose notice to acquire the land is at page 30 of his bundle of documents, and gave the reason for the compulsory acquisition as being that it was desirable or expedient in the interest of the republic, and was urgently required, the High Court agreed with that reason and dismissed his case.
- 9.6 He referred to the evidence of the then Senior Lands Officer Fortune Kachamba who was called as the witness by the Attorney General, which is contained in the Judgment of the High Court at page 38 of his bundle of documents. The testimony was that the acquisition was in the public interest. Jonathan Van Blerk also testified that Fortune Kachamba as seen at page 41, testified that the State had no plans for the land, but that the acquisition was in the public interest.
- 9.7 Then at page 42, the High Court found that the land was acquired for a housing project for the Lusaka City Council that took time. Jonathan Van Blerk further in his testimony, reiterated that the Supreme Court on appeal on 5<sup>th</sup> May, 2005, upheld the decision of the High Court, as seen in their Judgment at page 49 of Jonathan Van Blerk's

bundle of documents, where they stated that the land was acquired for a housing project for the benefit of the community, and there was no evidence of mala fides.

- 9.8 It was also Jonathan Van Blerk's testimony that it was only in 2011, that he discovered that the acquired portion of his land had been divided into Two (2) portions, being F/4300/B and F/4300/C and had been allocated to Kwikbuild Construction Limited and Bantu Capital Corporation Limited, being private entities, whose certificates of title are at pages 57-64 and 128-140 of his bundle of documents respectively.
- 9.9 He further testified that Kwikbuild Construction Limited as evidenced by the Lands Register at pages 65-68 had divided the land F/4300/C into roughly Four Hundred (400) plots, while Bantu Capital Corporation Limited transferred Two (2) subdivisions 1 and 2 of F/4300/B to Nyimba Investments Limited, and sold the rest of the subdivisions to the National Pension Scheme Authority.
- 9.10 Jonathan Blerk's testimony was also that on 27<sup>th</sup> April, 2017, the Attorney General directed the Commissioner of Lands to cancel the certificates of title which were issued to Kwikbuild Construction Limited and Bantu Capital Corporation Limited, identifying page 179 of his bundle of documents, as the said letter.
- 9.11 He further stated that currently, Lamasat is developing a shopping mall on the land in issue, as evidenced on the photographs at page 416-418 of his bundle of documents.

- 9.12 As earlier noted, in my Ruling dated 27<sup>th</sup> January, 2022, I struck out Jonathan Van Blerk's claims that did not relate to setting aside the Judgments of the Supreme Court and the High Court on the ground of fraud. This was on the basis that in an action to set aside a Judgment on the ground of fraud, what is impugned is the Judgment, and where that is successful, it will be set aside, and the trial in the cause in which it was obtained re-opened.
- 9.13 It is common cause, that in this matter, Jonathan Van Blerk seeks to set aside the Judgments of the High Court under cause number 1997/HP/272 and the Supreme Court under cause number SCZ/8/190/2002, dated 22<sup>nd</sup> July, 2002 and 5<sup>th</sup> May, 2005 respectively, on the ground of fraud. His assertion is that there was fraudulent misrepresentation by the sole witness for the Attorney General Fortune Kachamba, that the land was acquired for public purpose when not, in obtaining those Judgments.
- 9.14 The facts of the matter reveal that the Minister of Lands and Natural Resources on 27<sup>th</sup> April, 1987, issued Jonathan Van Blerk with a Notice of Intention to Acquire Property and Notice to Yield up Possession, being a portion of his land in extent of 351.2142 hectares of Farm 4300. The said Notice stated that the President had resolved that it was desirable and expedient in the interests of the Republic to acquire the property, and that the property was urgently required.

9.15 Various authorities have been cited by Jonathan Van Blerk in his submissions, which state that land that is acquired must be used for the purpose for which it was compulsorily acquired. Thus, in this matter, the land having been acquired in public interest, must be used for the public purpose. Reference is made to the case of **William David Carlisle Wise v Attorney-General**<sup>(5)</sup>

stating that the High Court in that matter observed that:

***“The Lands Acquisition Act, Cap. 296 of the Laws of Zambia empowers the President of the Republic of Zambia, whenever he is of the opinion that it is desirable or expedient in the interest of the Republic so to do, compulsorily to acquire any property or any description that is the general thrust of this Act. The Act does not stipulate the purpose or purpose for such compulsory acquisition. I should hasten to say that the silence of the Act on the question of the purpose or purpose for which the state may compulsorily acquire property upon payment of compensation does not per se give the State a blanket compulsory acquisition without any cause or purpose. There is a plethora of case law in common-law jurisdiction which shows that where no purpose has been indicated in the statute the Courts will look at the intention of the Legislature and invariably give an implied***

***purpose. This is an indication that there can be no compulsory acquisition without cause or purpose.”***

9.16 Jonathan Van Blerks also cites other authorities from other jurisdictions, such as the Kenyan case of ***Town Council of Awendo v Nelson Odur Onyango & 13 others***<sup>(6)</sup> EKR where it was held that:

***“Where the Government pursuant to the relevant constitutional and legal provisions compulsorily acquires land, such land shall only be used for the purpose for which it was compulsorily acquired. The allocation of compulsorily acquired land to private individuals or entities for their private benefit, in total disregard of the public purpose or interest for which it was compulsorily acquired, shall be incapable of conferring title to that land in favour of the allottees.”***

9.17 Another Kenyan case of ***Niaz Mohammed v Commissioner of Lands & others***<sup>(7)</sup> is also cited as having held that upon compulsory acquisition of land, and the vesting of land in the Government, then it does not mean that the land falls to be used by the Government in a manner that it desires. Rather, the land must be used for the purpose for which it was compulsorily acquired.

