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

SCZ JUDGMENT NO. 3 OF 1994
APPEAL NO. 7 OF 1994

B E T W E E N:

ZAMBIA NATIONAL HOLDINGS LIMITED 1st Appellant

and

UNITED NATIONAL INDEPENDENCE PARTY 2nd Appellant

and

THE ATTORNEY-GENERAL Respondent

CORAM: Ngulube, C.J., Sakala, Chaila, Chirwa, and Muzyamba, JJS.
On 11th April and 12th May, 1994
For the Appellants - J.B. Sakala and A.J. Mumba, of JB Sakala & Company
For the Respondent - A.G. Kinariwala, Principal State Advocate

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J U D G M E N T

Ngulube, C.J. delivered the judgment of the Court.

Cases referred to:

1) Garthwaite -v- Garthwaite (1964) 2ALL ER 233
2) Guaranty Trust Co. of New York -v- Hannay & Co. (1914-15) ALL ER Rep. 24
3) Miyanda -v- The High Court (1984) ZR62
4) Codron -v- Macintyre and Shaw (1960) R. & N. 418
5) Oliver John Iriwin -v- The People SCZ Judgment No. 4 of 1993
6) M -v- Home Office (1992) 4ALL ER 97
7) Elsie Moobola -v- Harry Muweza SCZ Judgment No. 3 of 1991
8) Johnson -v- Sargant (1918) 1K.B. 101
9) Harel Freres Ltd. -v- Minister of Housing (1988) LRC (Const.) 472
10) Re: Pan Electronics Ltd. SCZ Judgment No. 4 of 1988
11) Commissioner of Stamp Duties -v- Atwill and Others (1973) 1ALL ER 576

The appellants brought a petition in the High Court to challenge the decision of the respondent to acquire compulsorily under the Lands Acquisition Act the appellants' land being Stand number 10934 Lusaka which is also known as the New UNIP Headquarters. The President resolved that it was desirable or expedient in the interests of the Republic to acquire this property whereupon the appropriate Minister gave notice to the appellants of the Government's intention in that behalf and the steps and formalities under the Act for such acquisition were commenced. The appellants wrote to the respondent suggesting a sum of money to be paid as compensation but

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as it turned out, and as the parties specifically informed the learned trial judge, they wished the question of compensation to be postponed until the court had disposed of the challenge to the legality and constitutionality of the compulsory acquisition. The case has proceeded on that basis both below and here. The petition was unsuccessful and so this appeal. We propose to deal with the various legal issues and challenges in this appeal in the order in which they were argued before us.

Shortly after the institution of the proceedings, the appellants applied by summons for an interlocutory injunction to restrain the respondent, the servants or agents of the State from taking possession or occupation of, or entering upon, the appellants' property under discussion pending trial of the cause. The learned trial judge ruled that he was precluded from making an order of injuction by S.16 of the State Proceedings Act, CAP.92. This Section reads:-

> "16.(1) In any civil proceedings by or against the State the court shall, subject to the provisions of this Act, have the power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:
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> Provided that --
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> (i) where in any proceedings against the State any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and
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> (ii) in any proceedings against the State for the recovery of land or other property, the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the State to the land or property or to the possession thereof."

> (2) The court shall not in any civil proceedings grant any injunction or make any order against a public officer if the effect of granting the injunction or making the order would be to give any relief against the State which could not have been obtained in proceedings against the State."

In the judgment after trial and though the remarks in that behalf were all obiter and immaterial to the decision, the learned trial judge decided to revisit the question of injunctions against the State. He found that, although he would still have refused the interlocutory injunction on the merits (on the basis of adequacy of damages), he had changed his mind on the correctness of his earlier ruling based on S.16 of the State Proceedings Act. He accepted the argument by Mr. Sakala that in a constitutional case, S.16 of that Act contravenes Articles 28(1) and 94(1) of the constitution which is the supreme law. Article 28(1) of the constitution reads --

> "28. (1) Subject to clause (5), if any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court which shall--
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> (a) hear and determine ansy such application;
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> (b) determine any question arising in the case of any person which is referred to it in pursuance of clause (2);
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> and which may, make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of Articles 11 to 26 inclusive."

Article 94(1) of the constitution reads --

> "94(1) There shall be a High Court for the Republic which shall have, except as to the proceedings in which the Industrial Relations Court has exclusive jurisdiction under the Industrial Relations Act unlimited or original jurisdiction to hear and determine any civil or criminal proceedings under any law and such jurisdiction and powers as may be conferred on it by this Constitution or any other law."

