

**IN THE SUPREME COURT OF ZAMBIA**  
**HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

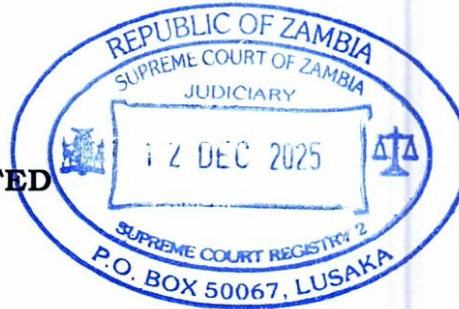
**SCZ/08/08/2025**

**B E T W E E N :**

**REPHIDIM INSTITUTE LIMITED**

**AND**

**ATTORNEY GENERAL**



**APPELLANT**

**RESPONDENT**

**Coram: Malila CJ, Mutuna and Chisanga JJS on 15<sup>th</sup>  
October 2025 and 12<sup>th</sup> December 2025**

*For the Appellant:* Mr. J. Jalasi of Eric Silwamba, Jalasi and Linyama,  
Legal Practitioners

*For the Respondent:* Mr. M. Muchende SC, Solicitor General, with Lt. Col.  
V. Hamusiya, Senior State Advocate – Attorney  
General's Chambers

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

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**Malila CJ**, delivered the judgment of the court.

**Case referred to:**

1. *Mwenya and Randee v. Kapinga* (1988) ZR 17
2. *Anti-Corruption Commission v. Barnnet Development Corporation Limited* (2008) ZR(1) 69
3. *Josephine Kabwe v. Dominic Kapasa* (Selected Judgment No. 4 of 2012)
4. *Zambia National Holdings Limited and United National Independence Party v. Attorney General* (1993 – 1994) ZR 115.

5. *Jonathan Van Blerk v. Attorney General and 5 Others* (SCZ/08/03/2020)
6. *Attorney General v. Nigel Mutuna & 2 Others* (Appeal No. 088/2012)
7. *Kenny Sililo v. Mend-A-Bath Zambia Limited & Spencom (Z) Limited* (SCZ Appeal No. 168/2014)
8. *David Nzooma Lumanyenda & Another v. Chief Chamuka & Kabwe Rural District Council & ZCCM Limited* (1988-1980) ZR 194
9. *Corpus Legal Practitioners v. Mwanandani Holding Limited* (SCZ Selected Judgment No. 50 of 2014)
10. *Atlantic Bakery Limited v. ZESCO Limited* (Selected Judgment No. 10 of 2018)
11. *Goswami v. Essa and Commissioner of Lands* (2001) ZR 31
12. *Prisca Lubungu v. Obby Kapango and Others and Ndola City Council* (Appeal No. 216/2016)
13. (See Gareth Jones, 'Restitutionary Claim for Services rendered' (1977) 93 LQR 273, 287)
14. *Trevor Limpic v. Richard Mawere and Two Others* (SCZ Selected Judgment No. 35 of 2014)
15. *Sambo and Two Others v. Paikani Mwanza* (2001) ZR 79
16. *Hilda Ngosi (Suing as the Administrator of the estate of Washington Ngosi) v. Attorney General and Lutherine Mission (Zambia) Registered Trustees* (SCZ Selected Judgment No. 18 of 2015)
17. *G.F Construction (1976) Ltd v. Rudnay (Zambia) Limited and Unitech Limited* (1999) ZR 134.

**Legislation and books referred to:**

1. *Rules of the Supreme Court of England (White Book)*
2. *Supreme Court Act, Chapter 25 of the Laws of Zambia*
3. *Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia*
4. *The law of Real Property* (2008) p.254 – 255
5. *Land Acquisition Act, Chapter 189 of the Laws of Zambia*
6. *Bryan A. Gardner Black's Law Dictionary, 10<sup>th</sup> ed. p.1430*
7. *Zambian Constitution. Act No. 2 of 2016*



## **1.0. INTRODUCTION**

- 1.1.** The imperatives of national security have in the present case collided with the sanctity of private property rights to give rise to intriguing and delicate questions: can a state security agency, in the name of safeguarding the realm, occupy private land and remain in occupation indefinitely without satisfying any formal process of land acquisition, release, negotiation, or compensation? If so, are there preconditions and limitation to such power?
- 1.2.** Does a purchaser of land, aware of the presence on the land of squatters, licensees and other non-title holder settlers, acquire, retain or lose the right to eject them or to negotiate terms for their continued occupation of the land?
- 1.3.** These issues constitute the essence of the appeal before us, a paradigm of tension between what is, from one perspective, the collective good, and from another, individual land rights, set against the backdrop of a parcel of land forming part of Farm 690 in the upscale Ferngroove area in the Lusaka West neighbourhood. There, the Zambia National Service (ZNS), a

state security apparatus, has for decades maintained a visible presence on part of a privately owned farm notwithstanding the registered landowner's repeated expressions of concern.

- 1.4. The property in issue had been privately owned by Lendor Burton long before it was occupied by ZNS. The latter established its presence during the semi-state of emergency times in Zambia to provide security to vulnerable settlements in the neighbourhood. This was owing to occasional rebel incursions from neighbouring countries at the time.
- 1.5. Although the occupation of the land was taken up by ZNS allegedly following a seemingly innocuous Executive decree during the semi-state of emergency, it was apparently not followed up by any formal regularisation of land ownership or occupation status in the official Lands Register.

## **2.0. BACKGROUND FACTS**

- 2.1. For a proper situation of the issues we are being called upon to determine in this appeal, it is imperative to give a recapitulation of the background facts. These are principally uncontroverted,



yet not unexpectedly, there is a slight variation in the narratives given by the rival parties.