9.18 Also relied on, is the case of ***R v Secretary for State for Transport and others; Ex-parte De Rothchild***<sup>(4)</sup>, among

other authorities, as having explained the need to check the power of compulsory acquisition as follows:

***“However, it has to be recognised that the compulsory purchase of land involves a serious invasion of the private proprietary rights of citizens. As Purchas LJ described them in Chilton v Telford Development Corp [1987] 3 All ER 992 at 997, [1987] 1 WLR 872 at 878, the powers of compulsory purchase of an acquiring authority are of a draconian nature. The power to dispossess a citizen of his land against his will is clearly not one to be exercised lightly and without good and sufficient cause.”***

9.19 In response to Jonathan Van Blerk’s submissions, the Attorney General agrees with the authorities cited by Jonathan Van Blerk above. However, their contention is that Jonathan Van Blerk has not pleaded fraud as required by the rules on pleadings, and he has not led evidence to prove the fraud as alleged. Therefore, he has not satisfied the requirements that must be met, in Order for the Judgments of the High Court and the Supreme Court to be set aside.

9.20 Kwikbuild Construction Limited in also agreeing with this submission, contends that Jonathan Van Blerk has misunderstood the extent of the Court’s jurisdiction in this matter, as this Court is not sitting as appellate Court against the decision of the High Court in cause number

1997/HP/272, and the Judgment of the Supreme Court in cause number SCZ/8/190/2002, and neither is it being called upon to review the said Judgments.

- 9.21 The argument by Kwikbuild Construction Limited is that the merits of the issues that were raised in the Two (2) Judgments are res judicate, as held in the case of ***Societe National Deschemis De Purdu Congo (SNCC) v Joseph Nonde Kakonde***<sup>(12)</sup>.
- 9.22 Kwikbuild Construction Limited further relies on the case of ***Development Bank of Zambia & Livingstone Sawmills Limited v Jet Cheer Development Co (Zambia) Limited***<sup>(8)</sup>, stating that Justice Ngulube in that matter, quoted with approval, the decision in the case of *Flower v Lloyd*, which was:

***“I agree with what has been said by the Master of Rolls, that in the case of a decree (or Judgment as we now call it), being obtained by fraud, there always was power, and there is still power, in the Courts of law in this country to give adequate relief. But that must be done by putting in issue that fraud, and that fraud only. You cannot go to your adversary and say ‘you obtained a Judgment by fraud and I will have a rehearing of the whole case’ until the fraud is established. The thing must be tried as a distinct and positive issue; ‘you the Defendants’ or ‘you the Plaintiffs obtained that Judgment or decree in your favour***

*by fraud, you bribed the witness, you bribed my solicitor, you bribed my counsel, you committed some fraud or other of that kind, and I ask to have the Judgment set aside on the ground of fraud'. That would be tried like anything else by evidence properly taken directed at that issue and wholly free from and unembarrassed by any other matters originally tried. That was the old course of the law, and there seems to be no reason why that should not be now followed; and if it is true that there was fraud practiced upon the Court, by which the Court was induced to make a wrong decree, the way to obtain relief will be to bring a fresh action to set aside the decree on the ground of fraud."*

9.23 The Attorney General, the Lusaka City Council and Bantu Capital Corporation Limited in their submissions refer to **Order 18/12/18 of the Rules of the Supreme Court of England** as stating as follows in terms of pleadings that allege fraud:

***"Fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts"***

9.24 They further refer to **Order 18 Rule 8 of the said Rules of the Supreme Court of England**, as read with **Order 18/8/16**, which states that:

***“It is the duty of counsel not to enter a plea of fraud on the record “unless he has clear and sufficient evidence to support it” (see per Lord Denning in Associated Leisure Ltd v. Associated Newspapers Ltd [1970] 2 Q.B. 450 at 456). Any charge of fraud or misrepresentation must be pleaded with the utmost particularity and see “Fraud”, para. 18/12/18, and “Concealed fraud”, para. 18/12/8.”***

- 9.25 Other authorities cited by the Attorney General, is the case of ***Bwalya Kalambo v Rock Limited and Meanwood Holdings Limited***<sup>(13)</sup>, stating that the guidance that was given in that matter, was that allegations of fraudulent misrepresentation or fraud must be set out in separate paragraphs from the particulars. The Attorney General, and the Lusaka City Council cite the case of ***Takhar v Gracefield Developments Limited and others***<sup>(17)</sup> as authority in that regard as well.
- 9.26 Kwikbuild Construction Limited relies on the cases of ***Sablehand Zambia Limited v Zambia Revenue Authority***<sup>(10)</sup> and ***Jonesco v Beard***<sup>(1)</sup>, which cases also stressed the requirement for the particulars of fraud to be pleaded.
- 9.27 The Attorney General’s submission is nevertheless that while Jonathan Van Blerk has not pleaded the particulars of fraud, the question is whether there are sufficient grounds to impunge the Judgments of the High Court and

the Supreme Court on the ground of fraud? The submission is that before the High Court in cause number 1997/HP/272, the Senior Lands Officer then, Fortune Kachamba testified that according to the records, the President resolved to acquire part of Jonathan Van Blerk's land in the public interest, also known as the power of eminent domain.