The learned trial judge expressed himself on the point in the following terms --

> "My mind has been troubled in this way: The constitution is the Supreme Law of the Country. It has enacted above that the High Court shall have unlimited jurisdiction. It has also enacted under Article 28(1) (b) that the Court "May make such orders, issue such Writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of, any of the provisions of Articles 11 to 26.
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> As I see it the provisions of Section 16 (1)(i) of the State proceedings Act have undoubtedly contravened the provisions of Articles 28(1)(b) and 94(1) of the Constitution by limiting the powers of the Court. The Provisions are un-constitutional and consequently null and void."

Although the learned trial judge finally came down in favour of the appellants on this narrow point, they have advanced as their first ground of appeal before us that the court below was in error when in the earlier ruling it refused to grant an interlocutory injunction on the basis that S.16 of CAP 92 barred such an order. The learned trial judge is now the Deputy Chief Justice of this country and it is therefore with much regret that we find ourselves constrained to disagree with the conclusion reached by such a senior judge. However, we have to seize the opportunity presented by the ground of appeal to reverse the nullification of S.16(1)(i) of CAP 92, a pronouncement which even Mr. Sakala, for the appellants, does not support.

In the passage from the judgment which we have quoted, much was made of the expression "unlimited jurisdiction" and the section was struck down allegedly "for limiting the powers of the court". The reasoning below is insupportable. In the first place, it revealed a misconception about the word "jurisdiction", especially when described as "unlimited jurisdiction." It is, in our considered opinion, necessary to first understand this troublesome word "jurisdiction" which appears no less than three times in Article 94(1) of the constitution. We recall a useful passage from the judgment of DIPLOCK, L.J., in GARTHWAITE -v-GARTHWAITE[1] at pages 241 to 242 where he said ---

> "The High Court is the creation of statute, and its jurisdiction is statutory. As was pointed out by PICKFORD, L.J., in Guaranty Trust Co. of New York -v- Hannay & Co. at page 35, the expression "jurisdiction" of a court may be used in two different senses, a strict sense (which he regarded as the only correct one) and a wider sense. I think, with respect, that he defined the strict sense too narrowly, for it would not embrace the court's lack of jurisdiction to entertain a suit based on the personality of a party, as for instance against a foreign sovereign or ambassador. However, it is important for the purposes of the present appeal to distinguish between the two senses in which the expression is used. In its narrow and strict sense, the "jurisdiction" of a validly constituted court connotes the limits which are imposed on its power to hear and determine issues between persons seeking to avail themselves of its process by reference (i) to the subject-matter of the issue, or (ii) to the persons between whom the issue is joined, or (iii) to the kind of relief sought, or any combination of these factors. In its wider sense it embraces also the settled practice of the court as to the way in which it will exercise its power to hear and determine issue which fall within its "jurisdiction" (in the strict sense), or as to the circumstances in which it will grant a particular kind of relief which it has "jurisdiction" (in the strict sense) to grant, including its settled practice to refuse to exercise such powers or to grant such relief in particular circumstances. This distinction between the strict and the wider meaning of the expression "jurisdiction" was of little importance in the case of the superior courts so long as they did not owe their origin

> to statute, for there was no need to distinguish between non-existence of a power and settled practice not to exercise an existing power. However, in the case of courts created by statute, as the Supreme Court of Judicature, comprising the High Court and the Court of Appeal, has been since 1873, the court has no power to enlarge its jurisdiction in the strict sense, but it has power to alter its practice proprio motu within the limits which it imposes on itself by the doctrine of precedent, subject, however, to any statutory rules regulating and prescribing its practice and procedure made pursuant to any rule-making power contained in the statute."

We would like to associate ourselves with the foregoing which we respectfully adopt. We also recall what was said in MIYANDA-v-THE HIGH COURT (3) at page 64---

> "The term "jurisdiction" should first be understood. In one sense, it is the authority which a court has to decide matters that are litigated before it; in another sense, it is the authority which a court has to take cognisance of matters presented in a formal way for its decision. The limits of authority of each of the courts in Zambia are stated in the appropriate legislation. Such limits may relate to the kind and nature of the actions and matters of which the particular court has cognisance or to the area over which the jurisdiction extends, or both. Faced with a similar question of jurisdiction, two of their Lordships in CODRON v MACINTYRE AND SHAW, (4) had this to say:
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> Tredgold, CJ., cautioned, at page 420.
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> "It is important to bear in mind the distinction between the right to relief and the procedure by which such relief is obtained. The former is a matter of substantive law, the latter of adjective or procedural law."