- 2.2.** As can be discerned from the pleadings exchanged between the opposing sides to this appeal, the appellant is the registered owner of Farm 690, Lusaka and holds a certificate of title in respect of that land. The appellant also holds the certificate of title to the adjoining sub-division A20 of Farm 690 Lusaka, which certificate of title the Court of Appeal, in its judgment, directed cancellation.
- 2.3.** It is a notorious fact that since independence in 1964, Zambia had been and remained in a semi-state of emergency until 1991. Around the 1980's, while that semi-state of emergency subsisted, ZNS moved on to a portion of the appellant's land, then belonging to Lendor Burton, and there put up a camp to maintain security. The land so occupied was approximately 66 hectares.
- 2.4.** Upon taking occupation of the land, ZNS constructed structures on it, some of them permanent. Yet, one thing was clear. Since purchasing the farm from its previous owner, the appellant had

not been quiescent about the presence of ZNS. In point of fact, it actively engaged ZNS on the possibility of formalising the latter's occupation and use of the portion of land by purchasing it from the appellant.

**2.5.** At a meeting allegedly held between the appellant and ZNS on 5<sup>th</sup> September 2008, ZNS had supposedly intimated a wish to buy the land it occupied from the appellant. At the instance of ZNS, the appellant procured site plans, survey diagrams and a valuation report for 72 hectares of the farm land covering the portion occupied by ZNS. The value of that land, according to a valuation report availed in evidence in the trial court, was K1,600,000 (rebased). ZNS, however, at some point, refused to engage further on the possibility of purchasing the land it occupied.

**2.6.** The respondent's version of events differs slightly from that of the appellant. It denied holding a meeting with the appellant on 5<sup>th</sup> September 2008 or agreeing to purchase the land. In its understanding of things, the Government through ZNS acquired part of Farm 690, Lusaka West from Lendor Burton

and established it as ZNS Builders' Brigade. At the time the appellant acquired the certificate of title to the subject land, the respondent already had an established presence on it.

- 2.7.** What has happened, according to the respondent, is that the appellant has been attempting since 2007 to sell to it land occupied by it which belongs to the Government (in effect ZNS's own land) granted that the interest of the Government in the land subsisted before the appellant acquired the certificate of title.
- 2.8.** The impasse between the appellant and the respondent over the purchase of, or compensation for, the land occupied by ZNS persisted, leading the appellant to, in May 2018, take out an action in the High Court against the Attorney General, claiming *brevi manu*, the following:
- (i) An order directing the defendant [respondent] to Compensate the plaintiff [appellant] for the current commercial value of the agreed portion comprising 72 hectares of Farm 690;**
  - (ii) *Mesne* profits for the period the ZNS has occupied the plaintiff's property;**



- (iii) **Special damages for the sketch plan, valuation report and survey diagrams secured by the plaintiff;**
- (iv) **Costs of this action; and**
- (v) **Any other relief that the court might deem fit.**

**2.9.** In denying the appellant's claim, the respondent maintained that the Government acquired part of Farm 690, Lusaka from Lendor Burton after the construction of the TAZARA Railway line and established it as the Builders' Brigade for ZNS over forty years ago. There was already Government presence at the disputed property when the appellant acquired a certificate of title over Farm 690, Lusaka.

**2.10.** Our view in passing is that if there is any dispute which, all parties being reasonable, could lend itself to high prospects of success in mediation, this it was.

**2.11.** Newa J, of the High Court tried the case. She heard evidence on behalf of the two parties. More relevantly, on behalf of the appellant, the court heard testimony to the effect that the appellant purchased the farm from Lendor Burton in 1990 with the help of a mortgage. This was after the appellant had initially been a tenant of the property for some time.

- 2.12.** It was also disclosed at trial that at the time the appellant acquired the property, it was informed that ZNS had established a presence on the farm in order to maintain law and order, particularly as there was a refugee camp in the vicinity which had become prone to occasional attacks from hostile external forces.
- 2.13.** The High Court also heard that ZNS did not register its interest in the land, if it had any. This prompted the appellant to engage ZNS over several meetings. The appellant subsequently wrote to ZNS proposing to sell the land occupied by it as opposed to just donating it as suggested by ZNS itself.
- 2.14.** The court also heard that the appellant was asked by ZNS to make a formal offer of sale accompanied by a diagram for the property as well as a valuation report. The appellant subsequently procured, at its own cost, a valuation report and sketch plans and made these available to ZNS, indicating that the value of the land was ZMW1,600,000 at that time.
- 2.15.** ZNS remained unresponsive to the offer until further reminders were written in 2015. This culminated in a meeting on 23<sup>rd</sup> July

2015 at which ZNS is said to have apologised for the delay in reacting to the offer and reiterated its interest to proceed with the purchase of the land. As the 2008 valuation had become antiquated, it was agreed that a new valuation report be procured.

**2.16.** The court equally learnt from the appellant's witness that other things agreed upon in the meeting were that the appellant was to procure a mark-off from the main certificate of title of the land occupied by ZNS, which was eventually done. The new valuation placed the value of the land occupied by ZNS at ZMW7,949,800.00.

**2.17.** After all this, there was again deafening silence from ZNS despite numerous follow-ups by the appellant. A meeting was subsequently held between the parties and the Commissioner of Lands. It was testified in court that it was in that meeting that ZNS for the first time disclosed its nolation towards all proposals designed to regularise its ownership status, stating that it was not prepared to pay for the land it was occupying.



**2.18.** It was on the basis of the foregoing that the appellant approached the court, as indicated at paragraph 2.8, seeking compensation at commercial value for the land occupied by ZNS, payment of mesne profits, special damages for the survey diagrams, valuation reports etc.

### **3.0. THE HIGH COURT DECIDES**

**3.1.** In a withering judgment delivered by Newa J, which in our view came out short in vital respects, she found as a fact that the appellant had actual notice of the presence of ZNS on the property at the time the appellant purchased it but did not make any inquiries from ZNS to ascertain whether it had any rights to the land before buying the same.

**3.2.** Going back in history, the trial judge found that from the memorials on the certificate of title, the lease for the land was first issued to Berend Jacobus Vorster in 1947 for 4790 acres which approximates 1938.44 hectares. The appellant, she found, obtained a certificate of title to 70.85 hectares on 17<sup>th</sup> June 2017, the land having been surveyed in July of 2016.