- 9.28 The contention is that in matters of project development for the public good, especially large-scale infrastructure projects, there are various methods of project delivery, by which to realise a project. These are named as including, exclusive public funded projects, donor funded projects, build on transfer (BOT) or build-own-operate-transfer (BOOT) where private entities receive concessions or leases from the public sector to finance, design, construct, own or operate facilities that are stated in the concession or lease.
- 9.29 This Court is asked to take judicial notice of the Lusaka-Ndola dual carriageway that is currently being constructed by the Government under the Public Private Partnership (PPP) concession with Micro-Ocean limited, stating that the arrangement is intended to benefit the public in terms of utility and annuity.
- 9.30 The submission is that it qualifies as eminent domain. The United States of America case of ***Kelo et al v City of New London et al***<sup>(11)</sup> is relied on as authority in that regard.
- 9.31 Bantu Capital Corporation Limited with reference to its business plan at pages 11-55 of its' bundle of documents,

states that they reveal the purpose for which the land that was alienated to it. Its' submission is that at page 13, the executive summary reveals that it was expressly created to invest in real estate development and property management in Zambia. Further, that its' flagship project "Bantu Town" is designed to be a world class, mixed-use development integrating commercial and commercial units, thereby fulfilling the need for modern real estate facilities in Lusaka.

- 9.32 Further, that the lack of modern suburb in Lusaka, along with the severe shortage of housing, commercial units, and office space that target the aspiring middle class and foreign investors, puts this project at the centre of a large and rapidly growing industry, one that is structurally attractive for investors and one that is not overcrowded by competition.
- 9.33 Reference is made by Bantu Capital Corporation Limited to Jonathan Van Blerk's submissions where he refers to the Minister of Lands words during the Parliamentary Debate in the National Assembly, over acquisition of a portion of Farm No 4300. Based on that, it contends that it can be seen that the intention of use by the State of the acquired land had remained consistent.
- 9.34 Bantu Capital Corporation Limited further submits that the Attorney General has elaborated in its' submissions how projects on a large scale are implemented, which include

build Operate Transfer (BOT) or Build Own Operate Transfer.

- 9.35 The Attorney General and Bantu Capital Corporation Limited's submission, is that Jonathan Van Blerk's submissions assail the compulsory acquisition itself, as opposed to proving the allegations of fraudulent misrepresentation, for which he seeks a declaration.
- 9.36 Referring to the case of ***Takhar v Gracefield Developments Limited and others***<sup>(17)</sup>, they submit that in that case, it was guided that to prove fraud in obtaining a Judgment, there must be evidence of conscious and deliberate dishonesty in relation to the evidence that was given at the original trial, and that the evidence was relevant to the Judgment that was obtained.
- 9.37 Kwikbuild Construction Limited and Bantu Capital Corporation Limited, also in submission, refer to the definition of fraudulent misrepresentation as given in ***Black's Law Dictionary by Bryan A. Garner, 8<sup>th</sup> Edition Thomas Reuters at page 1022***, which is:

***“Fraudulent misrepresentation. A false statement that is known to be false or is made recklessly without knowing or caring whether it is true or false-and that is intended to induce a party to detrimentally rely on it-also known as fraudulent representation; deceit.***

***A misrepresentation is fraudulent, if the maker intends that his assertion to induce a party to***

***manifest his assent and the maker (a) knows or believes that the assertion is not in accord with the facts or (b) does not have the confidence that he states or implies in the truth of the assertion or (c) knows that he does not have the basis that he states or implies in the assertion.”***

9.38 Further reliance is placed by Kwikbuild Construction Limited on the case of ***Royal Bank of Scotland Plc v Highland Financial Partners LP & Ors***<sup>(14)</sup> which case also reiterated, that in an action to set aside a Judgment on the ground of fraud, there has to be proof of conscious and deliberate dishonesty in relation to the relevant evidence given, action taken, statement made or matter concealed, which is relevant to the Judgment now sought to be impugned.

9.39 Further, that secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be “material” means that the fresh evidence that is adduced after the first Judgment has been given in, such that it demonstrates that the previous relevant evidence, action, statement of concealment was an operative cause of the Court’s decision to give the Judgment in the way that it did.

9.40 The submission is that put another way, it must be shown that the fresh evidence would have changed the way in which the first Court approached and came to its’ decision. Therefore, the relevant conscious and deliberate dishonesty

must be the causative of the impugned Judgment being obtained in the terms that it was. Further, the materiality of the fresh evidence is to be assessed by reference to its' impact on what decision might be made if the claim was to be re-tried on honest evidence.