Briggs, F.J., said, at page 433:

> "Confusion may arise from two different meanings of the word "jurisdiction". On an application for mandamus in England the King's Bench division may, because of a certain fact proved say "There is no jurisdiction to grant mandamus in a case of this kind." That refers to an obstacle of substantive or procedural law which prevents the success of the application, but not to any limits on the general jurisdiction of the Court to hear and determine the application."
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> I think it is important to understand the various aspects of jurisdiction to which I have referred."

We have no reason to disagree with the foregoing.

In order to place the word "unlimited" in Article 94(1) in its proper perspective, the jurisdiction of the High Court should be contrasted with that of lesser tribunals and courts whose jurisdiction in a cumulative sense is limited in a variety of ways. For example, the Industrial Relations Court is limited to cases under a single enactment over which the High Court has been denied any original jurisdiction. The Local Courts and Subordinate Courts are limited as to geographical area of operation, types and sizes of awards and penalties, nature of causes they can entertain, and so on. The jurisdiction of the High Court on the other hand is not so limited; it is unlimited but not limitless since the court must exercise its jurisdiction in accordance with the law. Indeed, Article 94(1) must be read as a whole including phrases like "under any law and such jurisdiction and powers as may be conferred on it by this constitution or any other law." It is inadmissible to construe the word "unlimited" in vacuo and then to proceed to find that a law allegedly limiting the powers of the court is unconstitutional. The expression

"unlimited jurisdiction" should not be confused with the powers of the High Court under the various laws. As a general rule, no cause is beyond the competence and authority of the High Court; no restriction applies as to type of cause and other matters as would apply to the lesser courts. However, the High Court is not exempt from adjudicating in accordance with the law including complying with procedural requirements as well as substantive limitations such as those one finds in mandatory sentences or other specification of available penalties or, in civil matters, the types or choice of relief or remedy available to litigants under the various laws or causes of action. We would like to conclude this part with an observation which we made in OLIVER JOHN IRWIN-v- THE PEOPLE[5](a case dealing with bail and since overruled by statutory amendments) in answer to the misconception harboured by the same learned trial judge as to the purport of Article 94----

> "The question of the jurisdiction of the High Court is of course irrelevant. Although Article 94 of the constitution gives the High Court unlimited jurisdiction that court is bound by all the laws which govern the exercise of such jurisdiction. If, contrary to our finding, S.123(1) (of the Criminal Procedure Code) did infact limit the powers of the High Court, it would be bound by such limitation." (words in bracket added for the sake of clarity).

In the next place we wish to acknowledge that there is a growing school of thought against the continued existence of state immunity against injunctive relief and other coercive orders: See, for example, de Smith's Judicial Review of Administrative Action, 4th Edition, from page 445. However, the underlying rationale, particularly the difficulties of enforcement by compulsory process of orders and judgments against the State make it unrealistic to expect that the State can be proceeded against in all respects as for a subject. Simon Brown, J, delivered a most useful review of this problem in M-v-HOME OFFICE[6]where, on appeal to the Court of Appeal, one of their Lordships suggested an ingenious way round the problem by finding that as Ministers and civil servants are accountable to the law

and to the courts for their personal actions, they can be proceeded against for contempt of court if they disobey or frustrate an order of the court. For our part, what is certain is that it was not true (and Mr. Sakala properly so conceded) that, in the absence of an order of interlocutory injunction, no other useful orders could have been made against the State in order to effect a suspension of the compulsory acquisition pending trial and, in case of breach, to exact compliance. If, for example, compliance with fairly coercive prerogative orders like mandamus and others can be exacted, so can other suitable orders (not amounting to prohibited reliefs) envisaged by Article 28(1).

We have dwelt on the first ground at some length but offer in mitigation that it was necessary to explain why we have reversed the learned trial judge and restored Section 16(1)(i) which is neither unconstitutional nor null and void for any of the reasons advanced in the court below.

The second ground of appeal alleged that the learned trial judge erred in law and in fact when he decided that the Lands Acquisition Act did not contravene the spirit and intent of Article 16(1) of the constitution. This Article reads ----

> "16(1). Except as provided in this Article, no property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compusorily acquired, unless by or under the authority of an Act of Parliament which provides for payment of adequate compensation for the property or interest or right to be taken possession of or acquired."