- 3.3.** Freakishly the learned judge held, in intriguing ratiocination, that as that land is sub-division A20 of Farm 690 Lusaka, it means that the original farm was sub-divided and that the appellant did not have title to the entire Farm 690 Lusaka.
- 3.4.** The judge went further to make more stunning findings and conclusions. One such finding was that as the appellant had not produced a contract of sale to show the extent of land that it had purchased from Lendor Burton, nor evidence to show how much land Lendor Burton had purchased from Berend Jacobus Voster, the land measuring between 66.24 to 72 hectares which ZNS occupied may thus not have been owned by the appellant.
- 3.5.** More uncanningly, in the wake of all the unchallenged evidence by the appellant, the judge held that the appellant may have laboured under a mistaken belief that Lendor Burton had sold it the entire Farm 690 yet it only had title to sub-division A20 of Farm 690.
- 3.6.** The learned High Court judge accordingly dismissed the appellant's claims, stating that the appellant had not proved its case on a balance of probabilities.

**3.7.** We can state in passing that as will become clear from the findings of the Court of Appeal, the approach to evidentiary issues taken by the learned trial judge is one that could easily give fodder to the unfortunate perception that state claims, however, amorphous they may be, enjoy an easier road to relief in the courts than those of ordinary citizens. The bottom line is that no court should ever play along with Government's gamesmanship, for that would indeed be to create a new legal regime in which no right is safe.

**3.8.** The appellant's reaction to that judgment was as unsurprising as it was predictable. It appealed the judgment to the Court of Appeal.

#### **4.0. THE COURT OF APPEAL DECIDES**

**4.1.** The Court of Appeal considered the grounds of appeal and the competing arguments submitted before it on behalf of the respective parties. It formulated the issue for determination as being whether the portion of land occupied by ZNS belongs to the appellant, and if so, whether the said land was purchased by the appellant subject to the interests of ZNS.



- 4.2.** The court quite correctly observed that there were serious gaps in the chain of evidence which made it impossible for the trial court to reach correct and firm conclusions of fact. The court thus opined that this was an appropriate case in which an appellate court could call for and hear fresh evidence pursuant to Order 59/10/11 of the Rules of the Supreme Court (White Book).
- 4.3.** It thus directed the appellant to file into court the certificate of title relating to Farm 690 Lusaka, and that relating to the remaining extent of Farm No. 690 Lusaka. It also ordered the production of the Lands Register relating to Farm 690 Lusaka, the Lands Register relating to the remaining extent of Farm 690 Lusaka, and a report of the Surveyor General to confirm whether the certificate of title relating to sub-division A20 of Farm 690 Lusaka, relates specifically to land occupied by ZNS.
- 4.4.** On the basis of the documents freshly filed by the appellant, the Court of Appeal found that the appellant did indeed purchase from Lendor Burton the whole of Farm 690 and obtained the

certificate of title on 28<sup>th</sup> October 1997. The extent of the Farm was 1,938 hectares.

- 4.5. The court also found that Farm 690 had undergone several subdivisions and that sub-division A20 of Farm 690 was the same geographical location where ZNS was sitting.
- 4.6. The court, having concluded that the appellant had purchased the entire Farm 690 from Lendor Burton, which includes the portion occupied by ZNS, overturned the findings of fact of the trial judge on the basis that the same were either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts.
- 4.7. Turning to the question whether the appellant purchased the land subject to the interest of ZNS, the Court of Appeal posed for itself the question whether the appellant was a *bona fide* purchaser for value without notice.
- 4.8. After regurgitating, with the help of authorities, the principles relating to innocent purchasers of land for value without notice, the Court of Appeal noted that the appellant knew at an early stage of the purchase transaction of the land from Lendor

Burton that ZNS had a presence on the land and was aware of the latter putting up structures on the land. In its judgment, the court noted two rather banal aspects. First, that the appellant did not query ZNS due to the state of emergency and second, that when the appellant subsequently enquired from ZNS about its interest in the land it occupied, the latter was nebulous in its response.

- 4.9.** Yet, in the view of the court, these factors should “have put the appellant on high alert and triggered a serious inquiry for any encumbrances or red flags before proceeding with the sale.”
- 4.10.** The court was further of the view that the appellant had acquiesced to the presence of ZNS on the property. With the help of various authorities, the court discussed a land purchaser’s obligation to undertake full investigation of title before completing the purchase.
- 4.11.** It concluded that the appellant was not a *bone fide* purchaser for value without notice and, therefore, that its claim failed. At paragraph 7.21 of its judgment, the court stated that:



In the present case, the appellant did not approach this transaction with the seriousness that it deserved. It is evident on record that the appellant failed to conduct a thorough investigation to establish the status of ZNS on the land it was buying. Had it done so, it would have discovered that the land was subject to vested rights in other persons other than the vendor. Failure to do so simply means that the equitable doctrine of notice will come into play which states that a purchaser is bound by any right which would have been discovered had he made ordinary investigations.

4.12. Before concluding its judgment, the Court of Appeal made an order that is deeply troubling as it appeared to disregard established legal precedent and to ignore the most rational interpretation of the evidence presented. In the penultimate paragraph of its judgment, the court stated thus:

We are aware that the appellant obtained a certificate of title for the portion of land occupied by ZNS which appears at page 120-129 of the record on 16<sup>th</sup> June 2017 for a total of 70.8585 hectares. However, in our view there was impropriety on the part of the appellant in the manner in which the certificate was obtained, in light of the fact that the land was still a contentious issue at the time the appellant had applied for the issuance of the same. We, therefore, order the cancellation of the appellant's certificate of title No. 33865 by the Commissioner of Lands.