9.41 Bantu Capital Corporation Limited and the National Pension Scheme Authority have also relied on the case of ***Sithole v The State Lotteries Board***<sup>(3)</sup> in which the Supreme Court held that:

***“If a party alleges fraud the extent of the onus on the party alleging is greater than a simple balance of probabilities.”***

9.42 The National Pension Scheme Authority cites the case of ***Sablehand Zambia Limited v Zambia Revenue Authority***<sup>(10)</sup> stating that the Supreme Court in that matter held that:

***“Where fraud is an issue in the proceedings, then a party or wishing to rely on it must ensure that it is clearly and distinctly alleged. Further, at the trial of the cause, the party alleging fraud must equally lead evidence, so that the alleging fraud must equally lead evidence, so that the allegations is clearly and distinctly proved.”***

9.43 The National Pension Scheme Authority further cites the case of ***Nkongolo Farms Limited v Zambia National Commercial Bank Limited Kent Choice Limited (In Receivership) Charles Huruperi***<sup>(9)</sup> where reference was

made to *Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 16* where it states that:

*"...the Court has never ventured to lay down as a general proposition, what constitutes fraud. Actual fraud arises from acts and circumstances of imposition. It usually takes the form of statement that is false or suppression of what is true. The withholding of information is not in general fraudulently unless there is special duty to disclose it."*

9.44 In that matter, it was further stated that:

*"Furthermore, it is vital for a Plaintiff to specifically set out the particulars of the fraud alleged. Volume 36 of Halsbury's Laws of England paragraph 36 states that:*

*".....where a party relies on any misrepresentation, fraud, breach of trust, willful default or undue influence by another party, he must supply the willful default or undue influence by another party, he must supply the necessary particular of the allegation in his pleading."*

9.45 The cases of *Bradford Third Equitable Benefit Building Society v Boarders*<sup>(18)</sup> and *Joseph Constatine Steamship Limited v Imperial Smelting Corporation Limited*<sup>(19)</sup> are further relied on as authority in that regard.

- 9.46 Bantu Capital Corporation Limited, like the rest of the Defendants states that Jonathan Van Blerk has not led evidence to establish the false representation and/or recklessness on the part of the State.
- 9.47 Kwikbuild Construction Limited also submits that for a Judgment to be set aside on the ground of fraud, the fraud must precede the Judgment itself and must have been applied upon the Court, which relied on it, in deciding in the manner that it did.
- 9.48 The Judgment of the High Court at pages J5-J6 of the Judgment at pages 38-40 of Jonathan Van Blerk's bundle of documents, reproduces the evidence that was led before the High Court as recorded by the Court was as follows:

***“The Defendants called One (1) witness, Mr. Fortune Kachamba, the Senior Lands Officer in the office of the Commissioner of Lands who is shown in the record as DW1. This witness testified that to his knowledge, and from the records held, the President of the Republic of Zambia made a resolve under the Lands Acquisition Act to acquire the property which was part of the Plaintiff's farm in the public interest. Following that resolve, the Minister of Lands issued the Plaintiff with a Notice of intention to Acquire Property and Notice to Yield up Possession dated 22<sup>nd</sup> April, 1987. Following the Notice, the Plaintiff's lawyers claimed for***

---

*compensation in the sum of K575, 000 and to prove their claim, the lawyers submitted a valuation report prepared by Anderson and Anderson. Following its' submission, negotiations took place between the parties and the Government Valuation Department after which the parties agreed on the figure of K540, 000, which was offered to the Plaintiff who accepted the payment.*

*DW1 further testified that after the compensation was paid, the Plaintiff failed to surrender the certificate of title so that the acquired portion of land could be marked off for State use. DW1 further testified that the purpose for which the land was compulsorily acquired could not be effected because the certificate of title was not surrendered. DW1 conceded that there was delay in the payment of compensation money which was acknowledged by the Minister and the payment of interest was considered but could not be implemented because the Plaintiff as registered proprietor of Farm No 4300 had failed to surrender the acquired portion of the Farm. DW1 also stated that the Plaintiff continued to use the land and had gone further to request the State to grant him a periodical lease which would be renewable until such time that the*

*Government's intention through the Lusaka City Council would be implemented. Following this request, it was agreed by the parties that the Plaintiff would pay for the use of this portion of land until when it was needed. However, since the Plaintiff failed to surrender the title deeds, the lease agreement could not be drawn. As a result, the State felt not obliged to pay the Plaintiff any interest which fact was communicated to him in writing. DW1 further stated that had the whole Farm No 4300 been compulsorily acquired, the Plaintiff's certificate of title would have simply been cancelled but since the acquisition was only for a portion of the Farm, it was necessary for the parties to agree on the demarcations. No such agreement was reached because the Plaintiff did not cooperate.*

*When cross examined, DW1 stated that the Plaintiff had since the compulsory acquisition on 22<sup>nd</sup> June, 1987, not yielded possession to the State and he did not surrender the certificate of title but instead engaged the State in negotiations. He also stated that although the portion of land had not been put to immediate use by the State, this was to give the State opportunity through the local authority to re-plan the acquired portion but in the meantime, upon*

***the Plaintiff's application, it was prudent for the State to allow him use of the land whilst other procedures were going on. He conceded that at the time of the acquisition, the State had no plans for the acquired portion but the acquisition itself was in the public interest. DW1 further stated that the Plaintiff did not request for 1800 acres of additional land to be given to him and this request was taken into account when the compensation payment was agreed and there was no further claim for additional land. DW1 stated that at the time the compensation was agreed, the Plaintiff had the opportunity to appeal against the compensation, which in this case, he did not do but accepted. This was the nature of the case for the Defendant."***

9.49 The submission by Kwikbuild Construction Limited is that Jonathan Van Blerk claims in paragraph 27 of the amended statement of claim, that Fortune Kachamba gave false evidence that a portion of his farm No 4300 was acquired for public use, when he knew that the said land was not acquired for public use, as it was granted to private companies/entities who would reduce the land to private use.