One of the appellants' arguments at the trial which has not been repeated with any enthusiasm here had been that any compulsory acquisition under sub-article (1) had to fit into one of the "pigeon holes" under sub-article (2). Sub-article (2) reads ---

> "(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of clause (1) to the extent that it is shown that such law provides for the taking possession or acquisition of any property or interest therein or right thereover--"

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and goes on to list numerous situations such as satisfaction of any tax, execution of judgments or oders of the court, and so on. Article 16(1) clearly states the general rule, that is, the acquisition must be under a law which must provide for adequate compensation. Subarticle (2) on the other hand goes on to give exceptions to, and not categories of, the general rule. It deals with situations where an involuntary loss of property could take place even without adequate or any compensation. We see no need for a strained and exotic construction of this straight forward Article in the manner attempted, and properly rejected, at the trial.

Before this court, Mr. Sakala's arguments were to this effect: Prior to the promulgation of Statutory Instrument number 110 of 1992 published on 30th July, 1992,(long after the commencement of the suit) under which the President, in the exercise of extraordinary powers granted by S.6(2) of the Constitution of Zambia Act, number 1 of 1991, effected amendments to the Lands Acquisition Act, CAP 296, this last mentioned Act was at variance with the current constitution in two important respects. In conformity with the old constitutional regime, the Lands Acquisition Act before the amendments required disputes as to compensation to be referred to the National Assembly when the current constitution ordains that they be referred to the Court. Again, the unamended law simply referred to "compensation" while the present constitution requires "adequate compensation". The submission was that CAP 296 was thus obsolete and in contravention of Article 16(1) of the constitution. Section 6(1) and (2) of the Constitution of Zambia Act, number 1 of 1991, read ---

> "6(1) Subject to the other provisions of this Act, and so far as they are not inconsistent with the Constitution, the existing laws shall continue in force after the commencement of this Act as if they had been made in pursuance of the Constitution, but shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution."

(2) The President may by statutory instrument at any time within two years of the commencement of this Act, make such amendment to any existing law as may appear to him to be necessary or expedient for bringing that law into conformity with the provisions of this Act or the Constitution or otherwise for giving effect or enabling effect to be given to those provisions."

In our considered opinion, even assuming that Statutory Instrument No. 110 of 1992 had not been passed, subsection (1) of Section 6 which we have quoted affords a complete answer to Mr. Sakala's arguments. It obliges that existing laws be read so as to be conformable to the constitution so that the word "adequate" to qualify the compensation and the reference of disputes to the court rather than to the National Assembly would have had to be imported into CAP. 296. This Act was not unconstitutional for any of the reasons advanced by the appellants. We do not understand the learned trial judge to have found that the Act was saved only by the late amendments effected through the Statutory Instrument but if indeed this was the finding, then we have no difficulty in affirming as we have done that Section 6(1) of Act No. 1 of 1991 had already catered for this and any other existing laws in need of adaptation, modification and so on. Of course, to any extent that any existing law could not be made to conform, it would be void to the extent of any such inconsistency, as provided by Article 1(2) of the constitution.

The appellants did not dispute the power of the President under S6(2) of Act number 1 of 1991 to amend laws. They argued, however, that since the amendments affected fundamental rights, only Parliament could legislate on such matters when Article 79 would have had to be complied with. Article 79 deals with alterations to the constitution and the special procedures needed for this, including a national referendum to endorse changes to the part dealing with fundamental rights. With respect to learned counsel for the appellants, the Lands Acquisition Act is not part of the

Constitution and is, on the contrary, simply a law envisaged under the constitution for depriving persons of their fundamental right of owning property. We agree with Mr. Kinariwala for the State that the Statutory Instrument was amending an ordinary enactment, that is CAP 296, and had nothing whatsoever to do with amendments to the constitution.

The second leg of the argument was that the statutory instrument's effective date could not be lawfully backdated so as to adversely affect the appellants' rights regarding the quantum of compensation. Rule 1(2) of the Statutory Instrument reads ----

> "1.(2) This Order shall be deemed to have come into operation on the 30th August, 1991."

In Rule 3 of the order, S.12 of the Lands Acquisition Act (the Section setting out the principles governing compensation) was amended so as to permit any assessment of compensation to take into account --- by deduction no doubt --- any money used in developing the land which was donated by the Government and any companies which do not certify that their contribution was specifically made for the use and benefit of the registered owner. The evidence showed that the bulk of the money, if not all, used to build the imposing complex the subject of this case came from Government grants