**4.13.** The appellant was unhappy with the judgment of the Court of Appeal. Having obtained leave to appeal to this court in terms of section 25A of the Supreme Court Act, the appellant filed two grounds of appeal constructed as follows:

- (1) The Court of Appeal erred in law in paragraph 7.22 at page J23 of the judgment when it anchored its decision that the appellant was not a *bone fide* purchaser as there was a military occupation during the semi or threatened state of emergency *videlicet* whether the state duly acquired an interest in sub-division A20 of Farm 690 Lusaka, under the provisions of the law; and**
- (2) The proper procedure for the state to acquire rights in land and evidence ownership during a semi or threatened state of emergency. [sic!]**

**4.14.** All we can do at this stage is to observe that the grounds of appeal could have been drafted more elegantly and with greater precision so that one would not have to read or hear the supporting argument first to appreciate the grievance of the appellant.

## **5.0. THE APPELLANT'S CASE ON APPEAL**

**5.1.** On behalf of the appellant, heads of argument were filed by learned counsel on 23<sup>rd</sup> June 2025. It is upon those heads of

argument that at the hearing of the appeal, Mr. Jalasi signaled he would place reliance.

- 5.2. To recap, under ground one, it was submitted that the Court of Appeal erred when it held that the appellant was not a *bona fide* purchaser for value and proceeded to cancel the certificate of title.
- 5.3. Counsel referred to the case of **Mwenya and Randee v. Kapinga**<sup>(1)</sup> as well as to generous reproductions of passages from case and other authorities used by the Court of Appeal in its judgment, and submitted that much as the law as articulated in those authorities is correct, the reasoning of the court and its application of those authorities was erroneous because they presupposed that the mere physical occupation of land by an agent of the state during a semi or threatened state of emergency, created a legal or equitable interest in the land capable of defeating rights held by a duly registered certificate of title holder.
- 5.4. As we understand it, the point that was made by the learned counsel for the appellant was that the doctrine of *bona fide*



purchaser for value was not correctly invoked in the circumstances because the evidence tendered in the trial court was that the state or ZNS did not have a registered legal or equitable interest over sub-division A20 of Farm 690.

- 5.5. After quoting from *Megarry et.al*, the learned authors of *The Law of Real Property (2008)*, at pages 254 to 255, it was submitted that the doctrine is only relevant when a purchaser's title is challenged by a pre-existing legal or equitable interest held by a third party. ZNS had no such interest.
- 5.6. The gravamen of that argument was that although the appellant acknowledged the physical presence of ZNS on the land, this amounted to mere knowledge of a land occupier, not a party with an established right capable of defeating rights of a registered title holder to the land.
- 5.7. The Court of Appeal, according to counsel, wrongly framed the issue of notice because there was no underlying legal or equitable interest for the appellant to have taken notice of in the first place and no such interest was in any case raised or shown by way of defence.

- 5.8. It was further submitted that the parties' disagreement in the present case was not in relation to ownership of the land but to appropriate compensation in order for legal ownership in subdivision A20 of Farm 690 to be transferred to the ZNS.
- 5.9. Counsel for the appellant then shifted the arguments to the issue of ownership of land and the effect of holding a certificate of title. Sections 33 and 34 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia, were quoted verbatim. The former provides that a certificate of title is conclusive evidence of ownership as from the date of its issue. The registered owner of land comprised in the certificate of title, except in the case of fraud or impropriety, shall hold the same subject only to encumbrances, heirs, estates or interests as may be shown by such certificate of title.
- 5.10. Counsel referred to our judgments in the cases of **Anti-Corruption Commission v. Barnnet Development Corporation Limited**<sup>(2)</sup> and **Josephine Kabwe v. Dominic Kapasa**<sup>(3)</sup> both of which decisions speak to the certificate of title being conclusive

evidence of ownership of land and challengeable only on grounds of fraud or impropriety in its acquisition.

**5.11.** Section 34 on the other hand restricts actions for possession or for the recovery of any land against the registered owner holding a certificate of title. It also provides statutory exceptions to the indefeasibility of a certificate of title.

**5.12.** Counsel referred to the evidence as given in the trial court on how the appellant acquired the property and obtained the certificate of title, confirming absence of fraud or other impropriety in the acquisition of Farm 690 from which subdivision A20 of Farm 690 was carved.

**5.13.** Turning to ground two regarding the proper procedure for the State to acquire rights in land and evidence of ownership during the semi or threatened state of emergency, the substance of the argument of the appellant was simply that for the State to acquire an interest in privately owned, titled land, it must strictly follow the procedures laid down in the law. Mere occupation, even under a semi or threatened state of emergency, is not enough.



- 5.14. It was also submitted that the State can compulsorily acquire land that is under an existing legal interest provided adequate compensation is paid as stipulated in the relevant laws, more specifically the Land Acquisition Act, Chapter 189 of the Laws of Zambia.
- 5.15. Counsel referred to previous use by the State of the power of compulsory acquisition and cited in this regard the case of **Zambia National Holdings Limited and United National Independence Party v. Attorney General**<sup>(4)</sup>. He also referred to our decision in **Jonathan Van Blerk v. Attorney General and 5 Others**<sup>(5)</sup> where we stated that compulsory acquisition of land must be done in public interest and not for the benefit of private entities.
- 5.16. Counsel went to great lengths in submitting on the legal requirement for compensation to be made whenever compulsory acquisition is effected of private land. He quoted, among other provisions, section 10 of the Land Acquisition Act, Chapter 189 of the Laws of Zambia.
- 5.17. Notwithstanding all the foregoing, and the apparent failure by the State to follow the law in respect of regularising ownership

of the land occupied by ZNS, it was submitted that the appellant is entitled to compensation for its land occupied by ZNS. This is because no legal or equitable interests were proved to subsist on sub-division A20 of Fram 690, Lusaka in favour of ZNS. In particular the process of compulsory acquisition had not been instituted.

**5.18.** Counsel urged us to allow the appeal, reverse the decision of the Court of Appeal, uphold the sanctity of the certificate of title over sub-division A20 of Farm 690 and allow the relief claimed by the appellant in the High Court.