9.50 It is Kwikbuild Construction Limited's submission that the question that arises, is whether at the time of his testimony, Fortune Kachamba knew that the land was not

acquired for public use. Like, the Attorney General and the Lusaka City Council, Kwikbuild Construction Limited submits that no particulars of misrepresentation are stated in the statement of claim as required by **Order 18 Rule 12 of the Rules of the Supreme Court of England**.

- 9.51 Reference has been made to **Order 18 Rule 13 of the Rules of the Supreme Court of England**, as requiring that where a party alleges a fact, that they had knowledge or notice of some fact, matter or thing, the Court may Order on such terms, service on the other party, the facts on which they rely, and where they allege notice, the particulars of the notice.
- 9.52 Kwikbuild Construction Limited has also submitted that in paragraph 29 of the statement of claim, Jonathan Van Blerk simply refers to the allegation that Kwikbuild Construction Limited and Bantu Capital Corporation Limited were given the land for private use, which has been repeated in the particulars.
- 9.53 The contention is that this does not qualify as particulars that show that Fortune Kachamba knew at the time that he testified before the High Court that his evidence that the acquisition was for a public purpose was false.
- 9.54 The Attorney General on the other hand, refers to page J11 of the High Court Judgment at page 44 of Jonathan Van Blerk's bundle of documents, stating that the Judge at that page stated as follows:

***“It is worth noting in this case, that the Plaintiff conceded in his evidence that he had not yet surrendered his title deeds to the State, since the compulsory acquisition. In my view, his failure to surrender the title deeds in this case, was crucial to the issue at hand, rather than the failure by the State to use the acquired portion of the farm. I say so because, had the Plaintiff surrendered the title deeds in 1987 when the compulsory acquisition took place, the Court would have been able to determine whether the acquisition was desirable or expedient as a matter of evidence.... Thus, I am unable to agree with the Plaintiff that there was no need for the President to compulsorily acquire the land in question or that the President acted in bad faith.”***

9.55 The assertion by the Attorney General is that by instituting this action, Jonathan Van Blerk is attempting to have a second bite at the cherry, having failed under causes number 1997/HP/272 and SCZ/8/190/2002 respectively. The Attorney General, the Lusaka City Council and Kwikbuild Construction Limited contend that there is no evidence to suggest that the witness at the time, Fortune Kachamba testified with conscious and deliberate honesty at the original trial that the land was acquired in public interest in the exercise of the power eminent domain.

- 9.56 Kwikbuild Construction Limited has also submitted that whether the housing project was realised is another issue. However, that what is important, is that in Order to establish that Fortune Kachamba's testimony was false, Jonathan Van Blerk needed to show that there was never any intention to put up the housing project.
- 9.57 That to the contrary, Jonathan Van Blerk's letter dated 20<sup>th</sup> October, 1994, which is at page 2 of the Lusaka City Council's bundle of documents confirms that he was aware of the reason that a portion of his land was compulsorily acquired. Further, Fortune Kachamba explained the reasons for the failure to actualize the Government's intention.
- 9.58 Also, in submission, Kwikbuild Construction Limited states that in cross examination, Jonathan Van Blerk testified that the fraud happened long after the Judgments of the High Court and the Supreme Court. Therefore, if there was fraud, that did not induce the High Court and the Supreme Court in making their decisions, which decisions considered Jonathan Van Blerk's failure to surrender the certificate of title for marking off, as having hampered the determination of whether indeed, the land was acquired as alleged, which Jonathan Van Blerk conceded in cross examination.
- 9.59 The Attorney General, Kwikbuild Construction Limited and Bantu Capital Corporation Limited have in their submissions, also taken the position that the evidence that
-

existed at the time of trial, is evinced from the Notice of Intention to Acquire a portion of Farm 4300, which is dated 22<sup>nd</sup> April, 1987, and the documents in the Lusaka City Council's bundle of documents at page 4, which is a minute from the Development Secretary of the Lusaka Urban District Council to the District Executive Secretary and the District Governor.

- 9.60 Then there is the letter at pages 5 and 6 of the Lusaka City Council's bundle of documents, which are also clear that the purpose of the compulsory acquisition was to facilitate the putting up of a housing project by the Lusaka City Council on the said land.
- 9.61 It has been submitted that the said documents reveal that the compulsory acquisition was for the purpose of building a housing estate in conjunction with the Lusaka Urban District Council. The Attorney General contends that Fortune Kachamba was not economical with the truth when he testified before the trial Court.
- 9.62 The further submission is that in any event, the trial and appellate Courts attached much weight and based their decisions on the intransigency and defiance of Jonathan Van Blerk as he refused to surrender the certificate of title.
- 9.63 On Jonathan Van Blerk's evidence as regards what transpired after 2006, that saw the allocation of the acquired land to Kwikbuild Construction Limited and Bantu Capital Corporation Limited which are private and not public entities, being evidence of the abuse of power of

eminent domain, the Attorney General's submission is that this is outside the scope of why the land was acquired in the first place.