#### **6.0. THE CASE FOR THE RESPONDENT**

**6.1.** The learned Solicitor General informed the court that he would rely on the heads of argument filed on 7<sup>th</sup> October 2025.

**6.2.** Those heads of argument were prefaced by a rather telling statement regarding what the State perceives as an emerging trend whereby prospective purchasers of land purposely proceed to acquire land upon which public infrastructure or amenities are present ignoring this fact and obtaining title

without making inquiries from the office of the Commissioner of Lands or relevant Government agencies.

- 6.3.** The Solicitor General went on to state that citizens have a patriotic duty to timeously inform the office of the Commissioner of Lands, as the agent of the President in land matters, of and about any public infrastructure or amenities that are found on the land for which they have been granted an invitation to treat, before they proceed to accept an offer and sign the lease agreement preceding the issuance of a certificate of title.
- 6.4.** Responding specifically to ground one of the appeal, it was submitted on behalf of the respondent that contrary to the submission of the appellant, the Court of Appeal did not anchor its finding that the appellant was not a *bone fide* purchaser for value without notice on the basis of the alleged state of emergency, semi state of emergency or threatened state of emergency.
- 6.5.** That rather, the court found that the appellant had failed or neglected to conduct the sort of due diligence that a prudent



purchaser of real property should normally conduct prior to entering into a sale and purchase transaction. The appellant was held not to be a *bone fide* purchaser for value without notice on this account.

- 6.6. Adverting to the definition of a *bona fide* purchaser for value as given in *Black's Law Dictionary*, 10<sup>th</sup> ed. at page 1430, counsel submitted that the appellant here had actual notice of the presence of ZNS on the land and was thus not a *bona fide* purchaser for value without notice.
- 6.7. The learned counsel for the respondent further submitted that ZNS maintained a presence on the land in national interest considering how the unit got established there.
- 6.8. According to counsel for the respondent, the Court of Appeal was correct to hold that the threatened or semi state of emergency did not diminish the appellant's obligation as a prospective purchaser of land to conduct necessary inquiries before purchasing such land. Whatever, legal interest was acquired by the appellant in the land was, according to counsel, subject to the equitable interest of ZNS.

- 6.9. As regards the cancellation of the certificate of title to subdivision A20 of Farm 690, counsel submitted that this was based on a finding of fact and the appellant's own admission that it omitted or neglected to conduct due diligence to ascertain the interest of ZNS before purchasing the farm.
- 6.10. Counsel concluded the submission under ground one with the contention that the finding by the Court of Appeal that the appellant was not a *bona fide* purchaser for value without notice was one of fact and was neither perverse nor indeed made in the absence of relevant evidence. We were thus urged to dismiss ground one of the appeal.
- 6.11. Turning to ground two, counsel for the respondent relied on a technical point to urge us to dismiss that ground of appeal. It was submitted that this ground raises an issue that never arose in the court below and should thus not be entertained.
- 6.12. Citing and quoting from our decision in **Attorney General v. Nigel Mutuna & 2 Others**<sup>(6)</sup>, as well as from Rule 25 of the Supreme Court Rules, Chapter 25 of the Laws of Zambia, counsel submitted that only issues that had been raised in the court

below and which the court had an opportunity to consider, can form the basis of an appeal. Counsel also quoted a passage from our decision in **Kenny Sililo v. Mend-A-Bath Zambia Limited & Spencom (Z) Limited**<sup>(7)</sup> to the same end.

**6.13.** An alternative argument in respect of ground two was proffered.

It was that there was no evidence of compulsory acquisition in this case and, therefore, that by its argument the appellant is proposing and arguing a procedure that did not occur. Counsel prayed that ground two be dismissed and that the whole appeal should fail.

**6.14.** At the hearing of the appeal, Solicitor General Muchende SC, augmented the written heads of argument orally. He submitted that despite having ample notice of the infrastructure and security installations of ZNS on the land prior to concluding the purchase, the appellant proceeded with the deal. This conduct, according to the learned Solicitor General, is very suspicious. It implies that the appellant threw away the doctrine of *caveat emptor* or buyer beware at the altar of convenience.



**6.15.** The Solicitor General likened the conduct of the appellant to a Machiavellian or opportunistic tactic where one purchases a piece of land which one can see houses Government installations in the hope that one would benefit by way of compensation or rentals.

**6.16.** The learned Solicitor General reiterated the prayer that the whole appeal be dismissed for lacking merit.

## **7.0. ANALYSIS AND DECISION**

**7.1.** We note from its judgment that the Court of Appeal had pithily formulated the issue for determination in the following words:

**The issue falling for determination is whether the portion of land that is currently occupied by ZNS belongs to the appellant. If the answer is in the affirmative, whether the said land was purchased subject to the interests of ZNS**

**7.2.** While we agree with the framing of the first part of the issue by the Court of Appeal, we have difficulties with the second part of it. With respect, the court appears to have misconceived the central question flowing from any confirmation of the appellant's ownership. The question should not have been whether the appellant purchased the property subject to the

interest of ZNS, but rather whether ZNS had acquired any legal or equitable interest in the property at the time of its purchase by the appellant thereby rendering the appellant's title defeasible.

- 7.3.** We thus believe that the second part of the issue as framed was presumptuous. The court assumed, without any plausible basis that ZNS, by reason merely of its occupation of the land in question, had acquired a legal or equitable interest so that the subsequent sale of the property to the appellant was subject to that interest. Had the court shifted the focus to determining whether ZNS had an interest in the land in the first place, it could have opened up new avenues for argument and potentially altered the trajectory of the appeal.
- 7.4.** Anyhow, having framed the issue in the way it did, the court, upon a review of the evidence and the relevant law, came to the conclusion, as regards the first part of the issue, that the appellant was indeed the registered owner of the land occupied by ZNS.
- 7.5.** As regards the second part of the issue, the Court of Appeal observed at paragraph 7.14 as follows:



From the appellant's own evidence, it is not in dispute that when the appellant was acquiring the land, he had actual notice of the presence of ZNS on the land. It is also not in dispute that the appellant did not enquire from ZNS what interest it had, not until the sale was finalised. The question can be posed here whether the appellant was a *bona fide* purchaser for value without notice?

The court, as observed earlier on, concluded that the appellant was not a *bona fide* purchaser for value without notice.

- 7.6. Interestingly, while the Court of Appeal concluded in the passage which we have just quoted at paragraph 7.5. that the appellant did not enquire from ZNS what interest it had until the sale was finalised, this finding is self-refuting as it contradicts sharply with the evidence as quoted by the court itself in the paragraphs preceding paragraph 7.14. The court, at paragraph 7.13, reproduced the evidence of the appellant's witness, Maxwell Mulondiwa, in his evidence in chief, as follows:

**When we were buying the property, we were told ZNS had come to maintain law and order. There was a refugee camp in the neighbourhood. In those days in the state of emergency, the rebel aero-planes used to bomb the refugee camp.**

**Over a period of time, they put up structures within the place. It was difficult to contest that because of the state of emergency. ZNS did not register their interest on the property.**



**I did a search at Ministry of Lands, I did not find anything as can be seen at page 23 of the plaintiff's bundle of documents. Commissioner of Lands on issuing title did not issue any conditions as regards ZNS...**

And in cross examination that:

**...I bought an existing farm. There were people living there, being some squatters who had encroached. I found out what their interest in the land was including ZNS.**

**I asked their presence on the land when we were finalizing the agreement. They were not specific. A company used to operate there called builders brigade. We spoke initially. Ownership of land is proved through title. I was told that the squatters would move out soon. I spoke to ZNS after we had concluded the sale.**

It also contradicts the earlier finding of the court as we have recorded it at paragraph 4.9 where engagement of ZNS by the appellant was found to have occurred even before the purchase.

- 7.7.** In our view, from the evidence given by the appellant's witness in the trial court, as quoted by the Court of Appeal in its judgment, which we have reproduced above, the appellant did in fact conduct the necessary official searches at the Ministry of Lands and did ascertain what the interests of those on the site, including ZNS, were. In other words, the appellant made all usual and proper inquiries.

- 7.8.** We do not know of anything more that the appellant could have done to investigate title to the land by way of additional due diligence beyond the search at the Lands and Deeds Registry, the inquiries with the vendor and the engagement with the land occupiers themselves. The question perhaps is what more would have been uncovered by a prudent search which the search undertaken by the appellant did not bring forth?
- 7.9.** This lends credence to our earlier observation that the issue to be determined should not have been whether the appellant bought the property subject to the interest of ZNS. Rather, the issue is what is the nature of the interest, if any, that ZNS had or has in the land? Did any such interest survive the grant of rights to the appellant by the certificate of title upon its issue in the appellant's name?
- 7.10.** That ZNS occupied the land in question during a semi-state of emergency is non-debatable. That occupation was without ceremony and did not purport to supersede any existing legal ownership arrangement – at least for as long as no formal steps were taken in that direction.



- 7.11.** We must ask the question still more explicitly: Did ZNS acquire any interest in the land through occupation? If so, when was that interest acquired and what is the nature of the interest?
- 7.12.** To be clear, as an occupant of sub-division A20 of Farm 690 Lusaka, ZNS could only have been legally considered either as a trespasser, a licensee, a title holder or an equitable interest holder. Thus, ZNS's interest in the land could only be legal or equitable.
- 7.13.** The uncontroverted facts clearly show that legal ownership in the property moved from Lendor Burton to the appellant; that ZNS had no documentation explaining its occupation or any legal right in the land. It thus did not have any registered interest over the land. To the contrary, evidence abound that legal ownership reposed in the appellant. This effectively eliminates any possibility of a legal ownership claim over the land on the part of ZNS.
- 7.14.** A trespasser on land is one who enters upon another's land without authority and in violation of the rightful owner's interest. A trespasser, of course, possesses no legal interest in



the land. It is also the position of the law that an occupier of land, whether a squatter or trespasser could well have enforceable rights against anyone else who enters the land except for the true owner.

**7.15.** As a footnote, it is significant to also recall that while in some jurisdictions a trespasser who openly occupies land exclusively and continuously for a number of years may, in appropriate circumstances, be able to acquire legal title through the doctrine of adverse possession, in this jurisdiction, adverse possession is not available to land subject of a certificate of title. Section 35 of the Lands and Deeds Registry Act provides that once land becomes the subject of a certificate of title, no rights can be acquired by possession or user adversely to the registered owner.

**7.16.** We stressed in **David Nzooma Lumanyenda & Another v. Chief Chamuka & Kabwe Rural District Council & ZCCM Limited<sup>(8)</sup>**, that no rights by adverse possession can be acquired if land becomes the subject of a certificate of title.

- 7.17.** A licensee, like a squatter or trespasser generally acquires no ownership rights, but has permission to use someone's land for a specific purpose. A landowner is entitled to pull back the licence at anytime unless, of course, the licence is coupled with an interest such as that involving the grant of a *profit à prendre*.
- 7.18.** In the present case, it has not been suggested that ZNS was either a trespasser or a squatter. Even assuming that it could be characterised as such, it is clear that it would not have acquired any right which any purchaser of land such as the appellant could have been subject to.
- 7.19.** Our view is that ZNS was neither a squatter nor a trespasser. It took occupation of the land in issue with the knowledge of the owner of the land then, Lendor Burton. It took that occupation for the stated purpose of providing security and as such obtained no ownership rights. In those circumstances, what ZNS had was a bare licence with no contract, meaning that the landowner could revoke the permission given at anytime with reasonable notice. ZNS did not acquire any automatic right to

remain on the land indefinitely or to claim ownership rights to the land.

**7.20.** A more pertinent question perhaps is whether ZNS otherwise acquired any equitable interest in the land it occupied. If so, how and at what time did such interest arise? This question is particularly significant granted that equitable interest may be acquired through various ways such as via the creation of a trust, through an enforceable contract for the sale of land, or by contribution to the purchase price or to the improvement of the property without being the legal owner.