- 9.64 It is reiterated, that it was to develop a housing estate, which Jonathan Van Blerk agreed to. The contention is that due to passage of time and change of Government, the model of implementation of the project changed. However, the common thread in the mind of the State was to achieve the same objective, under a different project development model using Kwikbuild Construction Limited and Bantu Capital Corporation Limited, as seen from the lease agreements at pages 267-274 of Jonathan Van Blerk's bundle of documents.
- 9.65 The assertion is that Jonathan Van Blerk's remedy does not lie in commencing this action, but rather, suing the State for breach of Clause 15 of the lease, which directed development in the amount of Ten Million United States Dollars (US\$10, 000, 000.00) being made, within Eighteen (18) months of obtaining planning permission being obtained, or Twenty-Four (24) months from the date of obtaining title, whichever occurred earlier.
- 9.66 The Lusaka City Council on the other hand, reiterates that it was in dire need of land for expansion at the time of the compulsory acquisition. It states that Jonathan Van Blerk was compensated at a market value for the acquisition of a portion of his land. The submission is that the Lusaka City Council did not take immediate possession of the acquired

land, as Jonathan Van Blerk did not surrender his certificate of title for marking off, but instead made a myriad of applications in Order for the State to reverse its' decision to expropriate the land.

9.67 The contention is that Jonathan Van Blerk contributed to the state of affairs in this matter, as he refused to surrender his certificate of title, which would have enabled the Lusaka City Council to have it marked off. The Lusaka City Council further, places reliance on the case of **Zambia National Holdings Limited and United National Independence Party (UNIP) v. The Attorney-General**<sup>(6)</sup> which case held that the appellants did not discharge the burden which was on them, to demonstrate mala fides on the part of the President, despite having adduced evidence that the statutory instrument was back dated, and that the MMD government planned to acquire all the assets that were procured using State funds.

9.68 **Sections 3 and 4 of the Lands Acquisition Act, Chapter 189 of the Laws of Zambia**, are cited by the Lusaka city Council, and it states that the case of **William David Carlisle Wise v the Attorney General**<sup>(5)</sup> demonstrated that the Lands Acquisition Act does not entirely cover the aspect of the purpose and reasons for compulsory acquisition.

9.69 However, in this case, the reason that was advanced, was that the land was required in the public interest for a housing complex and civil servants, and Jonathan Van

Blerk was compensated the amount of Five Hundred and Forty Thousand Kwacha (K540, 000.00) un-rebased. The submission that has also been made by the Lusaka City Council is that by virtue of *Circular No 1 of 1985*, it is an agent of the Ministry of Lands.

- 9.70 However, that agency was revoked, and it could not proceed to take up any further steps to implement the purpose of the acquisition. It has also contended that under the common law principle of equity, granting Jonathan Van Blerk the reliefs sought, would amount to unjust enrichment, as he was compensated, and he would retain such compensation. The case of ***Benedetti v Sawiris and others***<sup>(15)</sup> is relied on as authority.
- 9.71 Kwikbuild Construction Limited on Jonathan Van Blerk's submission, that itself and Bantu Capital Corporation Limited who were subsequently allocated the land were conduits that the State used to achieve its' purpose, states that this submission largely ignores Jonathan Van Blerk's testimony.
- 9.72 This is because, when cross examined, Jonathan Van Blerk conceded that at the time of the proceedings before the High Court in July, 2002, Kwikbuild Construction Limited and Bantu Capital Corporation had not yet been incorporated, and that this was so even at the time of the Judgment of the Supreme Court on 5<sup>th</sup> May, 2005.
- 9.73 It is also Kwikbuild's submission that Jonathan Van Blerk in cross examination, agreed that as shown at page 118 of

his bundle of documents, Kwikbuild Construction Limited was only incorporated on 1<sup>st</sup> June, 2006, while Bantu Capital Corporation Limited was incorporated on 11<sup>th</sup> February, 2011 as evidenced by the certificate of incorporation, which is at page 152 of Jonathan Van Blerk's bundle of documents.

- 9.74 As regards the assertion by Jonathan Van Blerk that the alienation of the land to Kwikbuild Construction Limited and Bantu Capital Corporation Limited is evidence of the fraudulent misrepresentation or falsehood, Kwikbuild Construction Limited relies on the case of ***Briess and others v Woolley and others***<sup>(2)</sup>, where it was held that:

***“The tort of fraudulent misrepresentation is not complete when the representation is made. It becomes complete when the misrepresentation not having been corrected in the meantime, is acted on by the representee`. Damage giving rise to a claim for damages may not follow or may not result until a later date, but once the misrepresentation is acted on by the representee` the tortious act is complete, provided that the representation is false at that date. If false when made, but true when acted on there is no misrepresentation. In art 73 of Spencer Bower on Actionable Misrepresentation, 2nd ed, it is stated (p 77):***

***“It is commonly said that the representation must be shown to have been false when made. But this is not quite correct. The only real issue is—was it true or false when it was acted upon.”***

- 9.75 That arising from this, the tort of fraudulent misrepresentation, would only have arisen when the witness testified before the Court, and became complete when the High Court acted upon it, after it was not corrected, and it induced the Court in arriving at its’ decision. Kwikbuild Construction Limited reiterates that itself and Bantu Capital Corporation Limited, had not been incorporated when the Judgments of the High Court and the Supreme Court were passed.
- 9.76 The case of ***Development Bank of Zambia & Livingstone Sawmills v Jet Cheer Development Co (Zambia) Limited<sup>(8)</sup>*** is cited as having held that there must be evidence of fraud or dishonesty which precedes the Judgment sought to be impeached on the ground of fraud, and which evidence must have had the material effect on the said decision.
- 9.77 The National Pension Scheme Authority states that there is no evidence at all, that it participated in the alleged fraud. That all Jonathan Van Blerk told this Court, is that it owns Thirteen (13) subdivisions of the portion of his land, that was compulsorily acquired, whose certificates of title are at

pages 222-398 of Jonathan Van Blerk's bundle of documents.

9.78 Based on the above, the assertion is that there has been no demonstration that the National Pension Scheme Authority participated not even remotely, in any fraudulent misrepresentation in the procurement of the High Court and Supreme Court Judgments. Further, at the time the National Pension Scheme Authority acquired the said Thirteen (13) subdivisions, there was no caveat or other encumbrance of any kind.

9.79 Indeed, as seen from the submissions, where allegations of fraud are made by party, they must be clearly and distinctly pleaded. Further, at trial, evidence must be led to prove those allegations of fraud, on a standard that is higher than a balance of probabilities. Jonathan Van Blerk in paragraph 29 of the statement of claim, sets out the particulars of fraud as:

- i. The High Court and Supreme Court Judgments under cause number 1997/HP/272 respectively were to the effect that the said portion of Farm 4300 Lusaka was acquired for public use, but instead the Commissioner of Lands and the Lusaka City Council issued the said land to Kwikbuild Construction Limited and Bantu Capital Corporation Limited for private use.*

- ii. *Numbering of portions of the acquired piece of land with individual plots No F/4300/B and F/4300/C and giving them to private entities/companies.*
- iii. *Allocation of a portion of land that was compulsorily acquired and numbered as F/4300/B and F/4300/C to private companies who have since subdivided the same and sold subdivisions 1-13 of F/4300/B for their own benefit to the National Pension Scheme Authority.*
- iv. *Allocation of the portion of the land that was compulsorily acquired and numbered F/4300/C to a private company which has since subdivided the same into several subdivisions.*

9.80 Therefore, he did comply with the law in so far as it relates to the crafting of pleadings alleging fraud. However, the question that arises, is whether, the particulars of fraud as pleaded, do in fact prove fraud on a standard that is higher, than a balance of probabilities?

9.81 Among other cases, the case of ***Takhar v Gracefield Developments Limited and others***<sup>(17)</sup> has been relied on, as having held that in a matter to set aside a Judgment on the ground of fraud, there must be evidence led to show that in the testimony that was given at the original trial, there was conscious and deliberate dishonesty, and that such evidence was relevant to the Judgment that was obtained.

- 9.82 At the core of the Judgment, that was delivered by the High Court under cause number 1997/HP/272, which was upheld by the Supreme Court in SCZ/8/190/2002, that is sought to be impugned on the ground of fraud in these proceedings, was the evidence of Fortune Kachamba, the then Senior Lands Officer in the office of the Commissioner of Lands. He testified that the portion of Farm 4300 which had been compulsorily acquired, was to facilitate the putting up of a housing project.
- 9.83 Excerpts of Mr. Fortune Kachamba's testimony as contained in the Judgment of the High Court, have been highlighted to that effect, but the actual transcript of proceedings has not been produced. Thus, I am unable to determine whether the documentary evidence at pages 4-6 of the Lusaka City Council's bundle of documents which reveal that the housing project was to be implemented by the said Lusaka City Council were tendered in support of Fortune Kachamba's testimony. He who alleges must prove.
- 9.84 Be that as it may, the Judgment of the High Court shows that the evidence that Fortune Kachamba gave before that Court, was summarised at pages 38-40 of Jonathan Van Blerk's bundle of documents. The gist of that testimony was that, according to the records that were held, the President of the Republic of Zambia, resolved to acquire a portion of Jonathan Van Blerk's Farm 4300 in the public interest.

- 9.85 Further, after compensation was paid to Jonathan Van Blerk, following the acquisition, he did not surrender the certificate of title of title, so that the acquired land could be marked off for State use. Therefore, the purpose for which the land was compulsorily acquired could not be put into effect. Fortune Kachamba, also in his testimony, stated that Jonathan Van Blerk requested that until the Government implemented its' intention through the Lusaka City Council, he should be granted a periodical lease of the acquired land which was renewable, which was agreed to.
- 9.86 Then in cross examination, Fortune Kachamba testified that although the acquired land had not been put to immediate use, this was to enable the State through the Local Authority to re-plan the land. He also stated that at the time the land was acquired, the State had no plans for the land but that the acquisition was in the public interest.
- 9.87 Jonathan Van Blerk in his testimony before this Court, conceded that he was informed that the portion of his land that was compulsorily acquired, was to enable the Lusaka City Council to put up a housing project, and that he engaged in negotiations with the Lusaka City Council over compensation for the acquisition.
- 9.88 The contention by John Van Blerk, is that the land was subsequently given to Kwikbuild Construction Limited and Bantu Capital Corporation Limited who are private entities. Therefore, there was fraud, as the purpose of the acquisition was not in the public interest. Jonathan Van

Blerk in cross examination, conceded that the alienation of the acquired portion of his land to Kwikbuild Construction Limited and Bantu Capital Corporation Limited was after the Judgments of both the High Court and the Supreme Court.