**7.21.** To illustrate the instances set out in the foregoing paragraph as we locate the possible equitable interest of ZNS in the property, let us take the legal owner of land who holds the land for the financial benefit of another person. The latter possesses an equitable interest. Likewise, where there is a valid and specifically enforceable contract of sale of land which is not yet fully carried into effect, the buyer will, pending formal change of legal ownership, have an equitable interest in the land. None of the situations of course apply to ZNS.



**7.22.** In like manner, a non-legal owner of land who makes a significant financial contribution to the property's purchase or improvement/development acquires an equitable interest. This is, however, subject to two caveats: first, there should exist a common intention or understanding that the contributor/developer (claimant) would have an interest in the property, and second, that he acted to his detriment by relying on that common intention.

**7.23.** On a realistic review of the circumstances implicating ZNS, we do not see ZNS emerging as an equitable interest holder merely on account of the developments it put up. It hardly satisfied the condition precedent. ZNS has not in its defence even raised any such argument.

**7.24.** In reverting to ground one of the appeal, therefore, we agree with the submissions of Mr. Jalasi that the mere occupation by ZNS of the portion of land in question did not establish for it any legal or equitable rights or interests in the land. We thus find merit in the appellant's argument.

**7.25.** On a proper review of the concatenation of the events as recorded in the evidence given in the trial court there was no basis for the Court of Appeal to hold that the appellant was not a *bona fide* purchaser of the property upon which ZNS is located.

**7.26.** The appellant was fully aware of the existence of ZNS on the site before it purchased the land. Furthermore, it was given an explanation of what ZNS was doing at the property. The appellant also engaged ZNS and other settlers on the land. The appellant conducted relevant official searches on the land by way of investigating title. Our view is that the appellant did what was necessary for a prudent purchaser to have done. Besides that demonstration of prudence, there is no evidence that was laid to confirm bad faith on the part of the appellant.

**7.27.** More importantly if, as Court of Appeal held, the respondent had acquired legally protectable interest in the land, the respondent should have, at the very least, indicated the nature of that interest, whether legal or equitable, and how it arose, rather than leaving it for conjecture.

- 7.28. As regards the cancellation of the certificate of title, it is the settled legal position that such certificate being conclusive proof of ownership can only be cancelled for fraud, mistake or impropriety in its issuance. The case of **Corpus Legal Practitioners v. Mwanandani Holding Limited**<sup>(9)</sup>, confirms that a certificate of title can only be cancelled after a full hearing.
- 7.29. In the present case, the court held that there was impropriety in the issuance of the certificate of title. To be clear, no fraud in the acquisition of the certificate of title relating to subdivision A20 of Farm 690 Lusaka, was alleged let alone proved. No mistake or impropriety in its issuance was claimed or demonstrated either.
- 7.30. Instead, the court, on its own volition, citing as a reason for doing so, the fact that “the land was still a contentious issue at the time the appellant had applied for the issuance of the same,” decided to cancel the certificate of title.
- 7.31. The evidence on record does not support the existence of any contention over the land in question between either Lendor Burton and ZNS or between ZNS and the appellant. What was



in progress were talks for a possible sale to ZNS of the same land. In fact, unrefutable evidence was that a sub-division and a valuation of that land were undertaken at the request of ZNS itself with a view to concluding a sale.

**7.32.** The respondent did not counter claim cancellation of that certificate of title as a relief in its pleadings. That is what it should have done if it had demonstrated a superior interest in the land. Needless to reiterate that courts should not make it a habit to grant relief not prayed for by parties to litigation.

**7.33.** In **Atlantic Bakery Limited v. ZESCO Limited**<sup>(10)</sup> we observed as follows:

**A court is not to decide on an issue which has not been pleaded. Put differently, a court should confine its decision on the questions raised in pleadings. It can thus not grant relief which is not claimed.**

**7.34.** In the present case there was thus absolutely no basis for cancelling the certificate of title. More gravely, upon cancellation of the certificate of title, the court made no orders or pronouncements as to what was to become of the affected land. Was it to vest in ZNS (respondent) or revert to Lendor

Burton? To the extent that the court envisaged some unspecified steps to be taken, that cancellation order renders the judgment ineffective in resolving the dispute.

**7.35.** In general, a judgment should be clear and certain in its pronouncement of the relief it gives and should thus specify the rights and obligations of the parties. Its contents should not be open to negotiation. It should as much as possible invite no further clarifications. It should be a definitive recording of the court's decision and the reasons for reaching it.

**7.36.** For all the foregoing reasons, we find merit in ground one of the appeal and we uphold it accordingly.

**7.37.** Turning to ground two of the appeal, we appreciate the learned Solicitor General's objection to the arguments by the appellant built around compulsory acquisition. There was here no compulsory acquisition and the process was not invoked.

**7.38.** However, we are of the considered view that because of the connectedness of state possession of private property and compensation, avoiding reference to eminent domain in a case of this nature is in truth ignoring the deeper issue in play which

is whether Executive orders to enter and occupy private land can ever be justified and if so, in what circumstances. In any case, the issue of compulsory acquisition was raised and deliberated upon extensively by the trial judge although she concluded that there was no evidence to show that the state took any steps towards compulsory acquisition of the land in question.

**7.39.** In **Goswami v. Essa and Commissioner of Lands**<sup>(11)</sup> we stated that:

**Our Constitution does not countenance the deprivation of property belonging to anyone without compensation.**

**7.40.** What is beyond doubt is that ZNS could have resorted to the issue agitated by the appellant in the submissions made on its behalf under ground two, namely, the constitutional and statutory scheme for compulsory acquisition of property. The power to dispossess a citizen of his land against his will is clearly not to be exercised lightly and without good and sufficient cause, even in situations of a state of emergency.