- 9.89 He also agreed in cross examination that at the time the Judgments of the High Court and the Supreme Court were delivered, the Two (2) entities had not yet been incorporated. As seen from the case of ***Breiss and others v Woolley and others***<sup>(12)</sup>, which has been cited by Kwikbuild Construction Limited, and which case referred to ***Spencer Bower on Actionable Misrepresentation, 2<sup>nd</sup> Edition at page 77***, were it was stated that fraudulent misrepresentation is only complete when it is not corrected by the representee, when it is acted upon.
- 9.90 Thus, in this case, fraudulent misrepresentation can only be said to have been proved, if both the High Court and the Supreme Court had acted on Fortune Kachamba's testimony which was false at the time. I have already noted that Jonathan Van Blerk has conceded that at the time of the said testimony, the State had compulsorily acquired a portion of his Farm 4300 in the public interest, as the land was intended to be used to put up a housing project by the Lusaka City Council.
- 9.91 The submission in reply by Jonathan Van Blerk is that Fortune Kachamba's testimony, as seen at page 40 of his bundle of documents, in cross examination, was that he

conceded that at the time of acquisition, the State had no plans for the acquired land. That this entails that he was aware that the State had no plans for the land. Therefore, he consciously and deliberately fraudulently represented to the Court that the land was acquired in the public interest for the Lusaka City Council to put up a housing project.

- 9.92 It is contended that the Attorney General has submitted that Fortune Kachamba's false testimony did not induce the Judgments of the High Court and the Supreme Court, as the Judgments of those Courts reveal that they were based on the failure by the Jonathan Van Blerk to surrender the certificate of title in 1987, that would have been enabled the Courts decide whether the acquisition was desirable or expedient as a matter of evidence.
- 9.93 However, the Supreme Court Judgment in SCZ/8/03/2020 discounted that position as seen at pages 26-27 of Jonathan Van Blerk's submissions. Jonathan Van Blerk to that end, contends that the Judgments of the High Court and the Supreme Court were premised on Fortune Kachamba's fraudulent misrepresentation on the reasons for the compulsory acquisition. Therefore, the Attorney General's argument cannot stand.
- 9.94 The Supreme Court in its' Judgment in cause number SCZ/8/190/2002 at page J8, which is at page 52 of Jonathan Van Blerk's bundle of documents, stated that it was clear from the evidence, that the intention of the State

could not be carried out as Jonathan Van Blerk failed to surrender the certificate of title for marking off.

- 9.95 As to when Fortune Kachamba testified before the High Court is not known, as the transcript of proceedings is not before Court. However, he testified in his testimony in cross examination, that when the State acquired the land, it had no plans for it. Jonathan Van Blerk in cross examination before this Court conceded that he had engaged in negotiations with the Lusaka City Council over use of the land until it was re-planned.
- 9.96 At page 4 of Jonathan Van Blerk's bundle of documents is a letter dated 11<sup>th</sup> April, 1988. It refers to the compulsory acquisition on behalf of the Lusaka City Council by the Commissioner of Lands, that was authored to the District Executive Secretary by the Development Secretary. That letter is dated before Jonathan Van Blerk instituted cause number 1997/HP/272, and clearly before Fortune Kachamba testified.
- 9.97 That being the position, and in view of the fact that Jonathan Van Blerk in cross examination, in this matter, admitted that he engaged the Lusaka Urban District Council then, and now Lusaka City Council, over use of the land until it was re-planned, does not make Fortune Kachamba's testimony with regard to the reason for the compulsory acquisition as having been false or fraudulent. This is because at the time, the possible actualisation of the intention of the acquisition was in the process of being

carried out, but had been delayed by Jonathan Van Blerk's failure to surrender the certificate of title for marking off.

9.98 Fortune Kachamba's testimony was material, as it was the basis upon which both the High Court and the Supreme Courts decided in the manner that they did. However, as already noted, the claim that Fortune Kachamba's testimony was fraudulent cannot stand, in view of what I have just stated.

9.99 The submissions that have been made by Jonathan Van Blerk relating to the observations that were made by the Supreme Court in SCZ/8/03/2020, that where property is compulsorily acquired for a public purpose, but it later turns out that it was not after all, for a public purpose, that compulsory acquisition can be set aside, and the property returned to the original owner, as well as the other authorities that have been cited in that regard, would only have been properly advanced, had in this matter, the contention that the Judgment was fraudulently obtained succeeded, and the Judgments of the High Court and the Supreme Court been set aside, and trial in cause number 1997/HP/272 been re-opened.

9.100 As it is, Jonathan Van Blerk has not proved that there was fraud in the procuring of the High Court Judgment in cause number 1997/HP/272 and the Supreme Court Judgment under cause number SCZ/8/190/2002.

**10. CONCLUSION**

10.1 Fraud in the obtaining of the Two (2) Judgments, not having been proved, Jonathan Van Blerk's claim to set aside the said Judgments on the ground of fraud fails, and it is dismissed. Costs go to the Attorney General, the Lusaka City Council, Kwikbuild Construction Limited, Bantu Capital Corporation Limited and the National Pension Scheme Authority, which costs, if not agreed, shall be taxed. Leave to appeal is granted.

**DATED AT LUSAKA THE 22<sup>nd</sup> DAY OF AUGUST, 2023**

*S. Kaunda*  
**S. KAUNDA NEWA  
HIGH COURT JUDGE**