**7.41.** By way of a short but necessary detour, we must observe that the **Zambian Constitution**, it is manifest, evinces a particular solicitude for the protection of private property in several of its



provisions. In article 10(1), for example, the Government is enjoined to create an economic environment which encourages individual initiatives and self-reliance among the people so as to promote investment, employment and wealth while in sub-article (4) it is stated that:

**The Government shall not compulsorily acquire an investment except under customary international law and subject to article 16(1).**

**7.42.** Article 16 of the Constitution protects individuals from deprivation of property. Property cannot be compulsorily taken or acquired except under an Act of Parliament which provides for adequate compensation.

**7.43.** It is evident that the Constitution's concern for private property is not unlimited or unqualified. It enables property to be compulsorily acquired if it is for a public purpose. But such compulsory acquisition must be done under a law that satisfies the provisions of article 16(1).

**7.44.** The Land Acquisition Act, Chapter 189 of the Laws of Zambia is, of course, the law which has been available to the respondent to use if it wished or wishes to acquire permanent ownership

rights in the land in question from the appellant - and it provides for compensation.

**7.45.** Viewed in perspective, there are many analogies to be made to the occupation by ZNS of the appellant's land, to compulsory acquisition gone wrong. To allow ZNS to remain in occupation of the appellant's land without compensation goes against all the laws that proscribe deprivation of an individual's property without compensation.

**7.46.** It is for the foregoing reason that we think the dictates of justice demand that the second ground of appeal should not be dismissed on the technical basis so fervently advanced by the learned Solicitor General.

**7.47.** The appellant here requests to be compensated so that in turn ownership of sub-division A20 of Farm 690 Lusaka, is transferred to the respondent (ZNS).

**7.48.** Should the respondent be unwilling or unable to compensate the appellant, the legal consequence could only be worse. In **Prisca Lubungu v. Obby Kapango and Others and Ndola City Council**<sup>(12)</sup>, we stated that a person who develops land that does

not belong to him, does so at his peril. We observed in that case that:

**An owner of land under a certificate of title given under the Lands and Deeds Registry Act, has bestowed upon him/her a bundle of legal rights. Those rights include the right to quiet and exclusive possession, the power to control the use, enjoyment of the land and the unfettered power of disposition of land.**

**7.49.** Improvement to land become part of the land and can never be returned or restored to a mistaken improver or developer of it. To compel the landowner to make recompense for improvements or to otherwise suffer detriment, would be unjust even if it can be demonstrated that the land owner had intended to effect similar improvements (**See Gareth Jones, 'Restitutionary Claim for Services rendered'**)<sup>(13)</sup>.

**7.50.** In **Trevor Limpic v. Richard Mawere and Two Others**<sup>(14)</sup> we declined to order compensation to the appellant for improvements made to property whose ownership the developer believed belonged to him. We reached similar conclusions in **Sambo and Two Others v. Paikani Mwanza**<sup>(15)</sup> and in **Hilda Ngosi (Suing as the Administrator of the estate of Washington Ngosi) v. Attorney General and Lutherine Mission (Zambia) Registered Trustees**<sup>(16)</sup>.



**7.51.** What this means in reality is that allowing ZNS to keep the developments it has put up on the land would go against the current position of the law as explained by this court in various case authorities. An order for ZNS to vacate the land and leave all the developments without compensation to it, would certainly be worse than the claim for compensation that the appellant has made.

**7.52.** We find, therefore, that there is merit in the claim for compensation that the appellant has put forth. To hold otherwise would be to further an existential threat to the rule of law. It would be an open invitation for the Government or its agencies to bypass clear constitutional and statutory provisions at the expense of respecting citizen's legal and constitutional rights.

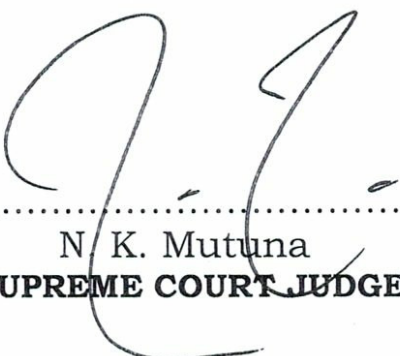
**7.53.** The whole appeal succeeds. The Court of Appeal judgment is hereby set aside.

**7.54.** The appellant has sought numerous reliefs in its action. We have tabulated these at paragraph 2.8. Not all these can be granted. We order and direct:

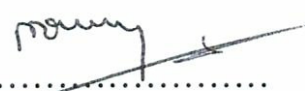
- (i) That the respondent (ZNS) do compensate the appellant for the current commercial value of the property comprised in the 72 hectares being sub-division A20 of Farm 690 Lusaka. We further direct that a neutral valuation surveyor be appointed by the President of the Zambia Institute of Valuation Surveyors within thirty days (30) from the date of this judgment to undertake such valuation whose expense shall be borne by the respondent.
- (ii) That payment of the compensation at (i) above shall be done within six months following the submission to the parties of the valuation report or such other period as may be mutually agreed upon. The appellant shall immediately thereafter transfer ownership of sub-division A20 of Farm 690 to the respondent (ZNS).
- (iii) In the event of failure by the respondent (ZNS) to effect compensation in terms of paragraph (ii) above, ZNS shall forthwith vacate such-division A20 of Farm

690 leaving all the unexhausted improvements which shall inure to the benefit of the land.


- (iv) The claim for *mesne* profits is hereby dismissed granted that there was never a landlord and tenant relationship between the parties (**see *G.F Construction (1976) Ltd v. Rudnay (Zambia) Limited and Unitech Limited*<sup>17)</sup>**).
- (v) The respondent shall pay to the appellant as special damages the costs of the sketch plan, valuation reports and survey diagrams secured by the appellant. Such cost shall be assessed if not agreed.
- (vi) The respondent shall bear the costs here and, in the courts below, to be taxed in default of agreement.



.....  
N. K. Mutuna  
**SUPREME COURT JUDGE**



.....  
Mumba Malila  
**CHIEF JUSTICE**



.....  
F. M. Chisanga  
**SUPREME COURT JUDGE**